Citation: *R.* v. *Enns,* 2017 YKTC 42

Date: 20170914
Docket: 15-00017
16-00428
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JAMES ROBERT ENNS

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Richard S. Fowler — Counsel for the Defence

RULING ON *VOIR DIRE*
(Challenge to Search Warrant)

[1] James Robert Enns is before the court on a number of charges relating to an impaired driving investigation. At issue in this *voir dire* is the validity of a search warrant that permitted the seizure of blood samples and medical records held by the Whitehorse General Hospital ("WGH"), which is where Mr. Enns was taken from the scene of a motor vehicle accident.

[2] Although counsel for Mr. Enns has raised other *Charter* issues relating to Mr. Enns' arrest, the subsequent search of his vehicle, and the obtaining of blood samples from him at WGH, this decision specifically addresses facial and subfacial challenges to

the warrant as well as the issue of whether the investigating officer properly sought a telewarrant in the circumstances.

[3] For the reasons that follow, I find that the authorizing judge had sufficient information on which he could have issued the search warrant. My view of the sufficiency of the basis in the information to obtain the telewarrant (the "ITO") is not affected by the amplifying evidence presented in this *voir dire.*

[4] Moreover, I am satisfied that the information before the justice was also sufficient such that he could have been satisfied that appearing in-person before a judge would have been impracticable for the affiant.

BACKGROUND

[5] The following facts are not in dispute.

[6] Mr. Enns was the driver of a vehicle involved in a collision on the Alaska Highway near Carmacks on October 8, 2014. RCMP officers were dispatched from Carmacks to the scene at 6:27 p.m., arriving at approximately 7:10 p.m. Mr. Enns' vehicle had severe damage to the front driver's side and he was trapped within it. The other vehicle was in a ditch next to the highway, and its driver had sustained some injuries, including a sore chest and a small cut on her hand.

[7] There were a number of people present at the scene of the accident, several of of whom were tending to Mr. Enns. Some of them had a conversation with Mr. Enns or had made observations about his behaviour, and a number of their statements to the police about these interactions were included in the application for the search warrant.

[8] Mr. Enns was extracted from his vehicle shortly after 8 p.m. and moved to an ambulance where it was determined that he had suffered a compound fracture of his left femur in the collision. The police attempted to caution him prior to making a blood demand, however he had been given a significant amount of pain medication, and EMS personnel were of the view that his ability to understand police direction or cautions was impaired at the time of transport. Mr. Enns was similarly impaired by medication while at the hospital and a blood demand could not be made by the police at that time either.

[9] Two RCMP members from the Whitehorse detachment were present at WGH during Mr. Enns' initial assessment and treatment there. During the course of the medical attention he was receiving, Mr. Enns' blood was drawn. The ITO states that:

> b. Cst. Melanson requested medical staff take vials of blood and informed them that a Search Warrant would be coming.

There is some question about whether this blood was collected at the request or direction of Cst. Melanson, or whether it was otherwise collected in the course of medical treatment. Although such a direction by Cst. Melanson, if made, would obviously form the basis of a very strong s. 8 *Charter* argument, both counsel agree that at this point it remains unclear as to how and at whose direction the samples were originally taken. Cst. Melanson apparently has no notes or independent recollection and, at this stage in the proceedings, medical staff have not provided testimony that may assist in this regard. Such evidence, I understand, may well be presented in the s. 8 *voir dire*.

[10] After Mr. Enns was removed from the scene of the accident, his vehicle was searched. Defence counsel also challenges the search of his vehicle, but those *Charter* arguments were not the subject of this *voir dire*. The police found four unopened 355 ml cans of Budweiser beer and one open can of Budweiser beer, which was nearly empty on the passenger floor board under some clothing and running shoes.

[11] A telewarrant was issued by Deputy Judge Luther of this court on November 17, 2014. This warrant authorized the seizure and subsequent analysis of Mr. Enns' blood and urine samples from WGH, as well as the seizure of WGH medical records relating to his assessment and treatment on October 8 and 9, 2014.

[12] The ITO was drafted by Constable Scott Guthrie. In it he swears that his grounds for seeking a telewarrant are his belief that it would be impracticable to appear personally before a judge or justice as there was no judge in Carmacks on that date and the resident justice of the peace is not authorized to sign search warrants.

[13] Apart from the facts already outlined, and relevant to this application, Cst. Guthrie relied on the following as grounds for the warrant:

- The road at the accident location is straight and flat;
- "Jimmy", who is accepted to be Mr. Enns', told a bystander, Pierre Marchand, that "I fucked up I'm drunk";
- Mr. Enns told another bystander, Karen Digby, who was offering him first aid, that he was on his way to go drinking. She also observed that his behaviour was erratic and he was going from calm to aggressive in a matter of moments;
- Cst. Dixon, the other attending RCMP member, told him that he had noticed the smell of beverage alcohol, that Enns' eyes looked wide-eyed, glossy and possibly dilated, that Enns told Cst. Dixon his leg

hurt, and that in response to being asked what happened, Enns responded “Oh she’s just doing what she does” and “She’s just going how she goes”, which Cst. Dixon thought were nonsense and incoherent;

- Jennifer Dixon, who I note parenthetically is Cst. Dixon’s wife, was at the scene and providing first aid, and she told Cst. Guthrie she could smell alcohol and believed Enns was intoxicated;

- On October 28, Jennifer Dixon provided a typed statement that indicated that Mr. Enns behaviour did not seem appropriate, that there was a strong smell of alcohol coming from under the blankets he was covered with when he lifted his head, that Mr. Enns was disoriented as to place and time, unable to stay on topic, unable or unwilling to follow basic instructions, that Mr. Enns was exhibiting uncoordinated movements and his mood would range from cooperative to sudden anger quickly and without provocation, and that Mr. Enns’ speech was slurred and he seemed unaware of his surroundings and injuries at times;

- Cst. Melanson, a member of the Whitehorse RCMP detachment who attended at WGH, requested medical staff take vials of blood and informed them that a search warrant would be coming;

- Chad Milford, the WGH Laboratory Supervisor, told Cst. Guthrie on October 9 that both blood and urine samples had been taken from Mr. Enns, and suggested that, based on his behaviour, it was possible Mr. Enns was not only under the influence of alcohol but possibly other chemical substances that could be determined by a urine analysis.

Evidence on the *Voir Dire*

[14] Cst. Guthrie was the only witness on this *voir dire*. Apart from being the informant on the application for a search warrant, he had responded with Cst. Dixon to the scene of the motor vehicle accident and had some limited interaction with Mr. Enns prior to his transport. He was also involved in the subsequent search of Mr. Enns’ vehicle. Cst. Guthrie testified on the basis of the ITO, his notes, statements he had taken from witnesses, and reports to Crown counsel.

[15] The *voir dire* focussed on whether or not it was impracticable for Cst. Guthrie to attend before a judge in person in order to obtain a search warrant, and whether the ITO was misleading with respect to the evidence about Mr. Enns' suspected alcohol consumption.

[16] I note that Cst. Guthrie's testimony continued on the same day in the context of a second *voir dire* going to *Charter* issues distinct from the attack on the warrant. As agreed to by counsel, I am not considering any of the evidence from that second *voir dire* for the purposes of this decision.

[17] The *voir dire* was structured so that Cst. Guthrie was first questioned by counsel for Mr. Enns about the contents of the ITO, and then examined on those narrow areas by Crown counsel in follow up. Defence counsel challenged certain assertions made by Cst. Guthrie in the warrant on the basis that he neglected to include certain relevant pieces of information.

[18] Specifically, Cst. Guthrie agreed that Karen Digby had said in her statement that she had asked Mr. Enns if he had been drinking before getting on the road and Mr. Enns had said "no". This denial was not included in the ITO.

[19] Cst. Guthrie also agreed that his handwritten notes stated that Cst. Dixon had smelled a "mild" odour of liquor. The ITO does not include the word "mild", however Cst. Guthrie said he had referred to a written document produced by Cst. Dixon when he drafted that paragraph of the ITO, rather than his own notes.

[20] Cst. Guthrie also testified that the temperature at the time he was driving to the scene of the accident was fluctuating between -2 and -1 degrees Celsius, and that there was some snow on the road, mostly on the shoulders and near the yellow centre line.

[21] With respect to the process of drafting the ITO and getting the warrant, Cst. Guthrie testified that he started with a template and worked on it over several weeks and that this was the second ITO he had ever written. He had not been advised about how courts have interpreted "impracticable" in the context of a telewarrant application.

[22] He agreed that the WGH lab had assured him the samples would be kept secure until he got a warrant. He also agreed that he swore the ITO on November 17 because he had just received it back from his supervisor either that day or the day before. He did not recall when the Territorial Court was sitting a circuit in Carmacks between October 8 and November 17, but he had that information at the time he was drafting the ITO, although he did not include it.

[23] Cst. Guthrie testified that it is approximately a 180 km drive between Carmacks and Whitehorse and that he drives to Whitehorse on occasion. He had no recollection of whether he made the drive between October 8 and November 17. He said he recalled having a conversation with his supervisor about whether he should do a telewarrant or a warrant in person.

[24] Cst. Guthrie agreed that he drove to Whitehorse to collect the blood samples, and that doing so was practical, although he also said he was sure the trip "wasn't just to pick up the blood at that time" and that if another member from the Carmacks detachment was coming to Whitehorse, they would have retrieved the samples. The

evidence also disclosed that he retrieved the samples from the Whitehorse RCMP detachment and that a Whitehorse member had seized them from WGH pursuant to the search warrant.

[25] Cst. Guthrie agreed that Cst. Melanson had told him that she had requested WGH staff to take and hold blood samples because a blood warrant, not a search warrant, would be coming. He testified that he did not know the difference between the two types of warrant until he was preparing the search warrant.

[26] Finally, Cst. Guthrie testified that he had searched the car without warrant to look for evidence of the offence and to secure any valuables.

Submissions of Counsel

[27] Defence counsel filed lengthy written submissions prior to this *voir dire*, which were supplemented and refined by his oral submissions. Crown counsel responded with written submissions filed shortly afterwards, and there is a brief reply filed by defence as well.

Defence

[28] While counsel did submit a lengthy written argument, it was without the benefit of the evidence obtained on the *voir dire*. As such, my understanding is that I should rely primarily on counsel's oral submissions with reference to the parts of his written submission relevant to his oral argument.

[29] Counsel largely focussed his submissions on the issue of whether Cst. Guthrie improperly assessed whether it was impracticable to attend in person before a justice for a warrant.

[30] Counsel as well relied on Cst. Guthrie's failure to include Mr. Enns denial to Karen Digby that he had been drinking and the failure to include the word "mild" with respect to Cst. Dixon's observation of the smell of liquor. I note that in his oral submissions, counsel indicated that it was Jennifer Dixon who had initially used this qualifier, but I think the cross-examination evidence is clear that it was in fact Cst. Dixon and not his wife whose observations were arguably inaccurately captured in the ITO.

"Impracticable"

[31] Section 487.1, the telewarrant section of the *Criminal Code*, requires that the peace office seeking a warrant believe "it would be impracticable to appear personally before a justice to make application for a warrant". Relying on *R. v. Erickson,* 2003 BCCA 693 and *R. v. Veranski and Bellotti,* 2012 BCSC 220, defence counsel argues that objectively this was not the case.

[32] Counsel points to the fact that there was no urgency with respect to the warrant, as the samples and records were secure and being held at the hospital. Seven weeks had already elapsed since the samples were taken and the hospital had agreed to retain them until the police retrieved them. Counsel accepts that telewarrants are generally justified in the context of police investigations in communities outside of Whitehorse, but says that these circumstances are different than most because there was no risk of any evidence being destroyed.

[33] Counsel also observes that the ITO was drafted at a point prior to it being sworn so that Cst. Guthrie's supervisor would have a chance to review it, and as such Cst. Guthrie's statement that there was no judge in Carmacks on "today's date" may have referred to a date other than November 17, 2014. He as well states that there was no factual basis provided that would allow the judge to appreciate whether or not this was an accurate statement. I note that it is accepted that there is no local justice of the peace authorized to issue warrants in Carmacks and the point of contention is with respect to the circuit court schedule and when a Territorial Court judge had been, or would be, in town.

[34] Defence counsel further submits that it was not impracticable for Cst. Guthrie to attend before a judge in Whitehorse, and observes that ultimately the officer did drive to Whitehorse to retrieve the samples. Indeed, counsel says the most practicable thing would have been to attend at the courthouse, obtain the warrant, and go directly to the hospital to retrieve the samples and documents.

[35] Defence counsel points to the definition of "impracticable" in *Erickson,* and says that, while it cannot be equated with impossible, it connotes a degree of urgency beyond mere convenience. He submits that Cst. Guthrie thwarted the process by creating the impracticability through submitting the warrant on a day when there was no circuit court in Carmacks and not referring the judge to the dates when there would be a circuit court. Counsel says the ITO in this case contains a bald statement without any supporting facts or information that would justify a telewarrant. To the extent that the officer's subjective belief must be objectively verifiable, there is insufficient information in the ITO to allow the issuing justice to assess the belief.

[36] Relying on para. 31 of *Veranski,* defence counsel says it is fatal to the warrant if there was an opportunity for Cst. Guthrie to appear in person before a judge or justice, whether or not he was aware of it.

Facial and sub-facial challenges

[37] Counsel says that a review of the warrant, including amplification of the grounds with evidence obtained in the *voir dire,* should lead the court to conclude that there was no basis on which the authorizing judge could have issued the warrant.

[38] Counsel points to the temperature and road conditions, as well as to Mr. Enns' statement to Karen Digby that he had not been drinking and Cst. Dixon's original use of the modifier 'mild' with respect to the odour of liquor from Mr. Enns as information that, if included in the ITO, would affect the authorizing justice's assessment of Cst. Guthrie's grounds.

[39] Counsel says that Mr. Enns' demeanour and behaviour have to be considered in the context of his involvement in a motor vehicle accident and his injuries. As well, the odour of liquor observed by Jennifer Dixon could be explained by the open can of beer, given that there is no information about whether it had spilled or been consumed. Counsel also says it is significant that the ITO contains no mention of when the accident actually occurred or any evidence of Mr. Enns' driving pattern.

[40] Counsel also argues that the evidence and observations flowing from the search of the vehicle should be excluded, as there is no evidence in the ITO that Mr. Enns was arrested and there was no warrant. As such, this search evidence should be considered

to have been unlawfully obtained and should not have been considered by the issuing judge. He also submitted in his oral submissions that the blood sample should itself be excluded, given that it was apparently taken at the direction of Cst. Melanson, again in the absence of any warrant.

Crown

"Impracticable"

[41] Crown counsel also relies on authority from the B.C. Court of Appeal to support his interpretation of 'impracticable'; in this case *R. v. Clark*, 2015 BCCA 488. In *Clark*, Mr. Justice Frankel wrote that the "telewarrant procedure was designed to make it possible for law enforcement officers to apply for a search warrant 24 hours a day, seven days a week" and that there is no requirement that the need for the warrant is immediate. Other cases, including *Erickson,* support the position that a drive from a community to a larger centre is sufficient to make out the impracticability requirement.

[42] Counsel as well relies on *Clark* to submit that the onus is on Mr. Enns to demonstrate the practicability of attending before a judge in person and that he has not discharged his burden.

Facial and sub-facial challenges

[43] Essentially the Crown submits that the ITO contains sufficient information to satisfy the authorizing justice that Cst. Guthrie had a reasonable belief that Mr. Enns was driving while impaired by alcohol. He specifically points to the accident, the

statement: “I fucked up I’m drunk”, Mr. Enns’ erratic behaviour, the smell of alcohol observed by witnesses and the presence of opened and unopened liquor in his vehicle.

[44] In terms of the sub-facial challenge, Crown counsel denies any suggestion that Cst. Guthrie omitted information with an intent to mislead the judge and says that, in any event, none of the evidence defence counsel wants to use to amplify the ITO undermines the basis for the warrant. Specifically, temperature information was included in the ITO, and it would have been reasonable to expect the issuing judge to know the highway was undivided and two lanes, just as he reasonably would have considered the impact Mr. Enns’ injuries could have had on his behaviour. Mr. Enns’ denial of having consumed alcohol would have been read in the context of the observations of other witnesses and the judge could have taken judicial notice of the fact that drivers are often less than candid about their alcohol consumption.

[45] To the extent that defence counsel seeks to exclude the ITO’s reference to the beer cans in the car and the blood sample seized at the hospital, Crown says whether or not this evidence was obtained in breach of the *Charter* is arguable.

Analysis

[46] It is clear that my role, as a reviewing judge, is to consider whether the material before Deputy Judge Luther, as amplified on review, could support the issuance of the warrant. If there is an objective basis on which the authorizing judge could have issued the warrant, that is the end of the inquiry (see e.g. *R. v. Liu,* 2014 BCCA 166).

[47] I intend to deal first with the question of whether the material in the ITO was sufficient to support the issuance of a warrant, by telecommunication or otherwise. I will then consider whether a telewarrant was properly issued in these circumstances.

Sufficiency of ITO

[48] At the outset, I want to address defence counsel's submissions about excising the references within the ITO to the blood samples taken at the hospital and the evidence obtained in the vehicle search. While evidence obtained as a result of a *Charter* breach can properly be excised from an ITO, the issue of whether or not either of these searches constituted a breach of Mr. Enns' s. 8 *Charter* right was not fully argued on this *voir dire.* Rather, I understood that these arguments were to be developed after hearing evidence from other witnesses. As a result, I am not in a position to excise the ITO's references to these pieces of evidence. That is not my role at this stage.

[49] Were I to have found, after hearing evidence and argument in a *voir dire*, that either or both of these searches were in contravention of Mr. Enns' *Charter* rights and excluded under s. 24(2), I would then have been in a position to excise the paragraphs in the ITO that referenced these searches. I understand that we are proceeding in the order that we are in that, were I to find that the issuance of the telewarrant was not in compliance with s. 487.1, there would be no need to call further witnesses. Had we first proceeded with the s. 8 search evidence and arguments in a *voir dire*, more witnesses than Cst. Guthrie would have been required.

[50] On my assessment of Cst. Guthrie's evidence, there are essentially three pieces of amplifying evidence which were not included in the ITO, that came out in the *voir dire*:

- there was some relatively small amount of snow at the centre line and on the shoulders of the highway at the time of the motor vehicle collision;
- when asked by Karen Digby, Mr. Enns told her he had not been drinking;
- Cst. Guthrie's notes indicate that Cst. Dixon had initially advised him of a "mild" odour of liquor from Mr. Enns.

[51] The other omissions or problems alleged by counsel are, I think, matters that the authorizing judge either would have taken judicial notice of (e.g. the Klondike Highway is an undivided, two-lane highway) or that he would have considered on the basis of the totality of the evidence presented in the ITO (e.g. that Mr. Enns' erratic behaviour could be attributable to the accident and his injuries).

[52] Even with the benefit of this amplification, I find that Cst. Guthrie's ITO provided information that could have satisfied the authorizing judge that there were objectively reasonable grounds for Cst. Guthrie's belief that Mr. Enns had committed an impaired driving offence and that the blood samples and medical documentation in possession of WGH would provide evidence of that offence.

[53] Although counsel did not press the point, I do not think any of these three omissions were deliberate on the part of Cst. Guthrie, in the sense that he was attempting to mislead the authorizing judge. Indeed, I find that Cst. Guthrie made efforts to draft the ITO carefully, in particular given his very limited experience in doing so. While it would have been better to have included Mr. Enns' denial of drinking to Ms.

Digby, it did include his statement that he was “on his way to go drinking”. Although the ITO did not reference the snow on the roadside and near the yellow line, it did reference the near-zero temperature, and I understood from Cst. Guthrie’s evidence that there was no snow to speak of in the driving lanes. Finally, I accept his explanation that he relied on documentation prepared by Cst. Dixon when recounting that officer’s observations rather than his own handwritten notes, and that this explains the omission of the modifier ‘mild’.

[54] The authorizing judge had before him evidence of a motor vehicle accident, hearsay evidence of a witness who was told by Mr. Enns that he was drunk, two witnesses who indicated that they smelled beverage alcohol, three witnesses who observed either erratic behaviour or a lack of comprehension on the part of Mr. Enns, and the affiant’s evidence that there was beer in the vehicle, including a can of Budweiser that was open and mostly empty. Even adding Mr. Enns’ denial of alcohol consumption to another witness, and the difference between an odour of liquor v. a “mild” odour, I would be hard-pressed to find that there is no basis on which the warrant can be sustained (*R. v. Liu,* 2014 BCCA 166, at para. 36, citing *R. v. MacNeil,* 2013 BCCA 162). While I accept that the odour of liquor could be consistent with spilled beer and Mr. Enns’ erratic behaviour due in some part to the physical trauma he sustained, and I acknowledge that perhaps not every judge would be satisfied of the basis for the warrant, I cannot say that the authorizing judge in this case could not have issued it.

Telewarrant

[55] The warrant obtained in this case was issued pursuant to s. 487.1, the telewarrant section of the *Criminal Code.* The relevant part of this section reads:

> 487.1(1) Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

[56] There is no justice of the peace available to authorize warrants in Carmacks. While judges occasionally attend Carmacks in the context of court circuits or special sittings, as counsel pointed out, typically a judge is only available in the community one day approximately every two months for circuit court. Carmacks, like other Yukon communities, is heavily reliant on the telewarrant procedure set out in s. 487.1.

[57] The argument made by counsel for Mr. Enns has a few aspects to it. Firstly, was the ITO sufficient in documenting the availability of a judge such that the authorizing judge could determine whether it was objectively impracticable for Cst. Guthrie to attend before someone in person? Secondly, given that the samples and documents were secure, would it have been impracticable for Cst. Guthrie to wait for a judge to attend Carmacks on circuit? Thirdly, would it have been impracticable for Cst. Guthrie to drive to Whitehorse to appear before a judge in person, especially given that this is where the blood samples and documents were?

[58] Defence counsel largely relied on the B.C. Court of Appeal decision in *R. v. Erickson,* which is cited above. In that case, a police officer based in Kimberly B.C. had obtained a telewarrant from a justice of the peace in Burnaby just after 11:30 p.m. The ITO indicated that "there is no local J.P. services available". In upholding the valid use of the telewarrant procedure, Saunders J.A. observed:

> "Impracticable" is not a word commonly used as a legal standard. More common words include reasonable, urgent, emergent, exigent, necessary and reasonably necessary. Parliament has chosen to use the word "impracticable", and clothed the process with extra protection for an accused through the requirement to file a transcription of the conversation. It is reasonable to conclude that "impracticable" means something less than impossible and imports a large measure of practicality, what may be termed common sense.

[59] The B.C. Court of Appeal has subsequently visited the question of impracticability, and I have been directed to *R. v. Ling,* 2009 BCCA 70, *R. v. Le,* 2009 BCCA 14 and *R. v. Clark,* 2015 BCCA 488.

[60] Crown counsel relies on *Clark* in his submission that the impracticability requirement has been satisfied. In that case, the police officer had completed the ITO at approximately 2 a.m., and he indicated that he was seeking a telewarrant "because I am working a nightshift in the early morning hours and the Kelowna Court House is presently closed". A judicial justice of the peace sought further details, and the ITO was amended to say that in the officer's experience there would be no one available to sign a search warrant during the day at the Kelowna, Vernon or Penticton Court Houses, that he would be off-duty between 4 a.m. and 6 p.m. that day, and that he would need time to assemble a search team to execute the warrant. Mr. Clark's counsel took the position

that since there was no immediate need for a warrant, the officer should have waited and attempted to swear the ITO in person. In this case, Frankel J.A. wrote:

> 65 I do not agree with Mr. Clark that to meet the impracticability requirement the facts set out in an ITO must satisfy a judicial justice not only that an in-person appearance is not feasible but also that there is an immediate need for a warrant.
>
> 66 The telewarrant procedure was designed to make it possible for law enforcement officers to apply for a search warrant 24 hours a day, seven days a week. Whether the application is made in-person or by fax the reasonable-grounds standard must be met before a warrant can be issued. The impracticability-requirement is concerned with whether it is practicable to make an in-person application at the time the application is brought; it does not require that an immediate need for a warrant be demonstrated. Apposite is the following from the judgment of Madam Justice Levine in *R. v. Le*, 2009 BCCA 14, 268 B.C.A.C. 58:
>
> > [35] The appellant suggests that as there was no urgency to carry out the search, Constable Lane should have waited until the next day when she could have appeared in person to obtain the warrant, or she should have asked another officer, who was working during the day, to obtain the warrant. In my opinion, the telewarrant procedure is available so that police officers who work on shifts or in communities where justices of the peace are not available at all hours may carry out their duties, and it is not for the court to interfere in the management of police investigations by requiring them to organize themselves to avoid using the telewarrant procedures in the Code or risk being found in violation of those provisions.
> >
> > [Emphasis added.]
>
> …
>
> 68 In the present case, the question is whether, on the basis of the statement on the printed form and para. 26 of Appendix A, JJ Cyr could have been satisfied that the ITO "discloses reasonable grounds for dispensing with an information presented personally and in writing" (*Code*, s. 487.1(5)). The answer is clearly "yes". Indeed, as discussed in *R. v. Nguyen*, 2009 BCCA 89 at para. 18, 243

> C.C.C. (3d) 392, if a judicial justice had been available for an in-person application, then one would expect either the Justice Centre or JJ Cyr to have so advised Constable Marshinew.
>
> 69 Accordingly, the telewarrant was properly issued.

[61] Defence points out that B.C.C.A. authority dealing with telewarrants is hard to reconcile and points to *Ling,* a decision by Bauman J.A. (now C.J.B.C.), where a telewarrant was quashed on the basis that the affiant failed to confirm the unavailability of an authorizing justice or explain the impracticability of travel between communities.

[62] While I agree that *Ling* is not easily reconciled with *Clark,* I note that *Clark* was upheld by the Supreme Court of Canada, following a full hearing of the appeal, with an endorsement of the reasons of Frankel J.A. by McLachlin C.J.C. (*R. v. Clark,* 2017 SCC 3). Accordingly, to the extent that the reasoning in *Clark* differs from *Ling* or *Erickson,* I consider myself bound by *Clark*.

[63] In terms of the first of the three discrete issues articulated by counsel for Mr. Enns, Cst. Guthrie's ITO simply stated that "there is not a Judge in the Village of Carmacks on today's date nor is there a Justice authorized to sign Search Warrants". While I recognize that, in *Clark*, the Court of Appeal was presented with significantly more detailed grounds for a telewarrant, the Court went on to find that the judicial justice of the peace did not need the additional information requested. At para. 81, Frankel J. explicitly ruled that "[o]n the basis of a statement in an ITO to the effect that the local courthouse is closed, a judicial justice could be satisfied that an in-person application is impracticable". Similarly, in *Erickson*, the telewarrant was upheld on the basis of the statement that "there is no local J.P. services available".

[64] Although perhaps not necessary to mention, given the state of the law in *Clark*, the *Erickson* (para. 31) and *Veranski* (paras. 92 and 97) decisions also acknowledge that it is open to trial and authorizing judges to take judicial notice of factors bearing on impracticability, such as geography and local courthouse hours and locations. In this jurisdiction, all of the judges and deputy judges authorized to issue warrants are aware of the relative infrequency with which the Territorial Court sits in the communities outside of Whitehorse. Similarly, all judges and deputy judges have a sense of the distances between communities, including the fact that Carmacks is an approximately two-hour drive from Whitehorse. I find that the statement made by Cst. Guthrie with respect to the unavailability of a judge in Carmacks on the date the ITO was submitted could have satisfied the authorizing judge that an in-person appearance before a judge was impracticable, especially in light of *Clark.*

[65] With respect to the other two aspects of defence counsel's submissions, I do not think it was incumbent on the officer to try to time his application to coincide with a Carmacks circuit or with a trip into Whitehorse. This does not mean that officers can deliberately take steps or organize their affairs in order to avoid appearing in person in order to seek a warrant. A judge will, of course, look carefully at the circumstances in each case.

[66] *Clark* is clear that the telewarrant procedure "was designed to make it possible for law enforcement officers to apply for a search warrant 24 hours a day, seven days a week" (*Clark,* para. 66), and that "it is not for the court to interfere in the management of police investigations by requiring them to organize themselves to avoid using the telewarrant procedures in the *Code"* (*Clark,* para. 66, citing *Le* at para. 35).

[67] The evidence indicates that the ITO in this case was drafted and reviewed over the course of several weeks while Cst. Guthrie and/or his superior were on shift. Similarly, it was submitted while Cst. Guthrie was on duty. It was not required of him to organize himself to attend before a circuit court judge, and neither was it required of him to drive to Whitehorse to personally appear in front of a judge. While both of these were options available to him, in my view both could have required him to significantly adjust his schedule and operational priorities, although I recognize that in the end Cst. Guthrie came to Whitehorse to pick up the blood samples. Further, in the event that Cst. Guthrie drove to Whitehorse to attend before a judge in Whitehorse with an intent to obtain a search warrant and then to obtain the blood samples pursuant to the issuance of the search warrant, there is no guarantee that the search warrant would have been granted. This could be problematic with respect to the policing resources and requirements in the community of Carmacks. The same could be said of other communities in the Yukon.

[68] Although I take defence counsel's point that there was no urgency to obtaining the warrant, urgency is not a prerequisite to a telewarrant, and the test for impracticability is broad enough to encompass the circumstances here.

[69] I also note that there is no established practice of having the presiding judge review ITOs while on circuit; circuit courts can be quite busy with trials and other court matters and, even if a judge is in the community, it may not always be possible for an officer on duty to access the judge for the purposes of obtaining a warrant, given the competing demand for court time. There may also be a perception issue if the officer

seeking the warrant will also be or has been called to testify before the judge during the course of the circuit.

[70] As such I find that the telewarrant procedure followed here was in compliance with s. 487.1 of the Code.

[71] The defence application to quash the search warrant is denied.

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COZENS T.C.J.