Court of Queen's Bench of Alberta

Citation: R v Neumann, 2022 ABQB 314

Date: 20220427
Docket: 200130284Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Jacob Neumann

Accused

Restriction on Publication

Trial Information in Absence of Jury – See the *Criminal Code*, section 648(1).

Permission having been given to the jurors to separate, information concerning this portion of the trial must not be published, broadcast, or transmitted in any way.

NOTE: This decision is available from the court file, and it may be published after the jury retires to consider its verdict.

Reasons for Judgment
of the
Honourable Mr. Justice D.B. Nixon

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[1] The Applicant, Mr. Jacob Neumann, is charged with one count of possession of cocaine and one count of possession of methamphetamine for the purposes of trafficking, contrary to section 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (the "*CDSA*").

[2] In an earlier hearing, I found that the police unlawfully obtained the Applicant's identifying information at the Rockwood Motor Inn, which is situated in Stonewall, Manitoba (the "Rockwood Inn") and subsequently at Advantage Ford, a truck dealership in Calgary: see ***R v Neumann***, 2022 ABQB 151 (the "Ruling").

[3] In the Ruling, I held that the unlawfully obtained information identifying Mr. Neumann constituted a warrantless search in contravention of section 8 of the *Charter*. Given that determination, certain information had to be excised from the relevant Information to Obtains ("ITOs"), with the result that the issuing judge could not have granted the tracking warrant for Phone #1 on October 9, 2019 or the tracking warrant for Phone #2 on January 24, 2020.

[4] At issue at this stage is whether the evidence obtained in the police investigations subsequent to the initial s. 8 *Charter* breach should be excluded under s. 24(2) of the *Charter*.

I. Background

[5] I found Mr. Neumann had a reasonable expectation of privacy in the identification and cell phone number information seized by the Winnipeg Police Service ("WPS") from the Rockwood Inn and by the Calgary Police Service ("CPS") from Advantage Ford. As a result of excision of the unlawfully obtained information, and the cascade effect, none of the warrants in the investigation could have issued.

[6] As a result of, I found Mr. Neumann was subject to nearly continuous violations of his ss. 7 and 8 *Charter*-protected interests throughout the police investigation that spanned approximately four months. The specific violations include the following:

a. s. 8 *Charter* breach for seizing without authorization the cell phone number and identification of Mr. Neumann as the resident in suite 11 from the Rockwood Inn;

b. s. 8 *Charter* breach for the search and seizure of information pursuant to the unlawfully issued Tracking Device and Transmission Data Recorder Warrants made pursuant to ss. 491.1(2) and 492.2 of the *Criminal Code* issued October 9, 2019 and in effect until November 2, 2019;

c. s. 8 *Charter* breach for the search and seizure of information pursuant to the unlawfully issued Tracking Device and Transmission Data Recorder Warrants made pursuant to ss. 491.1(2) and 492.2 of the *Criminal Code* issued November 1, 2019 and in effect until December 1, 2019;

d. s. 8 *Charter* breach for the search and seizure of information pursuant to the unlawfully issued Tracking Device Warrant pursuant to s. 492.1(1) of the *Criminal Code* issued December 16, 2019 in effect until February 13, 2020;

e. s. 8 *Charter* breach for seizing without authorization the cell phone number and name of Mr. Neumann as the person associated with the F350 truck ("F350 Truck") from Advantage Ford;

f. s. 8 *Charter* breach for the search and seizure of information pursuant the unlawfully issued Tracking Device and Transmission Data Recorder Warrants pursuant to ss. 492.1(2) and 492.2 of the *Criminal Code* issued January 24, 2020 in effect until March 22, 2020; and

g. s. 8 *Charter* breach for the search and seizure of information pursuant to the unlawfully issued Search Warrant pursuant to s. 11 of the *CDSA*.

(Ruling at paras 133 – 135.)

[7] I made several findings in the Ruling, that are important to this s. 24(2) analysis.

[8] On the inquiries at the Rockwood Inn, I found at paragraph 61:

> … the police were not simply interested in the Applicant's phone number so they could speak with him. The real reason that the police sought the phone number was so they could track the Applicant's movements and determine the identity of who he called. In my view, obtaining the phone number does indeed shed further light on the Applicant's lifestyle, activities and reveal other personal information. In my view, it is significant that his identity was unknown. Also, the police did not want the phone number to contact the Applicant.

[9] The CPS began their investigation after receiving information from the tracking data from the October 9 and November 1, 2019 Warrants. Cst Rydl obtained Mr. Neumann's name and other cell phone number from Advantage Ford's manager: Ruling at para 62 and 63.

[10] Cst Rydl's evidence confirmed the police did not obtain the cell phone number to contact Mr. Neumann. Further, the police did not want Mr. Neumann to know they were interested in him, and they had no expectation he would provide his cell phone number, if asked.

[11] I also found the information seized was sought to obtain details of the "lifestyle and personal choices" of Mr. Neumann: Ruling at para 64. Additionally, I concluded "[m]ost individuals consider their cellular numbers to be confidential": Ruling at para 92; see also, ***R v Jennings***, 2018 ABQB 296 at para 47 [***Jennings***].

[12] In finding the police technique of seizing the identification and cell phone number information without prior authorization to be intrusive, I explained, "the search was intrusive as it 'provided access to an intensely private virtual space . . . Cellular phone numbers provide access to a portal that is 'reserved for the select few closest to us'": Ruling at para 109, citing ***R v Ahmad***, 2020 SCC 11 at para 36 [***Ahmad***].

[13] I also found the unauthorized seizures not objectively reasonable because the police seized the information for the purpose of monitoring and tracking him in circumstances where the identity of Mr. Neumann was otherwise unknown: Ruling at para 113. I stated:

> [i]n this case, the police took advantage of the fact that private information was in the possession of third parties, and of the third parties' lack of understanding of privacy interests, to obtain information they properly required prior authorization to obtain: Ruling at para 114.

[14] Additionally, I acknowledged the information seized was capable of exposing intimate details of Mr. Neumann's lifestyle and information of a biographical nature. It was capable of revealing patterns of travel, communication, and other information that are biographical in

nature. The police used the unlawfully seized information to identify Mr. Neumann, and to track and record his movements and communications: Ruling at paras 115 – 116.

[15] The cascade effect of a finding of a s. 8 *Charter* violation by the initial seizure by the WPS from the Rockwood Inn is that all the impugned warrants could not have been issued after excision. This defect by the initial s. 8 *Charter* violation, as bolstered by the additional warrantless seizure by Cst Rydl, resolved the threshold issue in favour of finding the evidence obtained in a manner that infringed Mr. Neumann's Charter rights and freedoms.

[16] The Crown brought additional evidence before me during the s. 24(2) hearing. While I will touch on some of that evidence below where appropriate, I make three observations. First, most of the evidence the Crown brought forward during the s. 24(2) phase of this hearing was not new. Some of the evidence was simply recast, which is best described as a distraction. Second, most of that evidence was not relevant to the s. 24(2) component of this ongoing hearing. That said, where it was relevant, the incremental evidence tended to be supportive of the causal connections that Mr. Neumann advanced. Third, some of the new evidence was advanced in conjunction with a Crown argument that invited me to speculate that the evidence in respect of Mr. Neumann would have been discovered absent the *Charter* breaches. In my view, that approach is not appropriate. Where it cannot be determined with any confidence whether evidence would have been discovered absent a *Charter* breach, discoverability will have no impact on the s. 24(2) inquiry. To emphasize the point, courts should not engage in speculation about discoverability: ***R v Tim***, 2022 SCC 12 at para 94 [***Tim***] at para 94; see also ***R v Côté***, 2011 SCC 46 at para 70 [***Côté***].

II. Law and Analysis

[17] In ***R v Le***, 2019 SCC 34, the Supreme Court of Canada described the applicable framework for analysis:

> [139] Section 24(2) of the *Charter* provides that, where evidence was obtained in a manner that infringed a *Charter* right or freedom, that evidence *shall* be excluded if it is established that, having regard to all the circumstances, its admission *would bring the administration of justice into disrepute*. While the judicial inquiry under s. 24(2) is often rhetorically cast as asking whether evidence should be excluded, that is not the question to be decided. Rather, it is whether the administration of justice would be brought into disrepute by its admission (***R. v. Taylor***, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 42). If so, there is nothing left to decide about exclusion: our *Charter* directs that such evidence *must* be excluded, *not* to punish police or compensate for a rights infringement, but because it is necessary to do so to maintain the "integrity of, and public confidence in, the justice system" (***Grant***, at paras. 68-70).
>
> [140] Where the state seeks to benefit from the evidentiary fruits of *Charter*-offending conduct, our focus must be directed not to the impact of state misconduct upon *the criminal trial*, but upon *the administration of justice*. Courts must also bear in mind that the fact of a *Charter* breach signifies, in and of itself, injustice, and a consequent diminishment of administration of justice. What courts are mandated by s. 24(2) to consider is whether the admission of evidence risks doing further damage by diminishing *the reputation* of the administration of

justice — such that, for example, reasonable members of Canadian society might wonder whether courts take individual rights and freedoms from police misconduct seriously. We endorse this Court's caution in ***Grant***, at para. 68, that, while the exclusion of evidence "may provoke immediate criticism", our focus is on "the overall repute of the justice system, viewed in the long term" by a reasonable person, informed of all relevant circumstances and of the importance of *Charter* rights.

[141] In ***Grant***, the Court identified three lines of inquiry guiding the consideration of whether the admission of evidence tainted by a *Charter* breach would bring the administration of justice into disrepute: (1) the seriousness of the *Charter*-infringing conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. While the first two lines of inquiry typically work in tandem in the sense that both pull towards exclusion of the evidence, they need not pull with identical degrees of force in order to compel exclusion. More particularly, it is not necessary that *both* of these first two lines of inquiry support exclusion in order for a court to determine that admission would bring the administration of justice into disrepute. Of course, the more serious the infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the case for exclusion (***R. v. McGuffie***, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 62). But it is also possible that serious *Charter*-infringing conduct, even when coupled with a weak impact on the *Charter*-protected interest, will *on its own* support a finding that admission of tainted evidence would bring the administration of justice into disrepute. It is the sum, and not the average, of those first two lines of inquiry that determines the pull towards exclusion.

[142] The third line of inquiry, society's interest in an adjudication of the case on its merits, typically pulls in the opposite direction — that is, towards a finding that admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown's case (see ***R. v. Harrison***, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34), we emphasize that the third line of inquiry cannot turn into a rubber stamp where *all* evidence is deemed reliable and critical to the Crown's case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility (***Paterson***, at para. 56). Conversely, if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence.

[143] This Court has previously observed that, when considering the seriousness of the Charter-infringing conduct, a court's task is "to situate that conduct on a scale of culpability" (***Paterson***, at para. 43). The operating premise here is that inadvertent, technical or otherwise minor infringements impact less upon the rule of law and, therefore, upon the reputation of the administration of justice than

> wilful or reckless disregard of Charter rights (***Grant***, at para. 74; ***Harrison***, at para. 22). Further, as this Court held in ***R. v. Buhay***, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59, and ***Paterson***, at para. 44, a "good faith" error on the part of the police must be reasonable and is not demonstrated by pointing to mere negligence in meeting Charter standards. In other words, the reputation of the administration of justice requires that courts should dissociate themselves from evidence obtained as a result of police negligence in meeting Charter standards.

[18] In ***Tim***, the Supreme Court of Canada described the effect of "good faith" error, at paragraph 85:

> . . . Good faith on the part of the police, if present, would reduce the need for the court to dissociate itself from the police conduct (see ***Grant***, at para. 75; ***Paterson***, at para. 44). Good faith cannot be claimed if the Charter breach arises from a police officer's negligence, unreasonable error, ignorance as to the scope of their authority, or ignorance of Charter standards (see ***Grant***, at para. 75; ***Buhay***, at para. 59; ***Le***, at para. 147; ***Paterson***, at para. 44). I also accept that "[e]ven where the Charter infringement is not deliberate or the product of systemic or institutional abuse, exclusion has been found to be warranted for clear violations of well-established rules governing state conduct" (***Paterson***, at para. 44; see also ***Harrison***, at paras. 24-25) . . .

[19] In this case, good faith was breached when the identity of Mr. Neumann was sought by police without proper authorization, and his cell phone number was also sought by the WPS. That data was ultimately entered into both a "target sheet" and CPIC (also known as "Canadian Police Information Centre"). This intrusiveness led to tracking devices, which collected significant amounts of new data. In summary, this breach allowed the police to collect tens of thousands of data points on Mr. Neumann. In contrast, if traditional (physical) surveillance was used, the data collection would have been very limited.

[20] While I have no evidence that the police intentionally advanced a bad faith initiative, that does not excuse the conduct. Mere absence of bad faith is not mitigating as, "negligence in meeting *Charter* standards cannot be equated to good faith": ***Le*** at para 147.

A. The Seriousness of the Breach

[21] The cumulative effect of the *Charter*-infringing state conduct is serious. The initial unlawful intrusion on the privacy interest of Mr. Neumann concerning his identification and cellphone number was the catalyst to significant intrusion on his privacy and liberty interests from October 9, 2019 to January 30, 2020.

[22] As set out in Cst Herman's ITO for the October 9, 2019 warrant, the police considered covert physical surveillance of Mr. Neumann without the tracker impractical. This unilateral focus on the police investigative interests is highly problematic when unlawful interference with *Charter*-protected reasonable expectations of privacy is the path then chosen: ***R v Sandhu***, 2018 ABQB 112 at para 58 [***Sandhu***].

[23] There is no basis to infer that without the October 9, 2019 warrant Mr. Neumann would be the subject of any further police investigation by WPS. On the contrary, it is clear from the record, Mr. Neumann would not have been subjected to this investigation.

[24] The evidence of Cst Rydl and his approach to the privacy rights of Mr. Neumann, who was the subject of his investigation, reveals the problematic unilateral focus on police investigative interests:

> *Justification wasn't an issue that entered my mind*. For my investigations, if I'm considering obtaining a piece of information without a warrant, I do, you know, an analysis in my mind of whether it would be appropriate for me to do so, and *I'm more concerned about the additional time and resources that it would take to seek judicial authorization* for a *tiny thing* that would otherwise be -- that I would be more within my rights to ask for. *So, no, I was not concerned about justification. I was more concerned about logistics:*
>
> [See evidence of Cst Rydl, September 10, 2021 at 14/20-26, emphasis added.]

[25] Cst Rydl's subjective characterization of his intrusion on the reasonable expectation of privacy of Mr. Neumann as a "tiny thing" in the face of a challenge to exclude the evidence obtained from Advantage Ford belies his admissions of what he actually knew to be the significance of the subject matter of his search:

> Q In a drug investigation, a cellphone number can indicate to the police who is affiliated with who; right?
>
> A That's right.
>
> Q So part of the data that you're looking at is what phone numbers does this phone call --
>
> A Yes.
>
> Q -- how frequently are those calls made --
>
> A Yes.
>
> Q -- where the person is when they're making those calls --
>
> A Yes.
>
> Q -- what the person is doing when they're making those calls.
>
> A There may be some general inference that could be drawn from other factors, but those orders and warrants alone would not provide me with information about what the person is doing when they're making certain phone calls.
>
> Q *If you have a tracker that says where the phone is, then you can do surveillance to observe what the activities of that person are at that time.*
>
> A *Yes, that's correct.*
>
> Q *That can be an incredibly useful investigative technique.*
>
> A *Very much so.*
>
> Q From the information that you get from monitoring the activities of a cellphone, you then have people within the Calgary City Police organization that are data analysts; right?
>
> A Yes, that's right.

> Q And *data analysts will then take the raw data and try to make patterns between the raw data to determine the conduct of an individual; right*?
>
> A *Yes*: see evidence of Cst Rydl, September 10, 2021 at 24/29 – 25/20.
>
> [Emphasis added.]

[26] The repeated lack of regard for Mr. Neumann's *Charter*-protected privacy rights demonstrates a pattern of disregard for individual rights and freedoms in a one-sided pursuit of police investigation interests: ***Côté*** at para 81. The seriousness of the *Charter*-infringing conduct weighs heavily in favour of exclusion.

[27] None of the police conduct that violated Mr. Neumann's *Charter*-protected rights can be characterized as "merely technical or inadvertent". None of circumstances involved urgency or necessity that would diminish the seriousness of the police conduct.

[28] As aptly described by Graesser J in another case:

> "Seriousness" of the breach does not equate only to misconduct of some sort. In my view, the granting of a search warrant, authorizing state intrusion into a private place, in non-exigent circumstances, and on insufficient grounds is a serious *Charter* breach. It is obviously not as serious as many types of breaches, but neither is it trivial. The granting of a search warrant on insufficient grounds is not a technical breach, but rather goes to the heart of judicial authorization: ***R v Truong***, 2020 ABQB 337 at para 182 [***Truong***].

[29] Executing a search warrant which could not have been issued without unlawfully obtaining information in contravention of *Charter*-protected rights is significant. As Graesser J has noted "[b]ut for the issuance of the search warrant, none of this would have happened to Ms. Truong. These are not trivial matters": ***Truong*** at para 184.

[30] The breach in Mr. Neumann's case was not a trivial matter. Further, it was not a mere technical breach. To the contrary, the breach goes to the heart of the authorization for, and in respect of, the warrants that were issued.

[31] Further, the seriousness of the state *Charter*-offending conduct is not minimized by uncertainty in the law. Recognition of privacy interests such as anonymity and control and informational privacy enjoy long-standing recognition in Canadian jurisprudence.

[32] Any belief there is no privacy interest in Mr. Neumann's identification information and cellphone numbers flouts the very reason the police obtained the information. The police sought that information so that they could track the whereabouts of Mr. Neumann and his communications and affiliations with others. The tracking of his whereabouts, communications, and affiliations was all in an effort by police to establish evidence of a criminal lifestyle and criminal associations.

[33] Given their purpose in seeking the identification information and cellphone numbers concerning Mr. Neumann without a proper authorization, the police acted with reckless indifference to his privacy interests and their obligation to uphold the laws, including the *Charter*. Taking the easiest path forward to obtain evidence without any or proper regard to individual privacy interests cannot be condoned by the justice system.

[34] Further reasons that I considered for rejecting any argument on attenuation of seriousness due to any uncertainty in the law include:

a. The infringing conduct of the police involved not only obtaining a cell phone number but also Mr. Neumann's identification which the police had no reason to believe did not attract a reasonable expectation of privacy.

b. The broad and purposive approach to the interpretation of the scope of *Charter* rights is well established. The broad interpretation of privacy interests is reflected in the trend of Supreme Court finding in favour of a reasonable expectation of privacy: ***R v Spencer***, 2014 SCC 43 [***Spencer***]; ***R v Morelli***, 2010 SCC 8 [***Morelli***]; ***Ahmad***; ***R v Marakah***, 2017 SCC 59 [***Marakah***]; ***R v Jones***, 2017 SCC 60; ***R v Reeves***, 2018 SCC 56 [***Reeves***]. ***Spencer*** emphasized that a reasonable expectation of privacy requires looking beyond the precise information sought to consider "the nature of the information that it reveals" and considering why the police sought the information seized: at para 26.

c. Further, the enactment of privacy legislation communicates to the police the importance and recognition of individual privacy interests and serves to protect, not undermine, privacy interests: ***Spencer*** at paras 61 – 62, 73; Ruling at paras 100 – 104.

d. Although courts have found landline telephone numbers did not attract a reasonable expectation of privacy, cases such as ***Jennings***, which predate the seizures, distinguished cell phone numbers from landlines in finding a reasonable expectation of privacy: ***Jennings*** at para 54. Since ***Spencer***, there is no question it is unreasonable for the police to turn a blind eye to the existence of privacy interests in cell phone numbers obtained for the purpose of being able to continuously monitor the activity of a suspect.

e. The WPS sought the information from Rockwood Inn to identify an otherwise anonymous individual and obtain information that would permit them to constantly track and record his travels and communications to learn of his associations with other people and create a lifestyle profile consistent with criminality. For similar purposes, the CPS sought information associating Mr. Neumann with the F350 Truck and cell phone number from Advantage Ford. Therefore, it ought to have been readily apparent to the police that the obtaining of the cell phone number, not for the purpose of calling Mr. Neumann, but to track him, engaged a reasonable expectation of privacy.

f. Third parties cannot waive the privacy interests of another, and a person does not lose their privacy interests simply because another person possesses or access it. Just as found in ***Reeves***, the police "should have known that a third party cannot waive another party's Charter rights.": ***Reeves*** at para 62; see also ***Marakah*** at para 41; Ruling at para 91. Integral to informational privacy is the individual choice to determine for oneself when, how, and to what extent information about them is communicated to others. This safeguarding of information about oneself is "tied to the dignity and integrity of the individual, is of paramount importance in modern society": ***R v Jarvis***, 2019 SCC 10 at para 66 [***Jarvis***]; see also, ***Spencer*** at para 26. As the Supreme Court in ***Ahmad*** would come to note, cell

phones are a "portal of immediate access reserved for the select few closest to us. We carefully guard access to that space by choosing to whom we disclose our phone number and with whom we converse": ***Ahmad*** at para 36.

g. Even if it were that a third-party could consent to waiver of privacy interests, any consent must be informed. There is no evidence the WPS obtained Mr. Neumann's private information through informed consent from the Rockwood Inn. The evidence of Cst Rydl's seizure from Advantage Ford establishes an obvious lack of informed consent. Cst Rydl did not inform himself or Mr. Wood of the protection of customer privacy interests under the *Personal Information Protection Act, SA 2003, c P-6.5 ("PIPA")* or the company privacy policy. Nor did Cst. Rydl explain to Mr. Wood the purpose for which he intended to use the information – to continuously track and record Mr. Neumann's whereabouts and associations to analyze his lifestyle choices. To claim that this information was obtained with voluntary consent from Advantage Ford is to ask this Court to simply ignore what that term means in law and in everyday plain language.

[35] The state of the law at the time of the seizures of Mr. Neumann's private information supported a reasonable expectation of privacy and therefore the state of the law does not attenuate the seriousness of the infringing conduct. It is unreasonable for police to follow the least burdensome route. They are obliged to err on the side of, and have respect for, the *Charter*. The failure of the police to take steps to ensure compliance with Mr. Neumann's privacy rights protected by the *Charter* aggravates the seriousness of the police conduct.

[36] The record is void of any foundation to support the WPS acted in good faith. In particular, there is no evidence the seizing WPS officers turned their mind to any source of authority to seize the information from the Rockwood Inn or individual privacy interests.

[37] This void of evidence precludes the Crown from establishing the WPS acted in good faith. As Antonio J (as she then was) articulated in ***Sandhu***, without evidence that the police gave any thought to the legality of the technique at all "[a]t best, this is tantamount to negligence or wilful blindness": ***Sandhu*** at para 56. Here, as in ***Sandhu***, there is a void of evidence that there was any thought by the police as to whether the seizure was a reasonable intrusion on privacy interests: ***Sandhu*** at para 58.

[38] Cst Rydl's evidence in the *voir dire* establishes an absence of good faith, and arguable actions of bad faith, in the violation of Mr. Neumann's *Charter* rights in obtaining information from Advantage Ford: see also ***Tim*** at para 85. On the issue, Cst Rydl testified as follows.

a. He did not familiarize himself with the applicable privacy laws before attending Advantage Ford.

b. He attended at Advantage Ford unannounced and without prior warning.

c. He did not obtain a copy of Advantage Ford's privacy policy or contact the privacy officer in advance of obtaining the personal client information held by Advantage Ford.

d. He failed to inform Mr. Wood of the obligation of Advantage Ford under *PIPA* to protect customer's privacy interest in information held by Advantage Ford.

e. Although recognizing the information he sought had some privacy interest, since he believed it was not a high privacy interest he determined, without consultation to legislation, legal advisors, or senior officers, that he would see if Advantage Ford would give the information without going through the process of applying for a Production Order.

[39] The record supports a repeated lack of regard by the police for their obligation to uphold the law, including both privacy legislation and most significantly protection of *Charter* rights. The public's faith in the rule of law requires this Court dissociate itself from the cavalier attitude demonstrated to privacy interests by police taking an easy route despite it sacrificing and intruding upon *Charter*-protected privacy interests which go to the heart of a democratic state.

[40] The conduct of the police in obtaining the identification and cellular telephone number from an unwitting third-party without a warrant is a clear departure from clear limitations to the exercise of police power: ***Le*** at para 149. As I found in the reasons for the breach, "the police took advantage of the fact that private information was in the possession of third parties, and of the third parties' lack of understanding of privacy interests, to obtain information they properly required prior authorization to obtain": Ruling at para 114.

[41] Police conscribing third-party record holders into deliberate misconduct to acquire personal information belonging to individuals to whom the record holders owe a statutory duty to protect against unwarranted intrusions further exacerbates the seriousness of the state *Charter*-infringing conduct.

[42] Further, the inclusion of other misleading information in Cst Herman's ITO exacerbates the seriousness of the *Charter*-infringing conduct, especially in circumstances where the Crown conceded the evidence in this ITO was "thin". Within this "thin" affidavit exist three misrepresentations which exacerbate the seriousness of the *Charter*-infringing conduct:

a. The reference at paragraph 15 to Mr. Neumann briefly attending to his F350 Truck and putting "something" in his pocket before returning to the room in circumstances where Cst Herman and the other surveillance officers observed the "something" was a phone charger. This misrepresentation or material omission demonstrates a disregard for the care to ensure an issuing justice was not misled.

b. The reference at paragraph 16 of the ITO regarding police records of Mr. Neumann being a known drug user and frequented missing person is inconsistent with the information obtained by Cst Rydl's searches of databases, which showed "[n]o drug history or links or organized crime found". The Crown could not confirm the accuracy of the contents of the statement in paragraph 16 of the ITO, which supports a lack of care in presenting reliable information to the issuing justice.

c. The reference on page 1 that Mr. Neumann "constantly" travels across Canada is also problematic. This assertion was unsupported by the evidence in the ITO. It is another inclusion of misleading information, and exaggerated characterization, which undermines the obligation of the affiant to make full, frank, and fair disclosure to the issuing justice.

[43] These misrepresentations were repeated in the application for the extension of the Tracking Device and Transmission Data Recorder Warrants on November 1, 2019. I find that troubling.

[44] The inclusion by Cst Wenngatz of the confidential informant ("CI") information without taking any steps to ascertain the reliability or "pedigree" of the CI was unreasonable. That only served to provide potentially misleading information to the issuing justice.

[45] The assertion by Cst Wenngatz that only certain police officers (essentially walled-off handlers) would ever have information about CI pedigree information (such as financial motivation or payment for information) is not correct. Source information like that included in *Voir Dire* 1 Exhibit 6, is routinely provided to affiants expressly for the purpose of it being included in an ITO so that a proper assessment of the CI information can be made at the time an authorization is requested.

[46] Simply stated, there is nothing in this record to absolve Cst Wenngatz from having failed to take the most basic investigative step of asking questions of another law enforcement officer to inform himself of relevant and material information regarding the credibility and reliability of the CI. Cst Wenngatz "suspected" that he could have obtained information of this type from WPS, and it would have simply required him or Cst Rydl to ask questions. He did not do so.

[47] While it is true that an affiant's role is not to dictate to an issuing justice what weight he or she must ultimately place on any evidence included in an ITO, that does not alter the reality that an ITO is, by definition, an expression of an officer's subjective belief in relation to same. A subsequent judicial review in a pre-trial motion before an assigned trial judge should not be the first time an independent judicial officer is told that the affiant "placed very little faith in that specific information."

[48] Although Cst Wenngatz included an investigator note paragraph stating what he did not know about the CI, he kept to himself how that lack of information significantly diminished his reliance on it in the formation of what he said were his reasonable and probable grounds. With respect, the issuing justice ought to have been fully informed in this regard.

[49] In result, the analysis of this element of the ***Grant*** test reveals a compelling need for me to dissociate myself from the police indifference to Mr. Neumann's *Charter*-protected rights: see ***R v Grant***, 2006 SCC 32 [***Grant***]. That is, the *Charter*-infringing state conduct in this case is at the serious end of the spectrum.

B. Impact on Mr. Neumann's Charter-protected interests

[50] Consideration of the impact on *Charter*-protected interests was aptly summarized in ***Grant***, at para 76, as follows:

> This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. *The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute*.

[Emphasis added.]

[51] The cumulative effect of the *Charter* infringements may also increase the seriousness of the impact on an accused's *Charter*-protected rights. Protracted subjection to invasion of privacy interests, such as being subject to unlawful electronic surveillance, exacerbates the seriousness of the impact.

[52] It is within this context of the value and importance of the *Charter*-protected interest that the seriousness of the impact on Mr. Neumann's *Charter*-protected interests must be assessed. The state conduct specifically infringed on the following *Charter*-protected interests:

a. Privacy interests include privacy as secrecy, privacy as control, and privacy as anonymity: ***Spencer*** at paras 38 and 40; Applicant's s. 8 *Charter Voir Dire* submissions at paras 71 – 73.

b. The Supreme Court describes "anonymity as one of the basic states of privacy. Anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance": ***Spencer*** at paras 34 and 40. Privacy interests include the "wider notion of control over, access to and use of information, that is 'the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others": ***Spencer*** at para 40, see also para 34;

c. Personal and informational privacy in the nature of the cell phone number provided a portal to intensely private information which allowed the police access to information to build profiles of Mr. Neumann's contacts, travel patterns, and locations with the desire to make inferences about his core biographical information: ***Jennings*** at para 29; ***Ahmad*** at para 40.

d. Territorial privacy interest in the F350 Truck.

e. Right to liberty to conduct oneself within our democratic society free from unwarranted state surveillance. The state-surveillance in this case was particularly infringing for the following four reasons.

    (i) It constituted continuous surveillance of Mr. Neumann 24 hours a day for nearly four months.

    (ii) The surveillance included both the tracking of the vehicle and tracking activities through two of Mr. Neumann's cell phones.

    (iii) The surveillance was through means of technology which greatly exceeds any human capacity for information gathering, recording, and retention. Those cumulative factors constituted a significant threat to Mr. Neumann's privacy: ***Sandhu*** at para 45.

    (iv) It created a permanent record of the surveillance, which could be used to dissect Mr. Neumann's whereabouts, attendances at places, and contacts with people with the purpose to support inferences about his lifestyle choices.

[53] The initial breach of the s. 8 *Charter* interests in respect of Mr. Neumann created a domino effect which led to the nearly continuous unlawful intrusion into his *Charter*-protected

right to privacy and right to life, liberty, and security of the person over a period of four months. The cumulative effect of the unlawful violations of Mr. Neumann's *Charter*-protected interests is that the police used the initial violation of his informational privacy interests and interests in privacy as anonymity and privacy as control to enable the police to perpetually violate these rights. This culminated in the unlawfully positioning of the police, which further violated his territorial privacy interest through the search of the F350 Truck.

[54] The impact of the state *Charter*-infringing conduct can only be described as serious, weighing in favour of exclusion of the evidence.

[55] The first intrusion on Mr. Neumann's privacy rights occurred with the WPS warrantless seizure of his identification and cell phone number information. As I recognized in the Ruling, the nature of the privacy at play was not merely a telephone number to contact Mr. Neumann, it involved the privacy in his movements and associations which reveal his activities, lifestyle, and other personal information: see para 61.

[56] The warrantless seizure at the Rockwood Inn was highly intrusive into Mr. Neumann's privacy interest because it interfered with his privacy of anonymity and served to open the portal to continuous daily recording of his whereabouts, communications, and associations which the police intend to rely on to support inferences of his lifestyle and choices constituting biological core information: ***Spencer*** at paras 26, 27 and 32; ***Jennings*** at paras 36 and 39; ***Ahmad*** at paras 37 and 40.

[57] The significance of the intrusion into Mr. Neumann's privacy interest is exemplified by the Rockwood Inn keeping the information in a locked drawer to protect against public access: Ruling at paras 81 – 82, 90.

[58] The seriousness of the infringement is exacerbated by Mr. Neumann being unknown by the police but for the violation of his *Charter* rights.

[59] Anonymity is an important safeguard for privacy interests. In ***Spencer,*** the Court found the impact on *Charter*-protected interests was high because the violation of anonymity "exposed personal choices made by Mr. Spencer to be his own and subjected them to police scrutiny as such": ***Spencer*** at para 78. Similarly, the unlawfully steps by the police obtaining Mr. Neumann's identity and linking that identity to the cell phone number used to track his conduct exposed Mr. Neumann's personal choices. Tracking and continuously recording an individual's whereabouts and contacts reveals specific interests, likes, and propensities.

[60] The warrantless seizure also violates Mr. Neuman's interest in privacy as control. As recognized by the Supreme Court in ***Ahmad***, a "phone number provides access to an intensely private virtual space." In making this comment, I distinguish between a phone number associated with a land line, on one hand, and a phone associated with a cell phone, on the other hand. Cellular phones are a "portal of immediate access reserved for the select few closest to us. We carefully guard access to that space by choosing to whom we disclose our phone number and with whom we converse" (at para 36).

[61] In the circumstances of this case, the Tracking Device and Transmission Data Recorder provided an intrusion into the life of Mr. Neumann analogous to the search of a personal computer. Although it does not provide access to the content of the communications, the cell phone tracker permits the state to identify who Mr. Neumann communicated with, where he was located during the communications, the duration of the communications, what establishments he

attended and for how long, where he travelled, and how frequently he attended to various places. This could include highly private information such as attendance to a doctor's office, food bank, strip club, and political gatherings. It could provide information regarding the health, political affiliation, sexual orientation, economic status, and other intimate details to an individual's life choices and circumstances. In making these comments, I am recognizing the technological advances associated with cell phones today, as contrasted to the technology associated with a land line or the cell phones of a decade or two ago.

[62] The Agreed Statement of Facts ("ASF") describes the nature of the Transmission Data Recorder data: *Voir Dire* 1, Exhibit 15, ASF at para 9; Ruling at para 18. The evidence in this case exemplifies the use that the police can make of tracker data to analyze conduct to support a theory of an individual's lifestyle: *Voir Dire* 1, Exhibit 5; Ruling at para 19. The report written by the WPS civilian employee dated November 21, 2019, summarizing the analysis of the tracking data evidences this point.

[63] The unlawful authorizations effectively placed Mr. Neumann under 24-hour electronic surveillance, tracking all his personal choices of how he functioned in society and within his home. It created a permanent record of the same, which could be used by the state to link the information together to create a picture of his lifestyle.

[64] This is akin to the Supreme Court's concern in ***Morelli*** with the ability for the police to scrutinize an "electronic roadmap" of an individual's online activity: ***Morelli*** at paras 3, 4 and 105. In Mr. Neumann's case, the police were unlawfully empowered with a permanent record of Mr. Neumann's personal life choices. In my view, unlawfully utilizing an investigative technique which reveals information of a personal nature must be construed as having a high impact on the *Charter*-protected rights that Mr. Neumann is entitled to enjoy.

[65] The arguments with respect to the seizure by the WPS of Mr. Neumann's private information apply equally to the impact resulting from the seizure by Cst Rydl from Advantage Ford. Cst Rydl obtained Mr. Neumann's name and other cell phone number from Advantage Ford's manager for the purpose of conducting covert electronic surveillance. Cst Rydl's evidence confirmed the police did not want Mr. Neumann to know they were interested in him, and they had no expectation he would provide his cell phone number, if asked: Ruling at paras 62 and 63; see also para 87.

[66] The information from Advantage Ford's records was not in public view or accessible to the public: Ruling at paras 87 – 88 and 90. This supports the significance of the intrusion into Mr. Neumann's privacy interests.

[67] As with the WPS seizure, the information seized from Advantage Ford provided the police access to information about his interests and propensities. This intrusion was exacerbated by the co-existence of the F350 Truck tracker, the cell phone trackers, and the use of that information to locate Mr. Neumann to conduct in person surveillance of his activities and to obtain information from third parties who were identified through the tracker data.

[68] The serious impact on Mr. Neumann's *Charter*-protected interests weighs in favour of exclusion.

[69] In addition to the violation of the warrantless seizures of Mr. Neumann's identification information and cellular phone numbers and the continuous tracking and permanent record of his whereabouts and associations, the unlawful search of the F350 Truck further intruded upon his

territorial privacy interests. As McLachlin CJ emphasized in ***R v Harrison***, 2009 SCC 34 [***Harrison***], while individuals enjoy a lower expectation of privacy in their vehicles than in their homes, "being stopped and subjected to a search by the police without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial": ***Harrison*** at paras 30 – 31.

[70] Just as in ***Harrison***, I find the deprivation of liberty and privacy resulting from the unlawful detention and search pursuant to the impermissibly issued s. 11 *CDSA* warrant was a significant intrusion on Mr. Neumann's *Charter*-protected interests. This weighs in favour of exclusion of the evidence: ***Harrison*** at para 32.

[71] In making this determination in respect of the F350 Truck, I am cognizant that this Court has made equivalent determinations concerning vehicles in other cases. The court in ***Truong*** came to a similar conclusion recognizing "privacy rights are still recognized with respect to vehicles, whether they be owned, borrowed, or rented": ***Truong*** at para 186.

[72] There is no aspect of the underlying investigation in this case that is untouched by the police conduct which violated Mr. Neumann's *Charter* rights. The *Charter* violations are so thoroughly woven into the fabric of the entire investigation that it is an impossible task, and it would be an artificial pursuit, to tease out separate threads of evidence for different treatment. As a result, the entire body of evidence is corrupted by the initial *Charter* violations and those breaches perpetuated the continuous contraventions of Mr. Neumann's *Charter*-protected rights and freedoms.

[73] The initial infringement on the reasonable expectation of privacy was an integral component that led to a series of investigative tactics which relied upon the unlawfully obtained evidence. The same *Charter*-infringing tactics that undermined Mr. Neumann's privacy interests were deployed further into the investigation by Cst Rydl. This established a pattern and systemic disregard for the police obligation to know and act within the law, especially the rights and freedoms protected by the *Charter*.

[74] The violations permeated the entirety of the investigation and unlawfully provided to the police evidence obtained through unconstitutional means to promote their investigation. Absent the *Charter*-infringing conduct, the police would never have been situated to obtain the evidence from Tracking Devices and Transmission Data Recorders, physical surveillance, and, ultimately, from the F350 Truck. Significantly, there is no basis to believe any further investigation involving Mr. Neumann would have even proceeded but for the unlawful obtaining of his identification and cell phone information and unlawful obtaining of the Tracking Device and Transmission Data Recorder Warrants.

[75] As state actors, the police are duty-bound to uphold the law and the *Charter* rights of Canadians. In circumstances such as these, the Courts cannot be seen to condone police acting in the least onerous manner at the sacrifice of individual rights and freedoms protected by the *Charter*.

[76] In summary, the individual and cumulative effects of the numerous and repeated *Charter* infringements, and their seriousness, impact the very heart of the interests the *Charter* rights were designed to protect. The admission of the evidence obtained from the serious intrusions on Mr. Neumann's privacy and liberty interests would communicate to the public these individual

rights count for little: ***Grant*** at para 71. The resultant undermining of public confidence in the rule of law weighs in favour of the exclusion of the impugned evidence.

C. Public Interest in Adjudication on the Merits

[77] While this line of inquiry typically pulls toward inclusion because the admission of reliable evidence would not bring the administration of justice into disrepute, "not all considerations will pull in this direction": ***Le*** at para 158. Society also has a "vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high": ***Grant*** at para 84; ***R v Paterson***, 2017 SCC 15 at para 55 [***Paterson***]; ***Harrison*** at para 34.

[78] As McLachlin CJ explained in ***Harrison***, *Charter* rights provide protections that "law-abiding Canadians take for granted and courts must play a role in safeguarding them even where the beneficiaries are involved in unlawful activity": ***Harrison*** at para 3. Courts appearing to condone serious *Charter* breaches that constituted a significant incursion on an individual's rights "does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it": ***Harrison*** at para 39. In my view, the long-term consequences are always important to consider, and they are relevant in this case.

[79] It is also important not to allow this third ***Grant*** factor to trump all other considerations; "[t]he short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice": ***Grant*** at para 84; see also ***Reeves*** at para 68.

[80] In the same vein, the majority of the Supreme Court in ***Paterson*** adopted a comment of the Ontario Court of Appeal: "[t]he court can only adequately disassociate the justice system from the police misconduct and reinforce the community's commitment to individual rights protected by the *Charter* by excluding the evidence…. This unpalatable result is the direct product of the manner in which the police choose to conduct themselves": ***Paterson*** at para 56; see also the comment of Doherty JA in ***R v McGuffie***, 2016 ONCA 365 at para 83.

[81] In circumstances such as this, the interests of society in a justice system that is beyond reproach overpowers society's interest in the adjudication of a single case on its merits. Proper consideration of the significant *Charter*-infringing state conduct, including the perpetual casual attitude to *Charter*-protected rights and lack of candour in ITOs by the affiants takes too great a toll on long-term repute of the justice system.

D. Balancing the Grant Factors

[82] Mr. Neumann's case falls within the circumstances contemplated by the caution: when the factors of the seriousness of the breach and the impact on the *Charter*-protected interests "make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility": ***Le*** at para 142.

[83] Public confidence in the *Charter*-protection of privacy interests which are integral to human dignity, autonomy, and liberty in a free and democratic society compels exclusion of the impugned evidence in this case. The long-term effect of admitting the evidence is to undermine the very protections in place to constrain police exercise of warrantless powers of search and seizure and investigative tools that flow therefrom.

[84] The maintenance of the good reputation of the justice system requires the Court to disconnect itself from the *Charter*-infringing conduct of the police. It is important to emphasize and communicate that unlawful prioritization of investigative interests over *Charter* interests cannot be condoned. Having regard to all the circumstances, I find the admission of the impugned evidence would bring the administration of justice into disrepute.

III. Conclusion

[85] Mr. Neumann seeks the exclusion of all evidence obtained in the police investigations after the initial s. 8 *Charter* breach of obtaining the identification and cell phone number from the Rockwood Inn. The breaches flowing from Advantage Ford are also captured by the Rockwood Inn breach. As a result, the following evidence is to be excluded:

a. The cell phone number and identification evidence obtained from the Rockwood Inn;

b. All information obtained from Advantage Ford, including but not limited to, Mr. Neumann's cell phone number and identification as the individual who is associated with the F350 Truck;

c. All records and data obtained from the Tracking Device and Transmission Data Recorder Warrants;

d. Surveillance evidence obtained from the Edmonton Police Service on November 12, 2019 and all CPS surveillance evidence;

e. All records and information obtained from the US and Canadian Border Services regarding the Applicant's crossing the US-Canadian Border on January 25 and January 27, 2020;

f. All records, video footage, and information obtained from the Waterfront Hotel located at 2020 Lakeshore Road, Burlington Ontario regarding the Applicant's attendance there on January 27 and 28, 2020;

g. All records and information obtained regarding the F350 Truck attending to a bird watching area in Grimsby, Ontario on January 28, 2020;

h. All evidence obtained from the search and seizure conducted on the F350 Truck on January 30, 2020, including but not limited to:

   (i) the 47.68 kg of methamphetamine,

   (ii) the 47.88 kg of cocaine,

   (iii) the cellular phones and Icom radio,

   (iv) the personal identification and banking cards of Mr. Neumann,

   (v) the documents and receipts, and

   (vi) the suitcase; and

i. All evidence obtained from the arrest and search of Mr. Neumann, including the keys of the F350 Truck.

[86] Given the above determinations under s. 24(2) of the *Charter*, I agree with Mr. Neumann that there is no need for me to rule on either the Similar Fact Evidence application by the Crown or the Wood Affidavit at this time.

Heard on the 14th and 25th day of April 2022.
Dated at the City of Calgary, Alberta this 27th day of April 2022.

D.B. Nixon
J.C.Q.B.A.

Appearances:

Levi Cammack and Danielle Szabo
for the Crown

Jennifer Ruttan and Michael Bates
for the Accused