COURT MARTIAL

Citation: *R. v. McKie*, 2022 CM 2019

Date: 20221122
Docket: 202217

Standing Court Martial

3rd Canadian Division Support Base Edmonton
Edmonton, Alberta, Canada

Between:

Warrant Officer B.A. McKie, Applicant

- and-

Her Majesty the Queen, Respondent

Before: Commander S.M. Sukstorf, M.J.

NOTE:	Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

DECISION ON AN APPLICATION FOR EXCLUSION OF EVIDENCE PURSUANT TO SECTIONS 8, 9 AND PARAGRAPH 10(b) AND SUBSECTION 24(2) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

Introduction

[1] Warrant Officer McKie was originally charged with four charges under section 130 of the *National Defence Act* (*NDA*). At the commencement of proceedings, with the leave of the Court, the prosecution withdrew the third charge. The three remaining charges relate to possession of property obtained by crime contrary to section 354 of the *Criminal Code* and for possession of a prohibited device, contrary to subsection 91(2) of the *Criminal Code*.

[2] Prior to the start of the proceedings, Warrant Officer McKie filed three applications, in accordance with the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) subparagraph 112.05(5)(*e*), all which related to the search warrant, the off-base interception of Warrant Officer McKie by the Military Police (MP) while he was driving to work, and the subsequent search of his family home located at a civilian address off the base.

Background facts

[3] Warrant Officer McKie was a warrant officer in the regular force of the Canadian Armed Forces (CAF) and posted to 1 Service Battalion, Edmonton, Alberta at the time of the alleged offences. He was then married to Ms McKie, but they were separated and going through divorce procedures. The matrimonial home they shared was a civilian residence, located in Gibbons, Alberta and not on a defence establishment.

[4] On 04 February 2021, Ms McKie contacted 1 MP Regiment, Edmonton to report that her ex-husband, Warrant Officer McKie was in possession of multiple pieces of military equipment, which she believed were stolen.

[5] On 11 February 2021 Warrant Officer McKie's wife provided photographs to a MP, Corporal Clayton Bennett.

[6] On 13 February 2021, Corporal Bennett contacted Ms McKie.

[7] On 10 April 2021, Ms McKie was interviewed by Corporal Bennett. During the audio-video recorded interview, when discussing looking at ammunition magazines, she admitted checking to see if she could find any etching on them but said she saw nothing.

[8] Corporal Bennett denies having provided instructions to Ms McKie on how to conduct a search.

Application for a search warrant pursuant to section 487 of the Criminal Code

[9] An information to obtain (ITO) a warrant to search was made on a form sworn and dated 11 March 2021 by a justice of the peace for the Province of Alberta in the Edmonton region (the issuing justice).

[10] The application for the search warrant was made by Corporal Clayton Bennett, badge number XXXX, of the CAF MP (the affiant).

[11] The application for the search warrant was made pursuant to section 487 of the *Criminal Code*.

[12] On 18 May 2021, the search of Warrant Officer McKie's residence in Gibbons, Alberta was executed by Corporal Bennett and other members of the MP.

[13] On 18 May 2021, while Warrant Officer McKie was driving to work, he was pulled over by the MP a few blocks from his residence in the town of Gibbons, Alberta. The MP approached in the cruiser with flashing lights.

[14] The applicant was informed that they had a search warrant for his residence and demanded that he immediately return to that location.

[15] The MP car followed him as he returned to his residence and then he was approached by a plain-clothes MP member who showed him the search warrant and asked where they would find anything listed therein. There was one MP car and a green military van parked in front of the residence and some members were wearing military guard dress, CADPAT, and others wearing civilian attire.

[16] The applicant advised the MP that his children and two dogs were in the house. He put the dogs in the bedroom with his son's girlfriend and he sat at the kitchen table with his two kids while the search continued.

[17] The MP executed the search warrant starting in the basement, then he searched the main floor and garage.

[18] Prior to leaving the MP took photographs to show that they left the house in the condition that they found it.

[19] The applicant estimated that the search took approximately two to two and half hours.

[20] Warrant Officer McKie told the Court that he clearly, and unambiguously perceived his interception by the MP, and their request to return to his residence as a mandatory order from the MP given that they told him they had a search warrant.

[21] Once he arrived at his residence in Gibbons, the MP demanded that he enter the house and stay at the kitchen table during the search.

[22] From the moment, Warrant Officer McKie was stopped while driving in the town of Gibbons, to the MP departed his residence, the MP never informed him of his right to counsel.

[23] On 13 September 2021, based on the items seized during the search, the applicant was charged with four offences under the *NDA*.

Arguments raised by the applicant

[24] The applicant asserted that his section 8 *Charter* rights were violated as a result of the following:

(a) there was no territorial jurisdiction or authority for the MP to exercise the search warrant at the home of Warrant Officer McKie. They have jurisdiction to investigate him, but it does not provide jurisdiction them with territorial jurisdiction;

(b) there are deficiencies in the ITO which includes among other things blanket statements that were unsupported by the evidence. Further, the issuing justice could not have issued a search warrant for an alleged subsection 91(2) offence if the alleged offender fell within the definition of exempted person; and

(c) Ms McKie was an agent of the state, used to secure evidence on behalf of the state.

[25] Further, the applicant's section 9 and paragraph 10(b) *Charter* rights were violated when Warrant Officer McKie was arbitrarily detained and not provided with his right to consult with legal counsel.

[26] As a remedy, the applicant seeks:

(a) a stay of proceedings;

(b) the exclusion of all evidence obtained through and as a result of the execution of a warrant to search on 18 May 2022; and

(c) the exclusion of any other evidence whose admission could bring the administration of justice into disrepute.

Response of the prosecution

[27] The prosecution asserted that there was no breach of the applicant's section 8 *Charter* rights because:

(a) Ms McKie did not act as agent for the MP;

(b) the ITO was not deficient because it is abundantly clear that the affiant is a MP officer, the allegations are against a CAF member, and the items sought are the CAF property; and

(c) the MP had jurisdiction to execute a duly authorized section 487 search warrant of the applicant's residence.

[28] Even if the Court was to find there was a breach of the applicant's *Charter*-protected rights under section 8, it does not bring the administration of justice into disrepute pursuant to the *R. v. Grant,* 2009 SCC 32 analysis.

[29] Further, there was no infringement of the applicant's section 9 or paragraph 10(b) *Charter* rights because there was no detention. Furthermore, police and MP executing a search warrant have common law powers to control the scene of a search.

Issues to be addressed by the Court:

[30] The applications before the Court raise four separate issues which required the Court's analysis.

(a) Did Ms McKie act as agent for the MP?

(b) Was the ITO for the search warrant deficient?

(c) Did the MP have jurisdiction to execute a duly authorized section 487 search warrant at the applicant's civilian residence, which is not located on a defence establishment?

(d) Was Warrant Officer McKie arbitrarily detained and denied access to legal counsel?

Was Ms McKie an agent for the MP?

[31] The applicant argues that:

(a) the informant was an agent of the police;

(b) during her 10 April 2021 police interview with the affiant, the informant "states, around 10:02:11 AM (08:44 / 23:14), when talking about ammunition magazines: 'I looked them over, I searched every angle cause you had said watch for like the etching in them, and there was nothing.'";

(c) other than the words uttered above, neither the investigation report, the affiant's MP personal notes, nor the detailed information disclosed by the affiant in the ITO make any mention of the informant being an agent of the police; nor that the informant had been given instructions by the affiant on how to conduct a private citizen search of the applicant's private and personal property;

(d) the information regarding the use of an agent of the police was not disclosed to the issuing justice;

(e) to this day, it is unknown when the informant was provided with these instructions nor with the complete list of instructions provided;

(f) a search conducted by a private citizen is a police search when the police officer played a role in instigating or executing it, even when the police officer's role is more roundabout or subtle;

(g) the instructions provided by the affiant to the informant were specific to the case being investigated. At a minimum the instructions were concerned with specific search of ammunition magazines by the informant;

(h) when provided with secret instructions by the MP on how to search the private and personal property of the applicant, the informant became, de facto, an agent of the police;

(i) when the affiant fails to disclose critical information to the issuing justice, the search warrant granted on 11 May 2021 could not have been issued. On its face, the ITO is misleading as to the source of information not being a simple citizen, but an agent of the police acting under instructions of the affiant; and

(j) given the failure to disclose the use of an agent of the police to the issuing justice, the failure by the MP to note the instructions they had provided to the informant, the failure by the MP to note the time at which they had provided said instructions to the informant and the general failure of the MP to make any indication of the fact that they had provided instructions to the informant at any place in their investigation report, other than the few words uttered by the informant on 10 April 2021.

[32] In response, the prosecution argued that Ms McKie was not an agent of the police. She simply took pictures of items laying in plain sight, in her own home, that belonged to the accused. She took the initiative on her own prior to any involvement by the MP. The affiant of the ITO, Corporal Bennett, made no error in this regard, and did not mislead Hewitt when seeking the search warrant.

[33] A civilian may become an agent of the police for the purposes of a search. Determining so is a finding of fact. The Supreme Court of Canada (SCC), set out the test in *R. v. Buhay,* 2003 SCC 30:

> Based on the test set out in *Broyles*, *supra*, and *M. (M.R.)*, *supra*, the proper question is whether the security guards would have searched the contents of locker 135 but for the intervention of the police. On the facts here, it is clear that the security guards acted totally independently of the police in their initial search. In *M. (M.R.)*, the involvement of the police was even greater than in the case at bar, since the police had been contacted prior to the search and were present during the search. In the present case, the relationship between the police and the security guards developed after the security guards searched

> the appellant's locker. The guards started an investigation on their own initiative, without any instructions or directions from the police.
> [Emphasis added.]
>
> [30] Volunteer participation in the detection of crime by private actors, or general encouragements by the police authorities to citizens to participate in the detection of crime, will not usually be sufficient direction by the police to trigger the application of the *Charter*. Rather, the intervention of the police must be specific to the case being investigated (see, on the specific issue of whether security guards were acting as agents of the state: *Fitch, supra; R. v. Caucci* (1995), 43 C.R. (4th) 403 (Que. C.A.)). In the case at bar, there is nothing in the evidence which supports the view that the police instructed the security guards to search locker 135 and therefore the security guards cannot be considered state agents.

[34] The prosecution also relied upon the case of *R. v. Wilkinson*, 2001 BCCA 589, to support their position. *Wilkinson* involved a landlord who complained to police about a tenant conducting a grow-operation in one of his rental units. The police stated they were aware but could do nothing without evidence. The landlord entered the unit and obtained evidence of the grow operation. The Court found that he did this unbidden and was not an agent of the police.

[35] The respondent argued that the case at bar is analogous to the facts in *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, *Buhay* and *Wilkinson*. The affiant of the ITO, Corporal Bennett, made no error in this regard, and did not mislead Hewitt J. when seeking the search warrant.

[36] The applicant argues that the allegations all surface from the ongoing divorce proceedings which led to the applicant's spouse contacting the MP to complain of potential wrongdoings of her former spouse. She eventually reported that he was in possession of what she believed to be stolen military equipment which eventually led to her meeting up with then-Corporal Bennett where it was clear that she was given instructions on how to search the property of Warrant Officer McKie which makes her an agent of the police. There is nothing in the investigative report to suggest that she was not an agent of the police, yet she was allegedly given instruction on what to search for. The authorizing justice was not advised that Ms McKie was acting in the role of an agent to the police and therefore this means that the ITO should be quashed. I disagree.

[37] After consideration of the facts, submissions of counsel and reviewing the case law, I find that Ms McKie, who was at the time separated from the applicant, was a voluntary participant, and had her own personal motivation for contacting the MP. She was not asked by the MP to conduct an investigation. The evidence suggests that Ms McKie reached out to the MP first and took pictures of items she believed to be stolen by the applicant. I find that her situation is no different than the landlord who had his own reasons for gaining evidence on his tenants conducting a grow operation. Very often, persons approach the police with a complaint when they have a motivation to report, but that does not mean that the information is not valid. This cannot be confused with them suddenly acting as an agent of the police.

[38] I accept the submissions from the prosecution that the fact that the MP might have provided a tip in identifying the magazine based on etchings is not conclusive of Ms McKie acting as their agent, but likely was a filter to assist the complaint she had reported and an attempt to distinguish whether the alleged items were in fact military issue.

Was the ITO the search warrant deficient?

[39] Section 487 of the *Criminal Code* sets out the requirements for information that must be filed in order to have a search warrant issued. It reads as follows:

> **Information for search warrant**
>
> **487(1)** A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
>
> > **(a)** anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
> >
> > **(b)** anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
> >
> > **(c)** anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
> >
> > **(c.1)** any offence-related property,
>
> may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
>
> > **(d)** to search the building, receptacle or place for any such thing and to seize it, and
> >
> > **(e)** subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

[40] The applicable test to be used by the Court was set out by Sopinka J. of the Supreme Court of Canada (SCC), in the decision of *R. v. Garofoli*, [1990] 2 S.C.R. 1421. In short, I must decide whether the respective ITO provided to the issuing judicial justice contained sufficient reliable evidence, such that the authorizing justice could have concluded that the statutory prerequisites of section 487 of the *Criminal Code* were established. Watt J., writing for the Court of Appeal in *R. v. Mahmood*, 2011 ONCA 693, at paragraph 99, explained the test as follows:

> [99] A reviewing judge does not substitute his or her view for that of the justice who issued the warrant. Rather, the reviewing judge considers the record before the issuing justice, the ITO, trimmed of any extraneous or unconstitutionally obtained information, but amplified by evidence adduced on the hearing to correct minor technical errors in drafting the ITO, to determine whether there remains sufficient credible and reliable evidence to permit the justice to issue the warrant: [Citations omitted.]

[41] More simply, as summarized by Frankel J.A. in *R. v. Whitaker*, 2008 BCCA 174, at paragraph 43:

> [43] When a judicial order authorizing a search or seizure is challenged at trial, the trial judge's role is to determine whether the order could have been granted. This determination is made based on the record which was before the authorizing judicial officer as amplified on the review: *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65 at para. 51. As succinctly stated by Madam Justice Rowles in *R. v. Al-Maliki*, 2005 BCCA 157, 201 C.C.C. (3d) 96, "[t]he test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether, in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge": para. 19.
> [Emphasis added.]

[42] Firstly, the applicant highlighted that the form is sworn and dated 11 March 2021 and states events that happened subsequent to 11 March 2021, for example: "…10th of April, 2021 (…) 28th of April, 2021". The respondent stated that where there are minor clerical errors in the ITO (the date sworn), but these are of no consequence to the validity of the search warrant. (see *R v Sanchez*, 1994 CanLII 5271 (ON SC), at page 13: "specificity and legal precision of drafting expected of pleadings at the trial stage is not the measure of quality required in a search warrant information" In other words, normal human errors are to be expected.

[43] Further the affiant raised concerns that the ITO only refers to *Criminal Code* offences having been allegedly committed and does not provide any information that links these offences to the Code of Service Discipline.

[44] The respondent argued that the ITO correctly indicated the alleged offences which were in substance service offences. The affiant, Corporal Bennett, made no error in doing so, and he did not mislead Hewitt J. when seeking the search warrant. Section 487 requires that a search warrant may only be issued if there are reasonable grounds upon which it is based. The ITO was thorough, fulsome, and accurate. There were no significant details missed that would affect the basis of the reasonable grounds. The affiant was a peace officer for the purposes of the accused and the offences alleged.

[45] I find that it is immaterial whether the ITO defined the relevant offences as service offences or *Criminal Code* offence as long as the referenced offences are indeed included in the Code of Service Discipline. There is a presumption of validity unless it is proven otherwise. The SCC has clearly settled the issue as to whether *Criminal Code* offences are included within the definition of a "service offence" in *R. v. Stillman*, 2019 SCC 40:

> [3] Section 130(1)(a) creates, by way of incorporation, service offences that add to those already contained in the CSD. It establishes, as a service offence, any "act or omission that takes place in Canada and is punishable under . . . the Criminal Code or any other Act of Parliament". This transforms criminal and other federal offences (i.e., ordinary civil offences) that take place in Canada into service offences, thereby giving service tribunals jurisdiction (concurrent with civilian courts)1 over such offences when committed by a person who is subject to the CSD.

[46] The applicant has provided no evidence that the *Criminal Code* offences listed therein are those which are excluded at section 70 of the *NDA* and it is clear that they are not.

[47] The alleged offences involve the theft of military items from the military base. There was evidence to suggest that these items were located at the applicant's private residence.

[48] I find that provided it is clear within the ITO where the affiant draws their authority and that the matter relates to a member of the CAF, which it does, then in substance there is really no difference whether it refers to the *Criminal Code* offence directly or whether he specifically refers to the offence as falling within section 130 of the *NDA*.

[49] As the clerical errors recognized within the ITO have no bearing on the grounds upon which the search warrant is based, I find that the issuing judge was not misled and there was no breach of any duty of candour.

[50] The onus is on the applicant to prove the ITO is invalid based on irregularities and courts have long accepted that irregularities by themselves, do not invalidate the document. (see *R. v. Lising*, 2010 BCCA 390, at paragraph 30) I find that the applicant did not provide any evidence that detracts from the substance of the ITO and for this reason the presumption of regularity must prevail.

[51] The second major argument raised by the applicant included the following:

(a) the ITO describes C7 magazines of thirty-rounds capacity by explaining at footnote 1 that the C7 is the standard rifle used by the CAF and that the standard C7 magazine has a thirty- round capacity;

(b) when discussing the C7 magazines, the affiant makes the following blanket statement at paragraph 20.b. of the ITO: "items only issued to individual military members when on a field exercise or deployed overseas and not to be taken to their private residences";

(c) the blanket statement of the affiant is unsupported by the evidence disclosed to the issuing justice;

(d) the blanket statement of the affiant is not based on any evidence. Neither the information disclosed to the issuing justice, nor the complete

disclosure to the applicant contain any evidence of the blanket statement; and

(e) the blanket statement is critical to the issuing of the search warrant.

[52] In his submissions, the applicant tethered the above argument to the applicant's status as an exempted person as follows:

(a) by operation of the law, the applicant is clearly identified as an exempted person pursuant to section 117.07 of the *Criminal Code*;

(b) the issuing justice could not have issued the search warrant for reason of an alleged subsection 91(2) offence if the alleged offender is an exempted person. The only reason the exempted person status is removed from the applicant is through the use of a blanket statement unsupported by any evidence;

(c) as this is an *ex-parte* application, the affiant has a duty to provide full, fair and frank disclosure to the issuing justice. The use of a blanket statement on a critical aspect, instead of evidence, discredits the administration of justice;

(d) the affiant uses a short cut by substituting a blanket statement to actual evidence hence taking away the exempted person status from the applicant, without any evidence;

(e) the affiant did not inform the issuing justice that he had been provided no evidence in support of the blanket statement; and

(f) the applicant submits that, upon review, the search warrant that was granted on 11 May 2021 and signed on 12 May 2021 could not have been issued.

[53] The applicant argued that the above blanket statement was critical to the issuing of the search warrant and the affiant failed to inform the issuing justice that he did not have evidence to support it. Consequently, he argued that the search warrant could not have been issued. I do not agree.

[54] The ultimate question I must ask myself is whether the information to obtain establishes reasonable grounds to believe. This requires a consideration of all the evidence contained in the information to obtain, i.e., the totality of the circumstances. It has been held that there must exist a "credibly based probability that an offence has been committed and that there is evidence of it to be found in the place of the search" (see *R. v. Al-Amiri*, 2015 NLCA 37).

[55] Here are my reasons. Firstly, the ITO was very comprehensive and provided a great deal of information which would permit the issuing justice to be able to draw the necessary inferences needed. The items listed were all identified as military in nature and the applicant has not convinced this Court that the reference to the C7 magazines is wrong based on the facts before the Court. Once again, the test does not permit me to substitute my own view of the evidence for that of the issuing justice. I must simply determine whether the evidence that she had before her was such that the authorizing justice could have concluded that the statutory prerequisites of section 487 of the *Criminal Code* were established. There were additional items listed on the ITO so it is not fair to suggest that simply because one of them might not have been described in the preferred manner that the applicant would have, that the search warrant is invalid.

[56] In response to the prosecution's request for the court to draw judicial notice on the publication that sets out the procedures for the handling of weapons, counsel for the defence recommended the Court rely upon CANFORGEN 078/96 CANFORGEN /96 241430Z OCT 96.

[57] I have reviewed the CANFORGEN that sets out the CAF policy and direction to CAF members with respect to prohibited devices. Although it is true that CAF members at large fall within the exemption status set out, it is also clear that the exemption applies strictly to the use and possession of the items in the performance of their duties which would involve their possession and use on exercises, ranges, etc.

[58] I am unable to identify any provision within the CANFORGEN that authorizes a CAF member to hold a prohibited device in their private residence.

[59] At paragraph 3 of the CANFORGEN, the following definitions are applicable.

> . . .
>
> "B. PROHIBITED WEAPON: FULLY-AUTOMATIC WEAPONS, LARGE CAPACITY-CARTRIDGE MAGAZINES, ANY LIQUID, SPRAY POWDER OR OTHER SUBSTANCE THAT IS CAPABLE OF INJURING, IMMOBILIZING OR OTHERWISE INCAPACITATING ANY PERSON, AND ANY WEAPON DECLARED BY ORDER OF THE GOVERNOR IN COUNCIL TO BE A PROHIBITED WEAPON.
>
> C. LARGE CAPACITY-CARTRIDGE MAGAZINES ARE FURTHER DEFINED AS: (1) ANY MAG CAPABLE OF CONTAINING MORE THAN FIVE CARTRIDGES FOR USE IN (A) A SEMI-AUTOMATIC HANDGUN NOT COMMONLY AVAILABLE IN CANADA (B) A SEMI-AUTOMATIC FIREARM (C) A FULLY AUTOMATIC FIREARM (2) ANY MAGAZINE CAPABLE OF CONTAINING MORE THAN TEN CARTRIDGES FOR USE IN A SEMI-AUTOMATIC HANDGUN COMMONLY AVAILABLE IN CANADA (3) MAG LIMITS DO NOT APPLY FOR

> (A) RIMFIRE RIFLES (B) NON-SEMI-AUTOMATIC FIREARMS, (BOLT ACTION) (SECTION 84)"

[60] At paragraph 6 of the CANFORGEN, the guidance clarifies that a person is subject to section 117.07 of the *NDA* is exempt under the law if he or she is required to possess the restricted item.

> "DND PERSONNEL USING DND SA AND SAA FOR AUTHORIZED DUTY REASONS ARE EXEMPT FROM THE PROVISIONS OF REFS A AND B. REF A SECTION 92 (1) STATES THAT, QUOTE, A MEMBER OF THE CANADIAN FORCES... IS NOT GUILTY OF AN OFFENCE... BY REASON ONLY THAT ...UNDER THE AUTHORITY OF THE CANADIAN FORCES...THE PERSON IS REQUIRED TO POSSESS AND POSSESSES A RESTRICTED OR PROHIBITED WEAPON FOR THE PURPOSE OF THE PERSONS DUTIES OR EMPLOYMENT IN THE COURSE OF BUSINESS ON BEHALF OF THE CANADIAN FORCES. END QUOTE, FURTHERMORE, REF B SECTION 117.08 STATES, QUOTE, NOTWITHSTANDING ANY OTHER PROVISION OF THIS ACT, BUT SUBJECT TO SECTION 117.1, NO INDIVIDUAL IS GUILTY OF AN OFFENCE UNDER THIS ACT OR THE FIREARMS ACT BY REASON ONLY THAT THE INDIVIDUAL (A) POSSESSES A FIREARM, A PROHIBITED WEAPON, A RESTRICTED WEAPON, A PROHIBITED DEVICE, ANY PROHIBITED AMMUNITION OR AN EXPLOSIVE SUBSTANCE, (B) MANUFACTURES OR TRANSFERS OR OFFERS TO MANUFACTURE OR TRANSFERS, A FIREARM, A PROHIBITED WEAPON, A RESTRICTED WEAPON, A PROHIBITED DEVICE OR ANY PROHIBITED AMMUNITON"
> [Emphasis added.]

[61] However, the above CANFORGEN that sets out the law to which CAF members are expected to comply, also makes it clear that for the exemption to apply the person must be the in the physical possession of the device in the performance of their duties and recognizes that they are acting on behalf of the CAF. I find that the exemption provides no authority to permit a CAF member to hold these items in their private residence. Warrant Officer McKie was not using the weapon in the performance of any duty while it was being stored or held at his personal residence. The issuing justice had a peace officer before her who was also a member of the CAF and applying my own general military knowledge, I find that the blanket statement is not inconsistent with the policy set out in the above CANFORGEN.

[62] More importantly, in circumstances where such a presumption of using the weapon in the course of one's military duties is not automatic guidance can be gleaned from section 117.11 of the *Criminal Code* which puts the onus directly on the accused to prove that he is properly in the possession of the prohibited device.

> General

> **Onus on the accused**
> **117.11** Where, in any proceedings for an offence under any of sections 89, 90, 91, 93, 97, 101, 104 and 105, any question arises as to whether a person is the holder of an authorization, a licence or a registration certificate, the onus is on the accused to prove that the person is the holder of the authorization, licence or registration certificate.

[63] The applicant is charged under section 91(2) of the *Criminal Code* and therefore it is incumbent on him to provide the Court with prove that he was authorized by his chain of command to hold this prohibited device in his private residence. He has not provided this.

[64] I find that the applicant has not proven to me that the blanket statement was wrong, nor has he provided any evidence to rebut the presumption that he should not have had these items in his possession.

[65] Courts martial must not lose sight of the fact that a search warrant is an investigatory tool only. At the stage when an ITO is drafted, a reasonable belief in the existence of the requisite statutory grounds will suffice for the granting of an authorization. Upon further investigation, the grounds relied upon in support of the authorization may prove to be different or even false. However, those facts do not retroactively invalidate what was an otherwise valid authorization. (see *R v. Pires; R. v. Lising*, 2005 SCC 66).

[66] In summary, I find that there was indeed reliable evidence that might reasonably be believed upon which the authorization could have been issued. Once again, I am not to decide whether, in the opinion of myself as the reviewing judge, the application should have been granted at all by the authorizing judge.

Did the MP have jurisdiction to execute a duly authorized section 487 search warrant at the applicant's civilian residence, which is not located on a defence establishment?

[67] The applicant raised an interesting argument regarding the MP's authority to execute a search warrant at the personal residence of a military member. In short, his argument relies upon jurisprudence that makes it clear that the jurisdiction of the MPs is over the person and limited to the offences that fall under the Code of Service Discipline.

[68] The applicant argued that the MP had no jurisdiction outside of a defence establishment and consequently the new wording set out in section 487 of the *Criminal Code* does not permit them to exercise a search warrant in a location where they do not have the requisite authority. He relies upon the following:

> **Execution in Canada**
>
> **(2)** A warrant issued under subsection (1) may be executed at any place in Canada. A public officer named in the warrant, or any peace officer, who executes the warrant must have authority to act in that capacity in the place where the warrant is executed.
> [Emphasis added.]

[69] It is important to begin with an understanding of the background of the above provision in order to determine whether the strict interpretation advanced by the applicant automatically displaces the authority of the MP simply because they do not have authority on their own to act in the "place where the search warrant is executed."

[70] Beginning from first principles, we know that while section 91(27) of the *Constitution Act, 1867* provides Parliament with jurisdiction over criminal procedure, the provinces generally enforce the *Criminal Code* – for example, by conducting investigations, laying charges, and undertaking prosecutions. Section 92(14) gives the provinces jurisdiction over the "administration of justice in the province". The courts have interpreted this power to extend to criminal law, giving provinces authority over provincial police forces (and the rules governing them) and the prosecution of *Criminal Code* offences. In short, this means that policing powers are regulated within a province.

[71] The above provision set out at section 487 (2) of the *Criminal Code* is a modification of an earlier provision that required a search warrant intended to be executed in an area outside of the territorial limits where it was authorized, to be endorsed within the territorial division where it was to be executed. In short, it placed territorial limits arising from the constitutional division of powers. It read as follows:

> **Endorsement of search warrant**
>
> **(2)** If the building, receptacle or place is in another territorial division, the justice may issue the warrant with any modifications that the circumstances require, and it may be executed in the other territorial division after it has been endorsed, in Form 28, by a justice who has jurisdiction in that territorial division. The endorsement may be made on the original of the warrant or on a copy of the warrant transmitted by any means of telecommunication.

[72] Further the effect of the search warrant was set out as follows:

> **487(4)** An endorsement that is made in accordance with subsection (2) is sufficient authority to the peace officers or public officers to whom the warrant was originally directed, and to all peace officers within the jurisdiction of the justice by whom it is endorsed, to execute the warrant and to deal with the things seized in accordance with section 489.1 or as otherwise provided by law.

[73] The endorsement provisions for out-of-province investigative search warrants and authorizations raised several issues and uncertainty with respect to the nature of the endorsing judge's function, and the endorsement process's impact on the administration of justice and the conduct of investigations in Canada. In fact, the prior provision did not provide any direction on what was to be fulfilled in the endorsement function.

[74] The new provision set out at subsection 487(2) of the *Criminal Code*, simplifies the execution procedure in situations where a search warrant is being exercised in another province or territory. It removes the burden of the authorized person having to

go to the local justice to have the search warrant endorsed. In substance, it makes investigative tools available to law enforcement more easily enforceable across Canada with a view to enhancing the efficiency of the criminal justice system.

[75] For example, pragmatically, under the former regime, a search warrant issued in British Columbia for a portable storage unit that was eventually located in Ontario, in the past, the police would have had to the local justice of the police in Ontario to endorse the search warrant before it could be executed. However, the new provision provides that once a search warrant is issued in British Columbia, it may be executed by a police officer in Ontario who has the authority within that territory, Ontario where it is located. It removes the administrative burden, yet still respects the territorial limits.

[76] Keeping in mind that search warrants issued by a judge or justice of the peace have effect only within the issuing judge or justice's territorial jurisdiction, a judge or justice may also issue a search warrant for execution anywhere in Canada. Indeed, Parliament's legislative competence over the criminal law and procedure allows it to confer extraterritorial jurisdiction on provincial courts but only if it does so explicitly.

[77] A visiting police officer generally has no status in another province so practically speaking, an officer with the local police force in the endorsing jurisdiction must be engaged to assist. In some regions, visiting police officers will receive a police officer status designation provided under various police acts.

[78] The general net effect of the new provision is that police officers from out of province are usually accompanied by local police forces for police operations that unfold in their jurisdiction.

[79] However, section 91 of the *Constitution Act, 1867* sets out the areas of jurisdiction exclusive to Parliament, which includes those matters that affect the entire country, such as military and naval service. Within the *NDA* itself, Parliament sets out the Code of Service Discipline and a military justice system to which all serving military members must comply. Unlike the provinces and territories who are strictly responsible for the administration of justice within its boundaries, Parliament has chosen to provide its military forces with a complete system of justice where the jurisdiction rests on the person and the offence, without requiring the police forces to operate within limited boundaries.

[80] In his response, the prosecution argued the applicant's status as a regular force member gives military police peace officer status and authority over the applicant no matter wherever he is located.

[81] The prosecution argued that in the same way that Code of Service Discipline jurisdiction is not based on geography, but rather the status of the person at the time of the alleged offence, so too is peace officer status and authority for the MP. QR&O 22.012 provides that officers and men appointed under regulations pursuant to the section may exercise authority over persons subject to the Code of Service Discipline. In essence,

it captures the *NDA* section 156 which sets out the authorities of the MP. It reads as follows:

> **Powers of military police**
>
> 156 (1) Officers and non-commissioned members who are appointed as members of the military police under regulations made for the purposes of this section may
>
> > **(a)** detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence; and
> >
> > **(b)** exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council**.**
>
> **Arrest without warrant — limitations**
>
> (2) A member of the military police shall not arrest a person without a warrant for an offence that is not a serious offence if paragraphs 155(2.1)(a) and (b) apply."

[82] The above reference outlines the full extent of the grant of power. Under this reading, subparagraph 2(f) (i) of the *Criminal Code* allows such officers and men the additional authority to enforce the *Criminal Code*, but only in relation to persons referred to in section 156 of the *NDA.*

[83] As mentioned above, *Criminal Code* offences automatically become service offences when they are pursued within the military justice system. Section 130 of the *NDA* reads as follows:

> **130 (1)** An act or omission
>
> > **(a)** that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or
> >
> > **(b)** that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament,
>
> is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

[84] Not only did Parliament intend to capture offences found under the *Criminal Code* that unfolded anywhere within Canada, but it also granted extraterritorial jurisdiction which includes anywhere where the CAF serves. There can be no clearer expression of the intention of Parliament to ensure that military members are captured under the military justice system.

[85] The jurisprudence has continually reinforced the lack of territorial limitations in the administration of military justice recognizing the important priority as the maintenance of discipline of its military members wherever they serve. In the case of

R. v. Edwards, 2021 CMAC 2**,** the Court Martial Appeal Court of Canada recognized that "Courts martial are clothed with unlimited territorial jurisdiction, which extends throughout Canada and the world, but for those alleged offences arising in Canada referred to in section 70 of the *NDA*."

[86] In order to ensure the full operation of the military justice system, MP play an important role in the investigative functions incumbent within the system. Consequently, their investigations are not limited to the same territorial boundaries as their provincial counterparts.

[87] When I review the strict reading of the new provision of section 487 of the *Criminal Code*, I find it cannot be interpreted as excluding MP in executing search warrants off a defence establishment. The SCC in *R. v. Moriarity,* 2015 SCC 55, explicitly recognized the blurring of a military member's life between his civilian and military existence and emphasized the importance of ensuring that there are no artificial barriers that separate the two.

[88] I note that the search warrant was very specific with respect to the address to be searched, the time when it was to be conducted and it was issued by a justice of the peace in the same province where it was executed. The prosecution provided the Court with several cases that have been tried within the military justice system where the jurisdiction of the MP to execute a search warrant off a defence establishment was not considered to be *ultra vires*. The authorizing justice found that there was jurisdiction for the MP as a peace officer to execute the search warrant, she provided her conditions, and the applicant has not provided me with any evidence to rebut that presumption of jurisdiction she relied upon.

[89] Based on the above reasons, I find that the MP did have jurisdiction to execute a duly authorized section 487 search warrant under the *Criminal Code* at the applicant's civilian residence, which is not located on a defence establishment.

Was Warrant Officer McKie arbitrarily detained?

[90] The applicant argued that from the moment he was stopped as a motorist, by a police car with lights flashing, he was detained, and the situation stayed that way until the final execution of the search warrant. Warrant Officer McKie complied with all the actions requested of him.

[91] The applicant argued that neither the common law nor ancillary powers provide the MP the right to detain them. The MP could have secured the area and executed the search warrant without detaining them and asking them to do certain things.

[92] Conversely, the respondent asserted that there was no detention before or during the search. As such, he argued that the applicant's *Charter* right under subsection 10(b) was not triggered. Even if there was a violation of sections 9 and/or 10, this is not one of the clearest of cases justifying a stay of proceedings. In any event, he argued that the

Court should reserve its decision on the appropriate remedy until after a conviction is entered in order to better assess prejudice, if any, on the applicant's right to a fair trial.

[93] As the SCC stated in *R v Mann*, 2004 SCC 52, at paragraph 19; while a person stopped by police will in all cases be '''detained' in the sense of 'delayed', or 'kept waiting'", sections 9 and 10 *Charter* rights are not engaged by delays that involve no significant physical or psychological restraint).

[94] Occupants of the premise where the search is conducted may be controlled for a short period of time and for a limited purpose, namely, to ensure police are not placed in jeopardy (see *R v Trieu,* 2010 BCCA at paragraph 73). Based on the testimony of Warrant Officer McKie, the entire search took approximately two to two and half hours. This was not excessive or an abuse of the authority that they had been granted.

[95] Section 10 of the *Charter* provides for certain rights that are triggered as soon as an individual is "detained" or "arrested" within the meaning of the section. Section 10 "ensures that people have a chance to challenge the lawfulness of an arrest or detention." Consequently, it follows that if the applicant's section 9 rights have not been violated, nor has his subsection 10(b) right to counsel.

[96] It has long been recognized that temporary deprivation during a search does not engage subsection 10(b) *Charte*r right. The SCC explained that "as a general rule, police proceeding to search are not obliged to suspend the search and give a person the opportunity to retain and instruct counsel, as for example when the search is of a home pursuant to a search warrant" (see *R. v. Debot*, [1989] 2 SCR 1140 at paragraph 2.).

[97] As long as police do not go beyond what is reasonable in terms of restraint and do not prolong the deprivation of liberty beyond what is necessary for the execution of the search warrant, subsection 10(b) of the *Charter* is not engaged (see *R v Connor*, 2009 CanLII 48830 (ON SC) at paragraphs 66, 86). I note that the issuing justice provided a very wide window of time during a complete day for the MP to conduct their search. They were able to successfully complete their search within two and a half hours which did not unnecessarily prolong the limit on the liberty of Warrant Officer McKie and his family.

Conclusion

FOR THESE REASONS, THE COURT:

[98] **DISMISSES** the three applications filed by Warrant Officer McKie.

Counsel:

Major E. Carrier, Directorate of Defence Counsel Services, Counsel for Warrant Officer B.A. McKie, Applicant

The Director of Military Prosecutions as represented by Major B.J. Richard, Counsel for Respondent