Citation: *R. v. Corporal R.D. Parsons,* 2005cm3022

Docket: 200516

STANDING COURT MARTIAL
CANADA
ONTARIO
14 WING GREENWOOD

Date:22 October 2005

PRESIDING:COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL R.D. PARSONS
(Accused)

DECISION RESPECTING AN APPLICATION PRESENTED UNDER SUBSECTION 24(2) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS.*

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[1] This is an application under section 24(2) of the *Canadian Charter of Rights and Freedoms* to exclude evidence obtained as a result of the infringement of the right to be secure from unreasonable search and seizure. The applicant, Corporal Parsons, is charged with stealing and improper possession of certain items of public property. Military police investigators executed a *Criminal Code* search warrant at the residence of the applicant and seized three items. The application raises issues with respect to the lawfulness and reasonableness of the search, and the admissibility of the evidence obtained as a result of the search.

[2] The trial by court martial began on 05 April 2005. During the examination-in-chief of the first witness for the prosecution, Corporal David Comer, the three items in dispute were introduced and marked as exhibits. At the request of counsel, the court proceeded by way of a *voir dire* to determine the admissibility of the items, and after hearing argument on the issue I ruled that the defence could cross-examine Corporal Comer on the application.

[3] On 22 June 2005 I made a ruling on the application allowing the application in part. I said at that time that I would provide reasons for the ruling in due course, these are those reasons.

[4] The evidence disclosed that Corporal Comer has been a military policeman since 2001. He was assigned to investigate the loss of a Nikon brand digital camera from 14 Wing supply at Canadian Forces Base Greenwood which was said to have gone missing between 8 and 10 July 2003. The item was said to have been received at 2 hangar where the applicant was employed as a supply technician, and put on a truck for transportation to one Master Corporal Brace at the Hornell Centre. The loss was reported to the military police on 7 August 2003.

[5] In the course of his investigation Corporal Comer spoke to a large number of people. He focussed primarily on the personnel working at 10 and 11 hangars. He issued view questionnaires to the personnel at 11 hangar. The questionnaires are apparently used by the military police to focus the investigation on suspected persons. It appears that the applicant, Corporal Parsons, was not under suspicion at this point in the investigation.

[6] On 27 January 2004 a Corporal Lawrence McVeigh gave a written statement to Corporal Comer. Corporal McVeigh was employed as an image technician at 14 Wing Greenwood. He stated, in reference to the applicant, Corporal Parsons, that during the summer of 2003 a supply technician came through the photo section hoping to remuster and that he was going to purchase a "Nikon D1X." The supply tech was familiar with the whereabouts of a Nikon D1X in the supply system, and he had dealt with one such camera the previous day. At a later point Corporal McVeigh became aware of the loss of such a camera and he became suspicious that the applicant was responsible for the loss.

[7] Corporal McVeigh reported to the military police that he had a conversation with the applicant during the second week of January 2004. The applicant told Corporal McVeigh that he "got his new D1X" but did not know how to use it. Because of his suspicions Corporal McVeigh offered to assist the applicant with his new camera in order to get a look at the serial number. In his written statement Corporal McVeigh told the investigator that he visited the applicant at his home and checked out the camera. He saw that the last three digits of the serial number were 148 and that the serial number included two "5" digits. It appears that at this stage Corporal Comer was not aware of the serial number of the camera that was reported missing from 14 Wing supply.

[8] Corporal McVeigh also told the police that while he was in the residence of the applicant he noticed a Panasonic laptop as well.

[9] Corporal Comer spoke to Corporal McVeigh again on 31 January 2004. Although he had no note he recalled that in conversation Corporal McVeigh described the laptop as black and/or grey in colour. Corporal Comer testified that he had spoken to another military policeman, Corporal Leblanc, on 30 January 2004 and learned that a

black and grey Panasonic was missing from supply. In cross-examination Corporal Comer testified that he could not recall precisely when he learned of the loss of the Panasonic, or whether he himself had mentioned such an item to Corporal McVeigh before Corporal McVeigh made his statement describing the item he had apparently seen in the residence of the applicant.

[10] On 3 February 2004 Corporal Comer swore an information to obtain a search warrant before Her Honour Judge Crawford of the Provincial Court of Nova Scotia. The warrant under section 487 of the *Criminal Code* was granted the same day. It authorized the peace officers of the 14 Wing military police to enter the residence of the applicant on 12th Crescent, 14 Wing, Greenwood, Nova Scotia, to search for and seize "one Nikon D1X camera kit" including a black Nikon camera, two Nikon batteries, a Nikon charger and a "512 mb ultra compact flash", as well as "one Panasonic CF50A9KNBDM laptop, serial number 3AMTAO1003".

[11] The grounds upon which the warrant was sought were stated in 6 paragraphs in the information to obtain as follows:

> **That** I, Cpl David Comer of the 14 Wing Military Police, Greenwood, Kings County, NS and have been so employed for the past 2 years. I am currently assigned to the patrol section and have been tasked to investigate Federal and Provincial Offences.
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> **That** on August 7th 2003, Warrant Officer Deborah Allen, employed as a Supply Tech at 14 Wing Supply, 2 Hangar, Ad Astra Way, Greenwood, NS, contacted the Military Police service and reported a theft of a Nikon D1X Digital camera from 14 Wing Supply located at 2 Hangar, Ad Astra Way, Greenwood, NS.
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> **That** on the January 27th 2004, Cpl David Lawrence McVeigh, an Image Tech at 14 Wing, Greenwood, NS, who was so employed for the past 3 1/2 years, and has 3 month's training on the Nikon digital camera as well as an instructor of this particular Nikon D1X digital camera. Cpl McVeigh contacted the Military Police service to report that in the second week of January 2004, while he was at the 14 Wing Greenwood Hospital he met up with Cpl Dwayne Parsons to wit Cpl Dwayne Parsons advised him that he has a D1X (Nikon digital camera) however did not know how to use it. Cpl Dwayne Parsons mentioned that he had purchased a lens and a flash for his new camera. (The Nikon D1X camera that was stolen from 14 Wing supply did not have a lens or a flash). Cpl McVeigh offered to help Cpl Dwayne Parsons in the use of the Nikon digital camera. Cpl David McVeigh found out that a Nikon camera was stolen from 14 Wing Supply when he contacted the Image Tech at 404 Squadron in hopes of borrowing there [*sic*] Nikon D1X Digital camera. Cpl David McVeigh attended the residence of Cpl Dwayne Parsons at 21on 12th Crescent and did observe that Cpl Dwayne Parsons had in his possession a black Nikon D1X Digital Camera which matched the description of the Nikon D1X camera stolen from 14 Wing Supply, 2 Hangar, Ad Astra Way, Greenwood, NS. (A new Nikon D1X digital camera cost $6154.97). Cpl Dwayne Parsons advised Cpl McVeigh that he paid $3800 for his Nikon D1X camera and seemed

> unsure of the price. Cpl David Comer showed Cpl McVeigh a picture of the camera that was stolen to wit Cpl McVeigh said it looked like the same one that Cpl Dwayne Parsons had at his residence. Cpl McVeigh related that the camera looked brand new. Cpl McVeigh further related that he observed a Panasonic Laptop computer in the residence of Cpl Dwayne [sic]. Corporal McVeigh related that the laptop was black and/or grey in colour.
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> **That** on the January 30th, 2004, I received information from Cpl Jeff Leblanc, a member of the 14 Wing Military Police service, currently assigned to patrols at 14 Wing Greenwood, NS, that between March 14 – 31, 2003, a theft of a black and grey coloured Panasonic CF50A9KNBDM Laptop serial number 3AMTAO1003 from 14 Wing Supply, 2 Hangar, Ad Astra Way, Greenwood, NS. This Laptop was left on a trolley in the warehouse of 14 Wing Supply, 2 hangar. Cpl Dwayne Parsons has access to the warehouse floor were the Panasonic laptop was placed.
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> **That** I Cpl David Comer of the 14 Wing Military Police service, Greenwood, NS I verified and do verify that Cpl Dwayne Parsons is employed as a Supply Tech at 14 Wing Supply, 2 Hangar, Ad Astra Way, Greenwood, NS and to wit handles items that are received from outside the 14 Wing Greenwood area. Cpl Dwayne Parsons has access to the warehouse and have [*sic*] the keys to the attractive items storage lockup were the camera was secured as well as he is one of the persons responsible for filling out the paperwork for the items received at 14 Wing Supply, 2 Hangar, AD Astra Way, Greenwood, NS and placing these items on the customer shelves for pickup. Cpl Dwayne Parsons has access to all area's of the warehouse and is responsible for sending items to other departments within the 14 Wing Greenwood area.
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> **That** a Canadian Police Information Centre check was conducted for Cpl Dwayne Parsons that related that he had a previous charge of Public Mischief.

[12] The warrant issued by Judge Crawford authorized entry between 0800 and 1300 hours on 4 February 2004. Sometime after 0700 that morning Corporal Comer briefed a number of his fellow military police officers who were to take part in the execution of the search warrant. The briefing covered the information in the warrant and the items to be searched for. Corporal Comer also advised the officers about a number of other items that had been taken from 2 hangar over the previous few years so that the officers would be aware of those other items in case they came across them while searching for the items described in the search warrant. Those other items included a 40-channel cordless telephone serial number 10003068.

[13] Corporal Comer testified that he attended the Parsons residence shortly after 0800 with four other military policemen. Corporal MacEachern was sent around to the back door. Corporal Comer knocked on the front door and Mrs Yetman, the spouse of the applicant, answered the door. The applicant was present in night attire, and he was permitted to dress. He and his spouse were asked to be seated in the living room. Corporal MacEachern remained with them in the living room to observe them for

reasons of officer safety. It appears that both were kept under constant observation, including when they made private use of the bathroom, for reasons of officer safety.

[14] The other police members, including Corporal Comer, began the search with the basement area of the residence. They then proceeded to the main floor area, and in the living room they discovered the camera and the laptop computer that have been introduced into evidence. The camera was in a black bag, and the laptop was recharging on a shelf behind the couch. Thereupon, the search was stopped and the applicant and Mrs Yetman were arrested.

[15] Before the finding of the items in the living room a number of other articles were seized from the residence by the police. They are itemized in the return to a justice made by Corporal Comer following the execution of the search warrant as required by the *Criminal Code*. One such item is the cordless telephone which was found and seized by Sergeant Brown. It was mounted on the wall in the kitchen.

[16] A total of 19 items were reported to have been seized. Of these it appears that 16 were returned to the applicant at some time after the execution of the warrant and before the trial. The remaining three items are the exhibits before the court, the digital camera, the laptop computer and the cordless telephone.

[17] The applicant submits that the military police did not have reasonable grounds to believe that evidence of the offences of theft of a digital camera and of a laptop computer would be found in the residence of the applicant, and that the search warrant was issued in the absence of a sufficient evidentiary basis. In addition, the applicant submits that material facts were omitted or distorted in seeking the search warrant from Judge Crawford. As well, the applicant submits that the search warrant was executed in an unreasonable manner, and that the finding and seizure of the cordless portable telephone was unlawful and in violation of the section 8 right.

[18] Section 8 of the *Canadian Charter of Rights and Freedoms* provides:

> 8. Everyone has the right to be secure from unreasonable search and seizure.

[19] The applicant who seeks relief under the *Charter* bears the burden of establishing, on a balance of probabilities, that his or her right has been infringed or denied. Where the right in issue is the right to be secure from unreasonable search and seizure, and the applicant succeeds in demonstrating that the search was a warrantless one, the burden of persuasion shifts to the prosecution to show, on a balance of probabilities, that the search was nonetheless reasonable.[1]

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[1] *R. v. Collins* [1987] 1 S.C.R. 265, at page 278.

[20] I will deal individually with the three items tendered into evidence by the prosecution.

[21] With respect to the Nikon digital camera the applicant argues two main points. It is submitted that the search warrant was improperly sought and granted, and secondly that the search under warrant was conducted in an unreasonable manner. I will deal with both these submissions in that order.

[22] The first point taken by the applicant has to do with the sufficiency and propriety of the information to obtain upon which the search warrant was granted. The law to be applied on a review of a search warrant for the sufficiency of the information on which it is issued is well-settled.

[23] In *R. v. Garofoli* [2] the Supreme Court of Canada considered the test to be applied in cases where a claim of infringement of the right to be secure from unreasonable search and seizure under section 8 of the *Charter* involves an attack on a judicially authorized investigative procedure. In that case the police obtained judicial authorization to intercept private communications under the *Criminal Code* as part of an investigation into a drug offence. Sopinka J. delivered the judgment of the majority of the court. He held that, in determining whether the judicially authorized search is reasonable within the meaning of section 8, a reviewing court must consider whether the statutory requirements for the issuance of the authorization have been satisfied, and if, based on the evidence before the reviewing court, that court concludes that the authorizing judge could properly have granted the authorization, the reviewing court should not interfere and the authorization should stand. He wrote, at paragraph 56:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[24] The *Garifoli* case concerned a judicial authorization to intercept private communications, but it is clear that the test propounded by Sopinka J. applies equally to the review of a search warrant issued under section 487 of the *Criminal Code*. In *R. v. Grant*[3] the Supreme Court of Canada considered the validity of a *Criminal Code* search warrant which was issued, in part, on the basis of observations made by the police in the course of a warrantless, and therefore unconstitutional, perimeter search of premises.

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[2] [1990] 2 S.C.R. 1421.
[3] [1993] 3 S.C.R. 223. And see *R. v. Wiley* [1993] 3 S.C.R. 263.

Sopinka J. reiterated the test he had set out earlier in *Garifoli*, and went on to state (at paragraph 50):

> In *Kokesch*, supra[4], this Court determined that evidence obtained during a search under warrant had to be excluded under s.24(2) of the *Charter* where the warrant was procured through an information which contained facts solely within the knowledge of police as a result of a *Charter* violation. However, in circumstances such as the case at bar where the information contains other facts in addition to those obtained in contravention of the *Charter*, it is necessary for reviewing courts to consider whether the warrant would have been issued had the improperly obtained facts been excised from the information sworn to obtain the warrant: *Garofoli*, supra. In this way, the state is prevented from benefiting from the illegal acts of police officers, without being forced to sacrifice search warrants which would have been issued in any event.

[25] What, then, are the statutory requirements for the issuance of a search warrant under section 487 of the *Criminal Code*? So far as it applies to the evidence on this application, subsection 487(1) reads:

> 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
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> (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 ... against this Act or any other Act of Parliament,
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> ...
>
> may at any time issue a warrant authorizing a peace officer ...
>
> (d) to search the building, receptacle or place for any such thing and to seize it ...

[26] Thus, the statutory pre-conditions to the issuance of a search warrant under section 487 of the *Criminal Code* are reasonable grounds to believe, firstly, that an offence has been committed, and secondly, that the thing in respect of which the offence was committed, or evidence of the offence, may be found in a specified place.

[27] In the present case there is no suggestion that the information to obtain, sworn by Corporal Comer, failed to disclose reasonable grounds to believe that an offence had been committed. The attack in this case concerns the sufficiency of the information to obtain to support the conclusion that evidence of the offence; that is, the stolen items themselves might be found in the residence of the applicant.

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[4] *R. v. Kokesch* [1990] 3 S.C.R. 3

[28] What is the basis upon which an issuing justice can be satisfied that a search warrant should issue? Mere suspicion is not a sufficient basis upon which a search warrant can be issued. It is only where the investigative information rises beyond mere suspicion to the standard of "credibly-based probability" that the interests of the state in law enforcement overcome the private interests of the individual in being left alone. The standard of "credibly-based probability" for the issuance of a search warrant has long pre-dated the *Charter*,[5] but this standard is now of constitutional significance.[6]

[29] A review of an information to obtain a search warrant should take account of the nature and purpose of a judicially warranted search process. Hill J. in the Ontario case of *R. v. Sanchez*[7] suggested the following review guidelines:

> Search warrants are statutorily authorized investigative aids issued most frequently before criminal proceedings [are] instituted. Almost invariably a peace officer prepares the search warrant and information without benefit of legal advice. The 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: (authority cited)...
>
> The appropriate approach for judicial review of a search warrant information is scrutiny of the *whole* of the document, not a limited focus upon an isolated passage or paragraph. Reference to all data within the four corners of the information provides the fair and reasonable context for the assertions in question: (authority cited). . .
>
> A search warrant information draftsperson or affiant is obliged to state investigative facts sufficient to establish reasonable grounds for believing that an offence has been committed, that the things to be searched for will afford evidence, and, that the things in question will be discovered at a specified place. An issuing justice is entitled to draw reasonable inferences from stated facts and an informant is not obliged to underline the obvious: (authority cited)... In this regard, some deference should be paid to the ability of a trained peace officer to draw inferences and make deductions which might well elude an untrained person: (authority cited) ... Probable cause does not arise, however, from purely conclusory narrative. A search warrant information is not a Crown brief and the affiant is not obliged to record every minute step taken in the course of the investigation: (authority cited).

[30] In addition to these guidelines, the reviewing court should consider these principles. A failure to disclose to the authorizing justice every aspect of an ongoing police investigation is not fatal[8]. What the reviewing court must assess is the materiality of the omitted facts.

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[5] see *Re Church of Scientology and The Queen* (1987) 31 C.C.C. (3d) 449 at 504 (Ont. C.A.) (leave to appeal to the SCC refused [1987] 1 S.C.R. vii).
[6] *Hunter v. Southam Inc.*[1984] 2 S.C.R. 145 at 167.
[7] (1995) 93 C.C.C. (3d) 357 at page 364.
[8] *R. v. Breton* (1994) 93 C.C.C. (3d) 171 (Ont. C.A.)

[31] Also, good faith, or an absence of good faith, on the part of the officer who swears the information to obtain is an important factor in assessing the effect of the failure to disclose. In *R. v. Grant*[9] for example, at paragraph 51, the officer failed to disclose one of the perimeter searches. Good faith non-disclosure was not considered fatal to the validity of the search warrant in that case.

[32] With these guidelines and principles in mind I turn to a consideration of the information to obtain which was before Her Honour Judge Crawford when she issued the search warrant in this case. To reiterate, my role is not to decide whether I would have granted a search warrant on the basis of the information that was before Judge Crawford. Rather, as previously stated, I must consider whether, on the basis of all the evidence I have heard, there continues to be a basis upon which the authorizing justice could have properly issued the warrant.

[33] To begin with, and having regard only for the information disclosed in the sworn information to obtain, could the authorizing justice, Her Honour Judge Crawford, have found a credibly-based probability that the missing camera would be found in the residence of the applicant?

[34] The information discloses that the applicant was in possession of a Nikon D1X camera that he did not know how to use some months after such a camera disappeared from 14 Wing supply. By virtue of his employment the applicant had access to the stolen camera. The camera was quite expensive, but the applicant appeared to Corporal McVeigh to be unsure about the price he had paid for it. In the eyes of Corporal McVeigh who was trained in the use of this kind of camera, there was nothing to distinguish the stolen camera, as depicted in a photograph, from the camera he saw in the residence of the applicant. In my view the authorizing justice was entitled to find that the totality of these circumstances raised the matter above mere suspicion to a probability that the camera that was stolen from the 14 Wing supply was in the residence of the applicant.

[35] The evidence led in the course of the *voir dire* deals with the state of the investigation as known to Corporal Comer at the time he sought and obtained the search warrant. The evidence establishes that the statements he made in the information to obtain accurately reflect the information that was in his possession at the time he applied for the search warrant.

[36] On all the evidence, I find that Corporal Comer acted in good faith in putting information before Judge Crawford. It is true that the information to obtain does not include every relevant fact known to Corporal Comer at the time. But that is not the test. The information fairly sets out the basis upon which the warrant was sought.

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[9] *supra,* footnote 3.

Indeed, there were facts known to Corporal Comer that were not set out in the information to obtain that might have made a more compelling case for the issuance of a warrant. For example, it appears that Corporal Comer was aware of a witness who had seen the applicant load the camera into a truck and the camera was not seen again.

[37] The applicant points to several facts in evidence on the application that were not before Judge Crawford by way of the information to obtain sworn by Corporal Comer. For example:

> 1. in a conversation between Corporal McVeigh and the applicant held during the summer the camera disappeared the applicant stated that he wished to remuster to the trade of image technician and that he wished to purchase a Nikon D1X camera;
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> 2. the lens and flash for a Nikon D1X camera are sold separately; and
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> 3. the applicant was not under police suspicion at an earlier stage of the investigation.

[38] In my view, the facts that Corporal Comer did not include in the information before Judge Crawford are not so material as to undermine the basis upon which the search warrant was issued. Corporal Comer did not selectively omit information in order to mislead the issuing justice, nor was Judge Crawford misled in any material particular.

[39] It is also true that the information to obtain in this case is not a model of legal drafting. At points it is ungrammatical, and the information presented is not well organized. However, I cannot find that this shows an attitude of indifference or carelessness on the part of the investigator that vitiates the warrant.

[40] Finally, the issuing judge was entitled to rely on the information obtained by Corporal Comer from Corporal McVeigh. His information was detailed and came from first-hand observation without any apparent motive to mislead the investigator.

[41] I conclude that the search warrant was properly issued in respect of the Nikon digital camera kit.

[42] The second point taken by the applicant has to do with the actions of the police officers in executing the search warrant. The defence submits that the search warrant process was a ruse in order to conduct a general fishing expedition for any stolen property from 14 Wing supply that might be found in the residence of the applicant. In support of this submission the applicant points to the number of officers

who were engaged in the search for two items, and the pre-seizure briefing in which items of missing property were specifically brought to the attention of the officers.

[43] On all the evidence I cannot conclude that the police officers obtained a warrant for the camera and the laptop computer intending that the warrant would give them *carte blanche* to look for any items of suspected stolen property. Such a finding would be inconsistent with the clear evidence that I do accept that once the warranted items were found the search activity ceased. As a consequence of the finding of the warranted items the officers did not search the upper floor of the residence.

[44] In my view, the evidence supports the conclusion that the officers were merely to be aware of the existence of other possibly stolen property, but the purpose for their entry was to execute the warrant for the two described items. Even if the officers suspected that other stolen property might be found in the course of execution of the search warrant, I consider that such suspicions on the part of the searching officers do not render a lawful search for the warranted items either unlawful or unreasonable.[10]

[45] The applicant submits that the circumstances of the execution of the warrant were abusive of the rights of the applicant, and therefore the warranted search was not conducted in a reasonable manner. Counsel points to the number of officers who attended on the execution of the warrant, their conduct in relation to the applicant and his spouse during the search, and the order in which the search proceeded.

[46] I do not find any of these complaints, either individually or collectively, to amount to an unreasonable search in the circumstances of this case. The number of officers involved in the execution of this warrant to search a three storey residence for a camera and a laptop computer was not excessive. The officers who attended appeared to me to have assigned duties that were reasonable, although the assigned duties may have overlapped or varied as the search unfolded.

[47] The officers were entitled to keep the occupants of the residence under reasonable surveillance as the search progressed,[11] and that is all that happened in this case.

[48] I consider that at the conclusion of the search and seizure action there was a sufficient basis upon which to arrest both the applicant and Mrs Yetman for the offence of possession of stolen property. There is no basis upon which I can find that Mrs Yetman was arrested in order to intimidate the applicant in some fashion.

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[10] *R. v. Annett* (1984) 17 C.C.C. (3d) 332 (Ont. C.A.) leave to appeal to SCC refused March 4, 1985.
[11] *Levitz v. Ryan* (1972) 9 C.C.C. (2d) 182 (Ont. C.A.)

[49] I find nothing unreasonable, or even unusual, in commencing the search for the warranted items in the basement area that was apparently used for storage. The search proceeded in an orderly and systematic way, and the search activity ceased when the warranted items were found.

[50] 16 items were taken from the residence in addition to the three items in issue on this application. On some occasion or occasions since the seizure they have apparently been returned to the applicant under circumstances that were not developed in evidence before me. On the evidence I have heard I am not persuaded that the seizure of these other items was so abusive as to render the warranted search unreasonable.

[51] In conclusion, I find that the manner in which the search of the residence was conducted was reasonable in all the circumstances.

[52] There is therefore no violation of the right to be secure from unreasonable search and seizure in respect of the Nikon D1X camera kit, and accordingly this item is admissible in evidence on the trial.

[53] The material before Judge Crawford concerning the laptop computer was sparse indeed. The information to obtain sufficiently supports a conclusion that a black and grey coloured Panasonic laptop with a specified serial number was stolen in March of 2003 after being left on a trolley in the warehouse of 14 Wing supply, 2 hangar, a place to which the applicant had access. However, the information to obtain discloses no basis upon which to conclude that the black and grey Panasonic laptop that Corporal McVeigh saw in the residence of the applicant was the missing laptop computer from 2 hangar.

[54] The evidence heard in the course of this application is similarly insufficient to support such a finding. I find that there were no reasonable grounds to conclude that the applicant was in possession of the stolen laptop computer at the time that the search warrant was sought and granted, and therefore a warrant should not have been issued in respect of the laptop computer. The applicant has established a violation of the *Charter* guaranteed right to be secure from unreasonable search and seizure in respect of the laptop computer.

[55] This conclusion does not affect the validity of the search warrant so far as it authorized a search for and a seizure of the Nikon D1X camera kit. In my view the doctrine of severability applies as the invalid portion of the warrant in respect of the laptop computer can be clearly divided from the valid part in respect of the Nikon camera.[12]

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[12] *Grabowski v. The Queen* [1985] 2 S.C.R. 434 at page 453, *Re Regina and Johnson and Franklin Wholesale Distributors* (1971) 3 C.C.C. (2d) 484 (B.C.C.A.).

[56] A portable telephone was seized during the execution of the search warrant and introduced into evidence on this *voir dire*. The portable telephone was not mentioned in the search warrant granted by Judge Crawford or in the information to obtain the search warrant. Thus, the seizure of the portable telephone was a warrantless seizure, and the burden is therefore upon the prosecution to demonstrate that the seizure of this item is reasonable.[13] A warrantless search will be reasonable if it is authorized by law, the law itself is reasonable, and the search was carried out in a reasonable manner.[14]

[57] The prosecution argues that the portable telephone was seized because it was in plain view. The plain-view doctrine authorizes the seizure of an item if the police are lawfully present in the place where the evidence is discovered and there are reasonable grounds to believe the item can be associated to criminal activity.[15] In addition the discovered item must be immediately obvious to the seizing officer, and its discovery must be inadvertent.[16]

[58] The only evidence relating to the seizure of the portable telephone was given by Corporal Comer. He testified that the portable telephone was discovered on a wall in the kitchen in the residence of the applicant. Corporal Comer saw Sergeant Brown examining the telephone for a serial number, and Sergeant Brown seized the telephone. According to Corporal Comer the serial number of the telephone matched that of a portable telephone reported as stolen.

[59] Sergeant Brown was not called to testify on the application. There is no evidence as to the basis upon which Sergeant Brown thought he was acting when he seized the portable telephone. In the absence of such evidence I am unable to find that the sergeant was exercising his common law authority to seize an item in plain view.

[60] Section 489 of the *Criminal Code* provides:

> (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds
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> (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
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> (b) has been used in the commission of an offence against this or any other Act of Parliament; or

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[13] *R. v. Kokesch supra*, footnote 4
[14] *R. v. Collins* [1987] 1 S.C.R. 265 at page 278 *per* Lamer J.
[15] *R. v. Spindloe* (2001) 154 C.C.C. (3d) 8 (Sask. C.A.)
[16] *R. v. Fawthrop* (2002) 166 C.C.C. (3d) 97 (Ont. C.A.)

> (c) will afford evidence in respect of an offence against this or any other Act of Parliament.
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> (2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
>
> (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
>
> (b) has been used in the commission of an offence against this or any other Act of Parliament; or
>
> (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[61] This provision might also authorize the seizure of the portable telephone in this case. Again, however, in the absence of any evidence as to the basis upon which Sergeant Brown was acting when he seized the portable telephone, I am unable to find that he was relying upon this statutory power to seize.[17]

[62] I conclude that the prosecution has not discharged the onus of establishing the basis upon which the warrantless seizure of the portable telephone was effected. There has therefore been a violation of the right to be secure from unreasonable search and seizure in respect of the portable telephone.

[63] The applicant seeks the exclusion of the evidence of the laptop computer and the portable telephone as a remedy for the violation of the *Charter* guaranteed right to be secure from unreasonable search and seizure. Section 24 of the *Charter* provides:

> (1)Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2)Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[64] The burden rests upon the person whose rights or freedoms have been infringed or denied and who applies for the remedy to demonstrate, on a balance of probabilities, that the admission of the evidence would bring the administration of

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[17] *Ibid.*

justice into disrepute in the eyes of a reasonable person who is dispassionate and fully informed of the circumstances of the case.

[65] There are three kinds of factors that the court looks at in arriving at a decision on section 24(2)[18]. The first set of factors has to do with the effect of the admission of the evidence on the fairness of the trial. Where the evidence in question existed independently of the violation of the *Charter* right, its admission into evidence will rarely affect the fairness of the trial. But where the evidence is conscriptive there is a direct effect of the fairness of the trial. Evidence will be classified as conscriptive where "an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples."[19]In my view, neither the laptop computer nor the cordless telephone can be classified as conscriptive evidence, and I must go on to consider the remaining two groups of factors.

[66] In my view the search and seizure of the laptop computer was a serious violation of the *Charter* guaranteed right to be secure from unreasonable search and seizure. There was an entire absence of reasonable grounds to believe the computer was to be found in the residence of the applicant. The search warrant should not have been issued in respect of this item.

[67] Similarly, the complete absence of a properly articulated ground for the seizure of the cordless telephone I regard as serious. It is true that the police officers were lawfully inside the residence of the applicant when this seizure was made. Thus the privacy right of the applicant that is protected by the right to be secure from unreasonable search or seizure was already reduced or diminished in a lawful way. Nevertheless, the applicant had a right to be secure in the enjoyment of his personal effects unless and until the prosecution demonstrated a lawful basis to interfere with that right.

[68] A third group of factors address the effect of exclusion of the evidence. This recognizes that the exclusion of evidence may itself bring the administration of justice into disrepute, especially where the evidence is essential or critical to prove serious criminal charges. In this case, exclusion of the evidence of the laptop computer and the cordless telephone will result in the acquittal of the applicant on the charges relating to those items. The offence of stealing is a serious offence, but the facts of the case as established in the evidence on this application show that the offence of stealing the laptop is not among the most serious examples of stealing. The offences of conduct to the prejudice of good order and discipline, that is, improper possession of public property, are somewhat less serious.

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[18] *R. v. Collins* [1987] 1 S.C.R. 265
[19] *R. v. Stillman* [1997] 1 S.C.R. 607, at para.80.

[69] Balancing all of these factors, I conclude that the administration of justice would be brought into more disrepute by the admission than by the exclusion of the laptop computer and the cordless telephone from the evidence.

[70] For these reasons, on 22 June 2005 I made an order allowing the application in part, ruling that the laptop computer and the portable telephone were to be excluded from evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms*.

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