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R. v. Robertson

2016 BCSC 2474

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2016 BCSC 2474 R. v. Robertson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Robertson,

2016 BCSC 2474

Date: 20161117

Docket: 97803-3C

Registry: Kamloops

Regina

v.

Jason Robertson and Sarah Robertson

Before: The Honourable Madam Justice Watchuk

Oral Voir dire Ruling - Section 8

Counsel for the Crown:

Evan C. Goulet

Counsel for Jason Robertson:

Jeremy Jensen

Counsel for Sarah Robertson:

Julian van der Walle

Place and Date of Hearing:

Kamloops, B.C.

January 27-29, 2016

February 2, 2016

November 14-15, 2016

Place and Date of Judgment:

Kamloops, B.C.

November 17, 2016

I. Introduction

- [1] Jason and Sarah Robertson ("the applicants") are charged on Indictment 97803-3 with 10 counts relating to weapons and property offences. The charges arose on May 8, 2014 after a search warrant was executed at their residence on Arrowstone Drive in Kamloops, B.C.
- [2] In this application they submit that their rights under the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter] were violated in numerous ways and will ask that the evidence found during the search of their residence that forms the basis for all charges on the indictment be excluded under s. 24(2). This Ruling deals with the following breaches alleged by the applicants:
- (1) The police conducted the search in an unreasonable manner contrary to s. 8 of the Charter by failing to adhere to the requirements of the knock and announce rule;
 - (2) The police failed to ensure that the search was adequately supervised and thereby conducted the search in an unreasonable manner contrary to s. 8;
 - (3) The search was unreasonable and contravened s. 8 because police seized many pieces of personal property that were not authorized to be seized by the warrant nor any other law. These items included:
 - (a) the non-restricted firearms lawfully stored in the home in the gun safes;
 - (b) the applicants' passports; and
 - (c) numerous other miscellaneous items that had no evidentiary value.
 - (4) The police violated Sarah Robertson's s. 10(b) Charter right to counsel during the execution of the search warrant by failing to hold off asking her questions after she said she wanted to speak to a lawyer.

A. Background

- [3] In February 2014, the Kamloops RCMP began an investigation called "E-plosion", primarily targeting Jason Robertson. The RCMP believed that he was the head of a drug trafficking organization in Kamloops. Mr. Robertson lived with his wife, Sarah Robertson, and two young children on Arrowstone Drive in Kamloops, B.C.
- [4] During the investigation, the RCMP relied heavily upon surveillance, tracking targets, and intercepting transactions. Part of the aim was to identify drug stash locations. On March 10, 2014, the RCMP seized a scale with cocaine residue and drug ledgers known as score sheets from the garbage outside the residence.
- [5] On May 7, 2014, the RCMP saw associates of Mr. Robertson load a quad onto a truck at the residence and drive to another of Mr. Robertson's residences on Westsyde Road in Kamloops. They followed the truck and when they stopped it later that day, they found a large amount of cocaine in the truck and a large amount of marihuana in the quad and in the truck.
- [6] After that seizure, the RCMP obtained three search warrants and executed them on May 8, 2014. They searched the Westsyde Road residence, then the Arrowstone Drive residence, and then a third residence of one of Mr. Robertson's associates on Badger Drive. That the search warrants were valid is not in dispute.
- [7] In searching the Westsyde Road residence, the RCMP found half a pound of marihuana and drug trafficking paraphernalia. At the Arrowstone Drive residence, they expected to find more drugs as well as firearms and stolen property. Upon entering, however, the police found much more than they had expected.
- [8] In the Arrowstone Drive residence ("the residence"), the RCMP found, among other things, many firearms (some believed to be reported stolen, some improperly stored, and some in two gun safes), many electronics (some reported stolen), drugs, drug packaging material, score sheets, a large bundle of cash, brass knuckles, a conductive energy weapon, and an Indian Status certificate with Mr. Robertson's picture and another person's name.
- [9] The Crown submits that neither of the applicants' s. 8 Charter rights were violated in the course of the search. The Crown concedes that there was a breach of Sarah Robertson's s. 10 Charter rights.

II. The Search

- [10] Section 8 of the Charter states: "Everyone has a right to be secure against unreasonable search or seizure." A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265.

- [11] The primary issue in this application is whether the manner in which the search was carried out was reasonable. The applicants say that there are three reasons the search warrant was executed in an unreasonable manner. The police:
- (a) Did not adhere to the "knock and announce" rule;
 - (b) Failed to adequately supervise the search; and
 - (c) Seized items without authorization.
- [12] These Reasons will address first the manner of entry, then the seizure of various items, and the search of the vehicle (which the applicants raised as a feature of the inadequate supervision under). Finally I will deal with the submission of the applicants that the search was inadequately supervised including that police were acting as agents for Revenue Canada and Civil Forfeiture.
- [13] In order to put the evidence into context, it is necessary to describe the scene of the search of the residence. The residence is a bungalow with an attached garage on the front of the home. The garage vehicle door faces the street. On the driveway side of the garage there is a regular entrance door. The mailbox is also on this side of the garage. There is another regular door on the opposite side of the house. Downstairs there is a door that opens onto the back yard.
- [14] Importantly, the residence had a sophisticated multi-camera security system which recorded audio in addition to video. While the police knew at the time of entry that there was a surveillance system at the residence, it is not clear if they were also aware of the system's audio recording capacity.
- [15] After careful consideration the entire video was appropriately introduced by the defence part-way through the voir dire. There are two aspects of the video to be noted in this introduction: not all of the witnesses viewed the video; and the video provides visual and auditory evidence of the events that occurred during the search.

A. Manner of Entry - Knock and Announce Rule

- [16] In the execution of this search warrant, the plan was to knock and announce police presence. Sgt. Bannerholt, the project lead in the investigation, testified that after the knock and announce, they intended to wait for a short period of time then breach the door with a ram. The issue arises from the applicants' submission that the time that the police actually waited was insufficient.
- [17] The three general requirements of the rule are stated in by Cromwell J., writing for the majority, in *R. v. Cornell*, 2010 SCC 31 at para. 18:

Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give: "(i) notice of presence by knocking or ringing the door bell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry": *Eccles v. Bourque*, [1975] 2 S.C.R. 739, at p. 747.

[18] In *Eccles v. Bourque* at page 746, the reason for the rule was discussed:

Except in exigent circumstances, the police officers must make an announcement prior to entry. There are compelling considerations for this. An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance. No precise form of words is necessary. In *Semayne's Case* [(1604), 5 Co. Rep. 91a] it was said he should "signify the cause of his coming, and to make request to open doors". In *Re Curtis* [(1756), Fost. 135; 168 E.R. 67], nine of the judges were of opinion that it was sufficient that the householder have notice that the officer came not as a mere trespasser but claiming to act under a proper authority, the other two judges being of opinion that the officers ought to have declared in an explicit manner what sort of warrant they had. In *Burdett v. Abbott* [(1811), 14 East. 1, 104 E.R. 501], Bayley J. was content that the right to break the outer door should be preceded simply by a request for admission and a denial. The traditional demand was "Open in the name of the King". In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry. Minimally they should request admission and have admission denied although it is recognized there will be occasions on which, for example, to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required.

(Emphasis added)

[19] The issue of the length of time that police should wait after giving notices of presence, authority, and purpose was not directly addressed in *Cornell* or in *Eccles*. The cases that have considered the issue of waiting time appear to have their genesis in the reference in *Eccles* to the avoidance of an "unexpected intrusion" by the police and the harm that can result to police and the residents if the intrusion is unexpected.

[20] The British Columbia Court of Appeal discussed the rationale for this rule and its role in police practices in *R. v. Schedel*, 2003 BCCA 364. Paragraphs 46 and 47 include a description of a tragic case in which a young man was shot by police during a search warrant execution at his home (*Glover v. Magark*, [1999] B.C.J. No. 472 (S.C.), *aff'd* 2001 BCCA 390).

[21] The Court in *Schedel* also cites with approval a passage from the report of the Commission of Inquiry into policing in British Columbia conducted by Mr. Justice Oppal, then of this Court, which sets out the importance of police giving the occupants of a home the opportunity to put down whatever they may be holding, such as a channel changer, that

could be perceived as a weapon, and come to the door before entry is made. It is necessary for occupants to have the time to absorb the information given by the police during the knock and announce, and take such actions as putting down any objects in their hands. As stated by Madam Justice Koenigsberg in *Glover v. Magark* (S.C.), "notice of a second or two may not be sufficient opportunity for the occupant of a house to identify the intruders as police officers, particularly when they are not in traditional police uniform" (para. 28).

- [22] There is no hard and fast rule for the length of time that police should wait at the door after they knock before they force entry with a battering ram. As stated in *R. v. Truong*, 2011 BCSC 1483:
- [19] In [*R. v. Tran*, (10 November 2008), New Westminster X069686-2 (B.C.S.C.)] the use of the battering ram after only 30 seconds was found to be a serious breach of the "knock and announce" rule. In this case, the wait was at most 45 seconds according to Corporal Newman and on the evidence of Constable McNeil probably less than that. There could be no magic period of time after which forced entry is deemed reasonable in all cases and the police are not expected to execute a search warrant with a stopwatch in hand. What is reasonable will depend on the circumstances of each case including the nature of the property and the amount of time an occupant might need to come to the door. In that regard, it is significant that this was a two-story house which, in itself, may require a longer wait for a response than would a smaller house.
- [23] RCMP may diverge from the standard "knock and announce" procedure in the event of exigent circumstances (Cornell at paras. 18, 96, and 98). Examples of exigent circumstances are the potential destruction of drugs or the possibility of harm to either the occupants or the officers (Cornell at para. 20). In this case, the Crown is not alleging exigent circumstances but rather a manner of entry that was appropriate in the circumstances.
- [24] As stated above, the plan for this entry was to wait for a short period of time after the knock and announce, and then breach the door with a ram. Sgt. Bannerholt believed that it was "around a minute, maybe a little longer" that they waited after the announcement before breaching the door. The purpose of this knock and announce procedure was to achieve police and public safety by letting the occupants know that it was police at the door and not a rip-off or assault.
- [25] The best evidence of the entry is the surveillance video. Camera 5 from 5:29:08 to 5:29:36 shows the following:
- SGT. BANNERHOLT knocking on the door at 5:29:09;
 - SGT. BANNERHOLT announcing "POLICE" at 5:29:13;
 - SGT. BANNERHOLT knocking a second time at 5:29:16;
 - SGT. BANNERHOLT knocking a third time at 5:29:24;

- An unknown officer shouting "RCMP" and "SEARCH WARRANT" for the first time at 5:29:32; and
- The door being breached by a ram at 5:29:36.

[26] Sgt. Bannerholt also testified that, in this case, the officers executing the warrant were specifically concerned for officer safety. In response to questions in direct examination as to both why the mode of entry was chosen and why the officers did not wait longer for someone to answer the door, he stated that the concern was the potential presence of firearms inside the house, so mainly for safety reasons. They did not want to stand by the door for too long before entering.

[27] In cross-examination Sgt. Bannerholt agreed that a "middle ground" or partially dynamic entry was used in this case. He also agreed that their choice of the middle ground entry defeated the purpose of both a "hard entry" and a "knock and announce" entry. It defeated the purpose of the "knock and announce" because only waiting four seconds after announcing "search warrant" was probably not a reasonable amount of time for the occupants to get to the door. Knocking and announcing before entering also defeated the purpose of a hard entry because if there had been occupants inside who were inclined to arm themselves with weapons in anticipation of the police coming through the door, the knock and announce would have tipped them off that a police entry was about to happen.

[28] If the police depart from the knock and announce approach, the onus is on them to explain why they believed it necessary to do so:

If challenged, the Crown must lay an evidentiary framework to support the conclusion that the police had reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence. The greater the departure from the principles of announced entry, the heavier the onus on the police to justify their approach. The evidence to justify such behaviour must be apparent in the record and available to the police at the time they acted.

(Cornell at para. 20)

[29] In order to be meaningful and achieve their purpose, the principles of announced entry - notices of presence, authority and purpose - require time for the occupants to absorb the information of police being at their door, take safety actions such as putting down remote controls, and answer the door. Depending on the circumstances including the time of day, and the size and configuration of the residence, the necessary time will vary. Without such time, the entry becomes the "unexpected intrusion" described in Eccles.

[30] The departure from the principles of announced entry in this case results from the short times: 27 seconds from the first knock by police and the door being breached; 23 seconds from the first announcement of "Police" and the breach; and 4 seconds from the announcement of "Search Warrant" and the breach. These times were insufficient to allow any occupants to get to the door, especially with the police attendance at the garage door rather than the door which entered the living space directly.

[31] In terms of what evidence would justify a departure, Cromwell J. continued in Cornell:

I would underline the words Chief Justice Dickson used in [R. v. Genest, [1989] 1 S.C.R. 59]: what must be present is evidence to support the conclusion that "there were grounds to be concerned about the possibility of violence": p. 90. I respectfully agree with Slatter J.A. when he said in the present case that "[s]ection 8 of the Charter does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present": para. 24.

[32] Regarding the risk of weapons, Justice Slatter, for the majority of the Alberta Court of Appeal in Cornell, wrote:

The police are entitled to reasonably believe, from their experience, that drug trafficking is a violent business, often involving weapons. Those weapons are not necessarily primarily directed at the police, but might be kept to protect drugs and money.

(2009 ABCA 147 at para. 23, aff'd 2010 SCC 31)

[33] Justice Cromwell provided guidance for Courts asked to review the manner of entry chosen by police. He wrote, first, the police decision must be judged on what was or should reasonably have been known to them at the time, and second (para. 24):

[T]he police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: R. v. Asante-Mensah, 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 73; [Crampton v. Walton, 2005 ABCA 81] at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.

[34] However, in this case the police took into account before executing the warrant the information they had that there were weapons - including assault rifles - in the residence. They made a plan. The plan was to effect a knock and announce entry. Nothing changed. No events occurred after they arrived and during the time that they were at the door which changed their advance estimation of the amount of force or urgency that would be required for their entry. This was not a fluid situation.

- [35] The police on arrival embarked on their plan to knock and announce. They intended to allow a short time for response before forcing entry. About a minute's time was intended, with two minutes thought to be too long. Four seconds were actually allowed after the notices were completed, and 27 seconds after the first notice. This very short time is a departure from the knock and announce procedure, even if a minute was sufficient time. It is not justified by pre-existing information regarding drug trafficking and attendant weapons. Having made the considered decision to proceed by way of knock and announce, it was incumbent on the police to allow sufficient time. Given that they attended at the garage door, rather than the other door of which they were unaware, a longer time would have been needed for a possible occupant to walk through the house and out into the garage to reach the door where the police were waiting.
- [36] It is not necessary to consider if the extensive information known to the police in advance of the execution of the warrant would have amounted to exigent circumstances which would justify a dynamic entry. In assessing the circumstances that they understood were present at the residence, the officers themselves did not determine that there were exigent circumstances due to concerns for officer safety. Further, the entry itself after the door was breached does not support the Crown's claim that the timeline employed during the knock and announce was necessitated by concerns for the officers' safety. It was Sgt. Senner who first entered the living area of the residence after entering and crossing the garage. Sgt. Senner was wearing a t-shirt and baseball cap. He was not wearing any police identification on his clothing, nor was he wearing protective clothing such as a bullet-proof vest. He could easily have been mistaken for a civilian intruder.
- [37] It is also the submission of the Crown that the officers' entry was reasonable in the context of the residence being unoccupied. The "knock and announce" rule protects occupants from the risk of an unannounced entry. The Charter interest protected by the "knock and announce" rule concerns the safety and dignity of the occupants. In this case, the Crown says there was no occupant and so no one whose safety or dignity was at risk or ultimately affected by the officers' manner of knocking and announcing.
- [38] However, the evidence relied upon by the Crown is the testimony of Sgt. Bannerholt and the testimony of Sgt. Senner, both of whose evidence conveyed that the RCMP were not certain that no one was home. Sgt. Bannerholt testified that the RCMP had the residence under continuous surveillance for some period of time prior to the execution of the warrant, and that surveillance showed Mr. Robertson leaving and Mrs. Robertson leaving in a courtesy car with the children. He said that they were only fairly confident that no one was home, and had no reason to believe the children had returned home.
- [39] Sgt. Senner testified that, prior to executing the search warrant, the search team understood the house to be empty. It was possible, however, that someone other than Mr. and Mrs. Robertson and the children was in the house.

- [40] That it was later confirmed that the residence was unoccupied does not alter the duty of the police, having made the considered decision to effect a knock and announce entry, to abide by the proper procedures including allowing sufficient time. Further, their understanding that the residence was likely unoccupied would likely serve to alleviate any safety concerns.
- [41] Finally, it was submitted by the applicants that Sgt. Bannerholt's evidence is unreliable because he changed his evidence regarding the time allowed at the knock and announce from the preliminary inquiry to the voir dire. At the preliminary inquiry he testified that he knocked and announced several times for approximately one to two minutes before breaching the door. At the voir dire he first stated that he knocked on the door and announced, "police, search warrant" or "RCMP, search warrant" multiple times and that the time from knocking to entering the residence was around a minute, maybe longer. He then agreed it was possible the RCMP waited less than 30 seconds to breach the door following the first knock, and possible that they only announced "search warrant" once and about four seconds before breaching the door.
- [42] I do not conclude that the evidence of Sgt. Bannerholt was unreliable. It is reasonable even for an experienced police officer to err in estimating times between 30 seconds and one minute in situations of heightened awareness. His evidence in admitting that it was possible that his time estimates were incorrect and that the actual times were less than 30 seconds and 4 seconds respectively, was very fair.
- [43] In summary, the video shows the RCMP diverged from the "knock and announce" rule when they used a battering ram to breach the applicants' residence only 27 seconds after making their presence known. The forced entry occurred just four seconds after the first time a RCMP officer can be heard shouting "search warrant". The RCMP diverged from the knock and announce rule by not waiting a sufficient amount of time for any occupants to put down what they were holding and come to the door.
- [44] The Crown has not established an evidentiary basis to justify the divergence from the knock and announce rule. The concern about weapons is not supported by the decision to effect a knock and announce entry, and by the manner in which the first officer entered the living area of the residence. The evidence does not substantiate the Crown's claim that the officers entered as they did out of concern for officer safety. The knock and announce rule could safely have been complied with in full. No exigent circumstances arose at the scene.
- [45] Mr. Justice Smith's disposition in *Truong* is apt:
- [24] On all of the evidence, I conclude that the police in their eagerness to execute the warrant treated the "knock and announce" rule as a formality to get out of the way as quickly as possible rather than as a sincere attempt to give any occupants a reasonable opportunity to respond and cooperate. It was, therefore, a breach of the accused's s. 8 Charter rights.

[46] I conclude that the applicants' s. 8 Charter rights were breached because the manner of the entry into the residence with the divergence from the knock and announce procedure was not justifiable in the circumstances.

III. Overseizure

[47] In the search of the residence, 129 items were seized. Included in that total were 40 firearms, some of which, including three pink camo-patterned rifles, were located in two gun safes in the garage. The police knew that both applicants were licenced to possess non-restricted firearms. In the result, none of the firearms seized were prohibited or restricted firearms. The issue, however, is whether the seizure of the firearms in the gun safes was reasonable in the circumstances.

[48] Also seized were numerous boxes of ammunition, electronics, cash, drugs and drug paraphernalia.

[49] The issue of overseizure raised by the applicants concerns seizure of the firearms stored in the gun safes, the applicants' passports, and miscellaneous items.

A. The Applicable Law

[50] For a seizure to be reasonable, it must be authorized by law. The law relevant to the seizure of items from the residence is:

1. The warrant itself, issued per s. 11 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA];
2. Sections 489(1) of the Criminal Code, R.S.C., 1985, c. C-46 and 11 of the CDSA, which authorize seizure of a thing a police officer believed on reasonable grounds:
 - i. is offence-related property (or obtained by or used in the commission of an offence); or
 - ii. will afford evidence in respect of an offence; and
3. The common law "plain view doctrine".

[51] The plain view doctrine is not relied upon as a basis for the seizure of any of the disputed items.

[52] The search warrant authorized the seizure of certain drugs, score sheets, money, documentation of ownership/residence, packaging materials, cell phones, computers, tablets, prohibited firearms and restricted firearms relevant to the investigation of the offences of possession for the purpose of trafficking and possession of a prohibited and restricted firearm.

[53] Many of the items seized are explicitly covered by the warrant itself. The warrant, however, did not allow for the seizure of stolen property although that authorization had been sought. Property believed to have been stolen was seized during the search pursuant to the offence-related property provision of the Criminal Code in s. 489(1) which states:

Seizure of things not specified

489(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

- (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.

[54] The scope of s. 489 of the Criminal Code was considered by Smart J. in *R. v. Sipes*, 2011 BCSC 1763 at para. 212:

If the police do not have reasonable grounds to believe that things will be found that will afford evidence of the offences listed in the warrant, the police will not be granted a warrant to search for those things. If they find such things and seize them pursuant to s. 489 of the Code, they will have to demonstrate at trial that they had reasonable grounds for doing so if the Crown seeks to introduce them into evidence. Whether the police had the required grounds can be challenged by cross-examination and the introduction of other evidence. The result is that while the police need not demonstrate the requisite grounds before seizure, they may be required to after seizure; and when they are, those grounds can be thoroughly challenged by the accused.

[55] Section 489(1) "permits the police to seize things not authorized by the warrant without obtaining a second warrant, even when the police suspect that those things may be found" (*Sipes* at para. 213). Justice Smart found the police did not violate the applicants' s. 8 rights when they seized items not authorized by the warrant, even though some of those items were relevant to other offences and even though the police had anticipated they may find and seize those items while executing the warrant (para. 314).

[56] However, there was also a caution stated in *Sipes*:

[206] To permit a more extensive search than that necessary to search for the things authorized by the warrant would be inconsistent with the purpose of s. 8 of the Charter and the principles articulated in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97. Otherwise, once in the place to be searched, the police could search anywhere and for anything. This would result in a very significant intrusion into the privacy interests of the occupants and permit the police to engage in a "fishing expedition" to see what evidence they might find relating to any offence, committed at any time, by anyone, without pre-

authorization and without establishing reasonable grounds to do so.

[210] While s. 489 of the Code enhances efficient law enforcement, it does create the potential for abuse if the section is misused. A search warrant must not be used as a "Trojan Horse" to enter a place to search for things not disclosed in the ITO. In other words, the primary purpose of the warrant must be to search for the things that are authorized by the warrant, not to search for things that are not.

B. The Crown's Position on the Seizure of Items Outside the Warrant

[57] The Crown's position is that the police in this case had reasonable grounds for seizing all the items beyond the scope of the warrant that the Crown seeks to introduce into evidence, particularly the firearms stored in the gun safes.

[58] Cst. Froyland, as exhibits officer, was tasked with seizing items. The ultimate decision whether or not to seize an item in the residence lay with him. From his experience as a drug investigator he learned that people often trade stolen merchandise, or their own items, for drugs.

[59] In this case, Cst. Froyland had reviewed the ITO which contained information that Mr. Robertson was involved in drug trafficking and which mentioned source information stating this residence may contain stolen property. He observed that the residence had fortified windows and sophisticated video surveillance.

[60] Inside the residence, he saw packaging material that resembled that which contained drugs recently seized from vehicles that were at the residence the day before. He noticed a large number of items including electronics, drugs, score sheets, and firearms - things, he said, he would expect to see in a drug home. He believed that many of the electronics and firearms were related to drug trafficking.

[61] Cst. Froyland seized items outside the warrant believing at the time that they were offence-related property, with a few exceptions regarding the miscellaneous items. Although the decision to seize was ultimately Cst. Froyland's, that decision was supported by other investigators on scene. Cst. Froyland testified that:

I took information from other investigators to form grounds to believe different items were needing to be seized. This was done on a number of items, but not necessarily all items. I had to look at the totality of the placement of some of the items, the way that they were stored, or just the way that they appeared in the home, in order to form my belief that these items may be stolen property and that I was going to seize them under the offence-related property sections.

[62] Regarding his belief that some items were offence-related property, he said:

Speaking with Constable Gray, one of the investigators there, he quickly pointed out in the downstairs office two firearms that were rather unique and he had information about similar firearms being stolen from a break and enter. Also in the downstairs bedroom, I noticed that there was many electronic devices, like car stereo parts that were stacked up upon each other and TVs stacked against one another in that room, with no original packaging, cut wires. It didn't appear to be brand new merchandise and it looked it to be like it had been removed from vehicle parts.

I was relying on my experience as a police officer and my knowledge of stolen items that are commonly taken in the city from break-ins to cars or theft from vehicles, and car parts and stereo parts are often one of those things that we find go missing. So looking at kind of the totality of those things in that room, I started to see that there was what I believed to be stolen property in the home and although it wasn't listed on the warrant, I really couldn't ignore the fact that all of those things were now in front of me and I was looking at room -- that particular room full of items and other rooms of similar nature.

[63] Cst. Froyland also consulted with Sgt. Bannerholt, the team lead, about seizing items. Sgt. Bannerholt testified regarding his involvement in the decision to seize items beyond the warrant. He said he supported the decision to take electronics he believed were stolen, a belief he said was based on "the sheer abundance of those items", his "experience that drug traffickers will often barter stolen items for drugs," and intelligence that said Mr. Robertson was receiving stolen items.

[64] Specifically about his decision to seize the numerous electronics, Cst. Froyland said:

My Lady, there are a lot of electronics that were seized. The reason that I recall making the decision to seize these things as a bulk or all of them together was because, walking into the room, looking around at everything leaned up against the bed or shelving units and standing, looking at the shelving unit of electronics that were just pushed inside the shelves, stack upon stack of them with DVD screens or navigation screens. Some just straight radio players or CD players for your vehicle. Speakers, amplifiers, televisions. All of these things were stacked up in this bedroom.

I've never seen a home or something like it, where you walk into a room and they have so many electronics, without some sort of original packaging or where the wires are cut on the back of these items. Lots of them look like they had just been taken out of a vehicle and just placed in that room.

[65] The room he is referring to appears to be the downstairs bedroom. He continued:

I was aware of previous source information before this that was vague, that said Mr. Robertson will have stolen property. And when I walked into that room, based on my experience as an investigator and being in other drug houses, it jumped out to me that all of these electronics, one person couldn't have use for 10 TVs in a home when each room already had multiple TVs functioning in them. Why would there be 10 more stacked up in the bedroom?

[66] Asked in cross-examination about when the decision to seize items beyond the warrant crystallized, Cst. Froyland testified:

A My recollection of that would be when I was downstairs with Constable Gray. We have viewed the firearms that were in that bed -- the office.

Q Right.

A And then I viewed the electronic equipment in the downstairs bedroom -

Q Yeah.

A -- and then started, uh -- started there. That's where the -- the initial items were seized, so I would -- I would say that that's where it - it kind of came together.

[67] Cst. Froyland testified that almost 40 minutes passed between the entry and when he started to seize items. In that time, he walked around the scene and saw the large number of electronics in the house. He started seizing items at 6:07 p.m., after entry at 5:29 p.m., in the downstairs bedroom. He recorded Cst. Gray finding the commemorative Centennial rifles believed to be stolen in the downstairs office at 7:12 p.m.

[68] It seems, then, that Cst. Froyland started seizing some items not specified on the warrant before Cst. Gray found the rifles that were believed to be stolen. Although his decision to seize some of the items would have been based on the stolen rifles, he provided extensive evidence about the effect of seeing all the property, particularly the electronics, on his decision to seize items as offence-related property.

[69] It is not in issue that s. 489(1) permitted the police to seize all the electronics listed in the Major Incident Exhibit Flow Chart. Cst. Froyland outlined his reasons for seizing the property given his belief they were connected to an offence, and those reasons are reasonable given the information the police had beforehand and what they saw in the residence.

C. The Firearms

[70] Cst. Froyland also testified about his reason for seizing all the firearms in the residence. He seized the firearms because they were insecure or improperly stored, they may have been restricted or prohibited, and they may have been stolen. He said:

The firearms that were insecure on the workbench, in the master bedroom as well as the downstairs office were seized solely because they were insecure. The one on the garage floor, it was a shotgun, it was also insecure.

[T]he primary reason for the seizure of the firearms was once we had found that there was stolen firearms in the basement or what I believed to be stolen firearms, based on the information from Constable Gray, I was concerned that there were going to be other stolen firearms contained either within the safes or within the firearms that were found in other parts of the home. And so I

made the decision to collect all of the firearms, take them all together and we could examine them for being prohibited, restricted as on the face of the warrant. And then we could also query the serial numbers to find out if there were any stolen.

[71] He also discussed the significance of seeing a sawed-off trigger lock on the workbench in the garage:

[] It led me to believe that if a person was possessing firearms in a lawful manner and owned these firearms, they would be the one with the key. We don't often see somebody -- or, I haven't seen before somebody that cuts off a trigger lock off of their firearm. But it - it would have led me to believe that some of the firearms could have been stolen, and that the trigger -- the trigger lock has been cut off in order to gain access to that firearm, to make it a functioning firearm.

[72] Cst. Froyland stated he did not run serial numbers in police databases to confirm whether or not a piece of property was stolen because:

[] the sheer volume of exhibits that were being examined with serial numbers and information to place into the computer would have taken considerable time. And it wasn't something that -- that was practical to do while I was in the house.

[73] The belief that the two commemorative rifles were stolen was instrumental in the officers forming the belief that other firearms were also stolen. That belief was later learned to be erroneous.

[74] Cst. Froyland stated that it was an oversight not to have confirmed that the two commemorative rifles in the basement were not stolen. However, he had information from Cst. Gray that the distinctive rifles were recently stolen from a break-and-enter. Sgt. Bannerholt also testified that they had information the rifles were stolen from a home and sold to Mr. Robertson in exchange for drugs by Steven Insua (a believed associate of Mr. Robertson), according to another investigation.

[75] It was not unreasonable in these circumstances not to check each item, or each firearm, to obtain confirmation whether that item was stolen while on the scene. Sgt. Bannerholt and Cst. Froyland testified that checking whether or not an item is in the database as stolen can take a matter of minutes or "a matter of an hour, depending on Telecoms and their availability and what's going on at the time." The process involves calling the police telecom, getting an operator and requesting a check of the CPIC database.

[76] Despite Cst. Froyland's testimony that it was an oversight not to have confirmed the two rifles were stolen, s. 489 does not require confirmation or certainty that an object is stolen or is offence-related property. The police need only believe on reasonable grounds that the object was "obtained by the commission of an offence", which can include theft or trade for drugs. Confirmation from a police database that an item is stolen is not a prerequisite for reasonableness. With regard to the two rifles, their distinctive nature and the information held by two officers results in the belief being reasonable.

- [77] Regardless, the police were authorized to seize items for reasons other than believing the items were stolen. S. 489(1) is also authority for seizure of items traded for drugs (as the two commemorative firearms were believed to be), firearms that are improperly stored, and items that will afford evidence in respect of an offence.
- [78] The primary issue on overseizure is the firearms in the safes. The evidence of the officers was that they were seized because they were possibly stolen; stored unsafely, after police with a locksmith caused damage to the safes by forcing entry to the safes; possibly prohibited/restricted; and because the applicants were going to lose their guns licenses in the future anyhow.
- [79] With regard to the last justification, a conversation was recorded on the audio of the surveillance system in which an officer said that they would seize all the firearms anyway because the Robertsons were "going to get their licenses revoked". I do not take this unfortunate comment to be the basis for the seizure.
- [80] The warrant itself did authorize the seizure of some firearms, namely, restricted and prohibited firearms. Cst. Froyland stated he needed to seize the firearms to determine whether or not they were restricted or prohibited, because he was not able to determine that at the scene. Sgt. Bannerholt testified that they required an expert to determine whether or not the firearms were restricted or prohibited, because that knowledge is very specific.
- [81] Sgt. Senner testified that he attempted to have the firearms expert, Cpl. Kallert, attend the scene, but the expert was not available. He testified that he believes Cpl. Kallert is the only such expert in the Kamloops area, and that if he is unavailable, there is no other person to call.
- [82] While the witnesses were candid in their lack of expertise regarding the identification of restricted or prohibited firearms, there was no evidence that they had reasonable grounds to believe that the firearms stored in the safe were restricted or prohibited. There was only evidence of the possibility that the firearms may be restricted or prohibited.
- [83] If the firearms in the safe were unsafely stored, they could have been lawfully seized pursuant to s. 489 as affording evidence of an offence. However, those firearms were, until the police reasonably forced entry into the safe, stored safely. The offence of unsafe storage only occurred at the time that they opened the safe, and thus cannot be subsumed under the umbrella of s. 489.
- [84] Was it reasonable to believe that the firearms in the safes were stolen and thus, pursuant to s. 489, obtained by the commission of an offence? The evidence in this regard includes the testimony of Cst. Froyland that the decision to seize all firearms was made after finding the two commemorative rifles they believed to be stolen. After locating those rifles, and in the context of the amount of other property believed to be stolen, the police formed the belief that they had grounds to seize the remaining firearms, not already seized for unsafe storage.

- [85] The police had information that Mr. Robertson was a major drug trafficker, and not only that stolen items are generally exchanged for drugs, but that Mr. Robertson in particular has accepted stolen items for drugs.
- [86] Inside the residence, the police encountered a scene that further supported Mr. Robertson's association with drug trafficking and stolen property. They saw drugs, score sheets, drug packaging material, bundles of cash, a money counter, a sophisticated surveillance system, and prohibited weapons. They saw stashes of electronics, rows of televisions, piles of car stereo equipment (some with cut wires), professional telecommunications equipment (confirmed on scene to be stolen), and distinct-looking commemorative firearms (believed to have been stolen and traded to Mr. Robertson for drugs). They saw a large stockpile of firearms: on the floor upon entry into the garage; on the workbench (along with a sawed-off trigger lock); in and on top of the safes; in the basement; on the floor of the bedroom; and on the bedside table. They also saw many firearms improperly stored, without trigger locks and near ammunition.
- [87] Although the police were aware that the applicants both had licences to possess non-restricted firearms, it was reasonable to believe that they would not be in possession of 40 lawfully acquired firearms in the context of the evidence of drug trafficking (where stolen items are traded for drugs) and other stolen property. In these circumstances the police had reasonable grounds to believe that the firearms found in the garage safes were obtained by the commission of an offence. I find that the requirement for reasonable grounds for seizing the firearms in the safes is met.

D. Miscellaneous Items

- [88] I turn next to the miscellaneous items seized by Cst. Froyland that the Crown is not seeking to tender into evidence. Many of these items, after further examination by the police, were returned to the applicants.
- [89] These items were personal property that did not have any evidentiary value and were not authorized to be seized by the warrant. Cst. Froyland testified that some of the items he seized were a fishing rod, currency from Antigua, a 10 oz. silver bar, binoculars, cologne, a cook top, the security manual for the security system, and suitcases. He also seized scanners, walkie-talkies, televisions, gift cards, and a bottle of vodka. The reason the suitcases were seized was to help the police carry out all of the other items that they had seized.
- [90] Cst. Froyland testified that some of the items he seized, in hindsight, had no evidentiary value and that if he were to do it again, he would not have seized some of them like the bottle of cologne, the fishing reel, and the binoculars. He suggested the reason this happened was because he was "overwhelmed".

- [91] The test under s. 489, however, is not what a police officer would have done with the benefit of hindsight; it is based on an evaluation of the officer's grounds at the time.
- [92] At the time, Cst. Froyland was faced with a house full of items that he believed were obtained in the commission of an offence. This belief was based on the information he had beforehand about Mr. Robertson's occupation as a drug dealer, and about how Mr. Robertson had received stolen property. It was also based on the amount, nature, state, and location of items in the residence. The cologne and reel were found in the downstairs office piled on the floor with many other electronics and the rifles believed to be stolen. He had a subjective belief regarding these miscellaneous items.
- [93] Cst. Froyland stated he took luggage and other receptacles to assist the police in transporting the items. He admitted that, had he known in advance the large number of items in the residence he would determine should be seized, he would have brought more boxes. He said:

I hadn't planned for the sheer volume of what I faced, unfortunately, and my view was that, um, a suitcase or a -- a milk crate, a Rubbermaid container that was there assisted the police in containing those items so they could be sorted and then if needed to be, returned back to the Robertsons, which ultimately they were.

- [94] The situation regarding these miscellaneous items is aptly described in *Re Royal Canadian Legion Branch 177 et al* (1964), 48 D.L.R. (2d) 164 (B.C.S.C.) by Aikins J., who said the following in obiter:

Without expressing any final opinion as to whether or not Mr. Wallace's contention as to the interpretation to be placed upon s. 171(1) and (2) [of the Criminal Code] is correct, because it may be that this question will have to be argued more fully if the civil proceedings taken actually reach trial, I simply say that at first blush Mr. Wallace's contention for the applicants seems to me a reasonable one and that it would be unreasonable to construe the two subsections as meaning that the police with a warrant, or without a warrant, acting under subs. (2), could in effect simply strip premises which they have lawfully entered, taking everything with them, and then at their leisure discriminate between those things that had probative value and those things that did not. What it amounts to is that, in my opinion, Mr. Wallace has made a reasonable case for the interpretation of s. 171(1) and (2) for which he contends.

(Emphasis Added)

- [95] The case of *R. v. MacNeil*, 2014 BCSC 723, discusses a similar situation. Numerous power tools and other electronic items were seized during the execution of a search warrant for drugs. During the search the police had run CPIC checks on 32 of the suspected stolen items and three of them had come back as stolen. They seized those three items as well as other items not authorized by the warrant that did not have serial numbers on the basis that they were stolen property. Justice Silverman ruled this amounted to a breach of s. 8 of the Charter.

- [96] The seizure of the miscellaneous items occurred without reasonable grounds for the seizure of each of them. While the location of some of them, the downstairs room full of apparently stolen property, provided a context that could legitimately give the officers pause to consider whether there were grounds for seizing particular items, that further consideration does not appear to have taken place. Rather, a blanket seizure was implemented. The subjective belief was not objectively reasonable.
- [97] As in *MacNeil*, in the case at bar the seizure of many of the miscellaneous items in the residence of the applicants that were not authorized by the warrant was unreasonable. The onus is on the Crown to establish that the seizure of these items not authorized to be seized by the warrant was nonetheless authorized by law. There is no legal authorization for the seizures of these items, and as such the seizures constituted a breach of the s. 8 rights of the applicants.

E. The Seizure of Passports

- [98] The warrant expressly permitted the police to seize documentation of residency and ownership. As passports are usually kept where people live, the seizure of the passports as evidence of residency and ownership was authorized by the warrant.
- [99] It is submitted by the applicants that the real reason for the passports being seized is evidenced by the audio recording of what Cst. Froyland said to Sgt. Senner about the passports during the search: words to the effect of "that way they can't go anywhere".
- [100] The evidence of Cst. Froyland on this issue is as follows:
- At the preliminary inquiry, Cst. Froyland testified that he seized the passports as "proof of ownership" and that it would have been inappropriate had he seized them to prevent the Robertsons from leaving the country.
 - This was put to Cst. Froyland at the voir dire. The officers testified the following in relation to the seizure of the passports at the voir dire:
 - o Cst. Froyland testified the passports were seized "to show that they were documents of residency";
 - o Cst. Froyland testified the answer he gave at the preliminary inquiry was true;
 - o Cst. Froyland testified it is possible he told Sgt. Senner he would seize the passports so that the Robertsons couldn't go anywhere;
 - o Cst. Froyland acknowledged that he testified at the preliminary inquiry that it would never play a part in his mind to seize the passports for the purpose of preventing travel. Cst. Froyland testified the reason he gave this answer at the preliminary inquiry was that he did not recall the conversation;

o Sgt. Senner identified Cst. Froyland as being in the child's room with himself at the time the passports were located; and

o Sgt. Senner agreed he heard Cst. Froyland say "maybe we'll seize the passports. That way they can't go anywhere".

[101] The applicants submit that the evidence establishes that, although the passports could have been seized lawfully under the auspices of the warrant, the true purpose for why they were seized had nothing to do with gathering evidence of ownership, but instead was to prevent the applicants from travelling. They say that the lawfulness of this seizure must be assessed on this basis, not on the basis of any potential authority for the seizure. They cite *R. v. Dhillon*, 2012 BCCA 254 at para. 40 in support of this position.

[102] The applicants also submit that Cst. Froyland knew the defence possessed surveillance video footage of the search when he testified at the voir dire, although he had not seen it and it was not put to him at the voir dire. They say that it is likely for this reason that he went from saying at the preliminary inquiry that "it never played a part in [his] mind" to seize them to prevent them from travelling and that it would have been inappropriate to do so, to agreeing that it was "possible" that he in fact seized them for that purpose.

[103] With regard to the testimony of Cst. Froyland, I found him to be a most honest and earnest witness. He was intent on fulfilling his oath to tell the truth. For example, he was most candid regarding the seizure of the miscellaneous items being, in hindsight, not his best decision. At the voir dire he carefully answered the question put to him and responded that it was possible he made that statement to Sgt. Senner.

[104] On the totality of the evidence regarding the officers' basis for seizing the passports, and in consideration of the terms of the warrant, I do not find that the purpose for this seizure was to prevent the applicants from travelling. It was an unfortunate statement of the effect of the authorized seizure, and nothing more.

[105] I accept Cst. Froyland's testimony that the passports were seized as documents of residency. Their seizure was not unreasonable or a breach of the applicant's rights.

F. Search of the vehicle

[106] The applicants submit that Sgt. Senner made a mistake in deciding to search the Corvette parked on the applicant's property without being directed to do so. The warrant in this case authorized the search of "the premises" of 152 Arrowstone Drive. The applicants submit that the word "premises" connotes land and the buildings upon it, and it would stretch the meaning of the word to suggest it includes a mobile object like a car that is sitting on the land. In *R. v. Vu* 2004 BCCA 230, a case in which a car was searched purportedly under the authority of a warrant that only authorized the search of the "place, namely the dwelling house", Donald J.A., for the majority, held:

- [120] On the face of the warrant I do not, with respect, see how it is possible to find that it authorized the search of a motor vehicle. The warrant recites that there are reasonable grounds to believe that evidence of an offence under the Controlled Drugs and Substances Act are "in a place, namely the dwelling house...". The authority is "to enter the said place...". The antecedent of place is clearly the dwelling house. That language cannot be stretched to include a vehicle.
- [107] It is submitted that the search of the Corvette was also not authorized by any other law. The police do have the common law power to conduct a safety search even if it is not connected to the detention or arrest of anyone. A safety search is only authorized if the police have reasonable grounds to believe there is an imminent threat to police or public (R v. MacDonald, 2014 SCC 3). Reasonable grounds to believe is the same standard as "reasonable and probable grounds" (Baron v. Canada, [1993] 1 S.C.R. 416).
- [108] Sgt. Senner was clear that he searched the vehicle for officer safety. The basis for his decision to search the vehicle included that he was aware of source information that suggested that Mr. Robertson had a gun compartment in the vehicle. Little detail was provided about the tip by Sgt. Senner other than that he understood it to be "direct information" and that it came to him from an investigator from the lower mainland.
- [109] The defence submits that the Crown has not called enough evidence to establish that the warrantless search of the Corvette was authorized by the common law safety search power. The onus is on the Crown because a warrantless search is presumptively unreasonable. The only evidence put forward by the Crown to justify this warrantless search was the source information testified to by Sgt. Senner. An informant tip, by itself, is insufficient to establish reasonable and probable grounds. In R. v. Garofoli, [1990] 2 S.C.R. 142 at 1456, Justice Sopinka, writing for the majority, said that:
- (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
- [110] The Crown submits that the search warrant authorized a search of "the Premises of Jason Robertson at 152 Arrowstone Drive". The warrant did not limit the search to "the dwelling-house" or "the residence". The warrant, in authorizing a search of "the premises", permitted Sgt. Senner to search the vehicles on the premises, just as it permitted the RCMP to search the residence and other objects found inside the residence.
- [111] The Crown also submits that the police are permitted to search property outside the scope of a warrant for officer safety reasons. Safety was, in fact, Sgt. Senner's stated reason for performing the search.

[112] Sgt. Senner searched three vehicles in the driveways of Arrowstone Drive: a Corvette, a travel trailer, and a truck. The truck and trailer, he believes, were unlocked, and he got the key to the Corvette from inside the residence. He did not discover any evidence in any of the vehicles.

[113] In *R. v. Chuhaniuk*, 2010 BCCA 403 at para. 59, Justice Frankel, writing for the Court, said:

In my view, when a warrant has been issued to search one place or premises on a particular property, the police, in the course of executing that warrant, have the authority, at common law, to inspect and enter other places or premises on that property to the extent reasonably necessary to protect themselves and others. However, they cannot take such action as a matter of course, or on the basis of generalized, non-specific, concerns. Before acting, they must have a reasonable basis for believing there is a possibility that their safety, or the safety of others, is at risk.

[114] In this case, Sgt. Senner stated he searched the Corvette because they received intelligence from the Lower Mainland that there could be a handgun in a gun compartment in that vehicle, and that if there was such a gun, someone could come to the residence while the police were there and get it. He believed this possible based on experience and training, and his knowledge of the Mayerthorpe shooting.

[115] Sgt. Senner testified he briefly searched the trailer to see if there was anything in there that someone could have access to that could harm the search team. For similar reasons he searched the truck in the driveway.

[116] In addition to the tip, he had observed the interior of the residence. Sgt. Senner noted that, in the "well over a hundred" residence search warrants he had executed, this residence, he said, had "the most firepower or firearms I have seen, I think, in one place in - in my service."

[117] With regard to the search of the vehicles, there was a marked change in the information known to the police after they attended and searched the residence. This new information, together with the information the police - including Sgt. Senner - had about Mr. Robertson and his associates, formed a reasonable basis for his belief that there was a safety risk. This belief justified the brief search of the trailer and truck in the driveway, and the search for a gun that he had information was hidden in the Corvette. There is therefore no breach of the applicants' rights in the search of the Corvette.

IV. Lack of Supervision

[118] The applicants submit that the evidence tendered in this voir dire, particularly the video evidence, suggests that the police had in their mind that they were, at least in part, acting as seizure agents for Revenue Canada and the Civil Forfeiture Office. The applicants submit that this, along with the search of the Corvette, was a specific symptom of a lack of proper supervision and contributed to the unreasonable manner of the search in this case.

A. Civil Forfeiture

[119] RCMP are only authorized to search in their capacity as RCMP agents, acting to further their specific investigation as authorized by their warrant. If the RCMP are searching and seizing items in order for the Office of Civil Forfeiture/Revenue Canada to bring an action, they are no longer acting within the legal authority of their warrant. The applicants say that the RCMP officers were acting in some manner of capacity as agents for the Office of Civil Forfeiture/Revenue Canada, as they would be seizing items for the purposes of these offices, rather than their own investigative needs.

[120] The evidence regarding this allegation comes from testimony on the voir dire and two short video clips:

- Sgt. Bannerholt testified:

- o He was not acting in any capacity for Civil Forfeiture or Canada Revenue Agency;

- o He would not have allowed another officer to take any photos to later forward to Civil Forfeiture;

- o He was not aware of any activity by officers suggesting they were gathering any evidence for/acting as agents of Civil Forfeiture or Canada Revenue.

- Cst. Baker testified:

- o It is possible he said something indicating a plan to go after some items under a proceeds of crime investigation.

- Cst. Froyland testified:

- o He was not acting as an agent for Canada Revenue Agency, or for the Office of Civil Forfeiture.

- Sgt. Senner testified:

- o He understood he was not allowed to seize things on the belief they may be used for future Civil Forfeiture proceedings;

- o He may have mentioned the Office of Civil Forfeiture and Revenue Canada and their interest in some of the items found;

- o He agreed he can be heard saying "especially Revenue Canada and Civil Forfeiture" during a discussion about pursuing a future proceeds of crime investigation;

- o He agreed he heard a question about if Paul (Bowman) got a picture of the security system for Civil Forfeiture.

[121] In one video clip, from the audio on Camera 3 at around 8:43:53, Cpl. Johnson says something to the effect of, "I wonder if Paul got a picture of the security system. That'd be good for Civil Forfeiture, eh?" In the other video clip, there is a brief exchange recorded on the audio of Camera 3 at 6:17:30-43, when Sgt. Bouwman, Sgt. Senner, and Cst. Baker are in the garage:

Sgt. Bouwman: Would you go after a place like this for proceeds of crime?

Sgt. Senner: Oh yeah.

Cst. Baker: I think that's the plan after this, eh?

Sgt. Senner: Especially Civil Forfeiture and Revenue Canada (inaudible [but possibly "usually Civil Forfeiture"])

[122] There is no indication that any member seized any item for or at the direction of Civil Forfeiture or Revenue Canada. Moreover, Cst. Froyland, who was the exhibit officer and person who seized the items, was not a part of either of the audio clips. The totality of the evidence goes only to the fact that these members were aware of the interests of the other two agencies and on occasion share some information with them. Such interaction or awareness does not determine that in these circumstances the RCMP members were acting as agents for those agencies.

[123] This evidence is insufficient to establish that the RCMP were acting as agents as alleged. Neither Cpl. Johnson's statements about what another member may have done, and whether that picture could be used for civil forfeiture, nor the 13-second exchange among some members establish the RCMP here acted as "agents" for Civil Forfeiture or Revenue Canada.

[124] I therefore conclude that the RCMP were acting within the authority of the search warrant.

B. Supervision of the Search

[125] Finally, the applicants allege a breach of their s. 8 Charter rights saying that the search as a whole was improperly supervised.

[126] They cite two cases in support of their argument: *R. v. MacNeil*, 2014 BCSC 723 and *R. v. Nguyen*, [1999] B.C.J. No. 12. In both cases the Court found that a failure to adequately supervise the search contributed to the unreasonable manner in which the search was executed.

[127] A search must be adequately supervised or risk being characterized as being unreasonable. Justice Levine stated in *R. v. Nguyen*, [1999] B.C.J. No. 12, at paragraphs 79 to 82:

[82] the failure of any officer to supervise the search are factors that contribute to unreasonableness of the manner in which the search was executed.

Silverman J. cited this authority with approval in *R. v. MacNeil*, 2014 BCSC 723, at paragraph 42.

- [128] A lack of supervision can be evinced in a number of ways and is dependent on the factual context. In *Nguyen*, the police had a warrant to search an upstairs suite of a residence for drugs and drug paraphernalia. The search warrant was found to be invalid. Pursuant to that invalid warrant, and in the middle of the night, the police battered down the door without any consideration for why that was necessary. In the course of several arrests, the police strip-searched one of the accused, and evicted another with her children without allowing them to get proper clothing or money. They seized a vehicle from the garage, knowing it was of no interest to the police and was seized by mistake. In that case, no officer admitted to being responsible for the search and supervising it, and the Court found that was a factor that contributed to the unreasonable manner of the search.
- [129] In *MacNeil*, two warrants were issued to search a particular property. The first warrant expired and the police applied for a second one, which was importantly different from the first: The two warrants differed in where they authorized the police to search, and what they authorized the police to seize. Crucially in that case, neither the lead investigator nor the senior investigating officer showed or communicated to the search team the parameters of the second warrant. The members, then, were unaware they were seizing items and searching places unauthorized by the warrant.
- [130] Both cases involved several serious breaches that were found to be related to the lack of supervision. The case at bar is not similar to *Nguyen* or *MacNeil*. In this case, the team had a plan prior to entry, except for Cpl. Johnson they knew what the warrant said, and each member had a role in the search.
- [131] The following testimony is relevant to the issue of supervision:
- Sgt. Bannerholt testified, in response to being asked if he was the leader: "I was. I had to leave at some point there around 7:30 p.m. at which point Sgt. Senner was then the lead";
 - Sgt. Senner testified that at no point did he consider himself to be team leader of the search, and that Cpl. Johnson would have been the supervisor/team leader when Sgt. Bannerholt left;
 - Cst. Froyland testified that Cpl. Johnson would have been in charge when Sgt. Bannerholt was not there, but did not know if Cpl. Johnson was there during the search; and
 - Cpl. Johnson testified that he did not assume the role of lead.
- [132] According to this evidence, Sgt. Bannerholt was on scene as lead for two hours from 5:30 to 7:30. For the 1½ hours from 7:30 to 9:00, no one was in charge and there was no clear supervision during that time. This is evidenced by the fact that Sgt. Bannerholt, Sgt. Senner, and Cst. Froyland each indicated different beliefs about who was acting in a supervisory capacity once Sgt. Bannerholt left.

[133] Items were seized by Cst. Froyland after Sgt. Bannerholt left the residence. However, as listed on the Major Incident Exhibit Flow Chart, many of the problematic miscellaneous items were seized while there was supervision. Cst. Froyland testified that he did feel overwhelmed and wished he had some assistance in deciding what to seize.

[134] To summarize, although the evidence establishes a lack of supervision from 7:30 to 9:00 p.m., the demonstrable effects are limited to:

1. Cst. Froyland mistakenly seizing some miscellaneous items with no investigatory value;
2. Cst. Froyland wishing for assistance in his role as exhibits officer during the search; and
3. Cst. Froyland feeling overwhelmed.

[135] The applicants' s. 8 Charter rights were not breached in this case because a member felt overwhelmed by, and wished for assistance with, a manifestly large and evidently unexpected task, or some items without investigatory value were seized, or the combination of those effects. As a result, I do not find that the lack of supervision for the last 1 1/2 hours of the search resulted in the manner of the search being unreasonable.

V. Section 10(b) - Right to Counsel and Duty to hold off

[136] The Crown has fairly conceded that Ms. Robertson's right to counsel was breached.

[137] When an accused is arrested or detained, it is incumbent on the detaining/arresting officer to explain the reason for the detention, and to inform the detainee of their section 10(b) right to contact and instruct counsel without delay (R. v. Bartle, [1994] 3 S.C.R. 173). Once an accused has indicated a desire to contact counsel, officers must hold-off from asking questions or eliciting evidence from the detainee until they have had an opportunity to contact and instruct counsel (R. v. Prosper, [1994] 3 S.C.R. 236; R. v. Suberu, 2009 SCC 33).

[138] Failure to hold-off with questioning amounts to a violation of the accused's section 10(b) rights.

[139] In this case, Ms. Robertson is depicted in the video asking for a lawyer before she is read her rights. After she is read her rights she says she does want to talk to a lawyer. Instead of holding off, Cst. Baker and then Sgt. Senner both ask her questions related to such things as her knowledge of the guns and where the TV's came from, the whereabouts of her husband, as well as some general comments to her about how she made money. Although Cst. Baker testified that she was more concerned about her kids than speaking to a lawyer, this is not borne out in the video as it is clear she was requesting to speak to counsel from the beginning. Cst. Baker conceded that he did not hold off, even though he was fully aware he was required to hold off on the day he arrested Ms. Robertson.

[140] It should be noted as well that Cst. Baker testified that it would have been possible to permit Ms. Robertson to speak to a lawyer on a cell phone prior to transporting her back to the detachment. In *R. v. Camacho*, 2011 BCSC 175, Justice Barrow held that failing to provide an arrestee the opportunity to consult with counsel prior to taking them back to the detachment can amount to a breach of section 10(b) if there was nothing that prevented the police from facilitating the arrestee's right to counsel at the scene.

[141] Ms. Robertson's rights were breached when Sgt. Senner and Cst. Baker attempted to elicit evidence from her prior to implementing her s. 10(b) right to contact counsel. Her rights were also breached when she was not permitted to speak to a counsel on a cell phone at the scene prior to being taken to the detachment. Both breaches are violations of the implementational component of s. 10(b).

VI. CONCLUSION

[142] In summary, the s. 8 Charter rights of the applicants were breached in the knock and announce entry, and in the overseizure of miscellaneous items.

[143] Ms. Robertson's s. 10(b) rights were also breached.

[144] We will next proceed to submissions on the application to exclude evidence pursuant to s. 24(2) of the Charter.

"The Honourable Madam Justice Watchuk"

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