

CANADA / JUDGMENT

R. v. Sasano

2022 BCSC 714

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 714 R. v. Sasano

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sasano,

2022 BCSC 714

Date: 20220429

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Registry: Chilliwack

Regina

v.

Jeff Luke Rigear, Roy Makoto Sasano, Nicholas Steven George Schafer and Amy Elysia Soranno

Corrected Judgment: The text of the judgment was corrected at paragraph 105 where changes were made on September 14, 2023.

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment re Application to Exclude Amy Soranno Cell Phone Evidence (Voir Dires 4 and 5)

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Place and Date of Voir Dire:

New Westminster, B.C.

March 30, 31, 2022

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April 29, 2022

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I. Introduction

- [1] The accused, Amy Soranno, applies pursuant to s. 8 of the Charter to exclude evidence from the trial obtained as a result of the seizure of her cellular phone by the Abbotsford Police Department ("APD") on April 28, 2019, incidental to her arrest. The co-accused parties, Jeff Rigeat, Roy Sasano, and Nicholas Schafer, join in the application.
- [2] The applicant challenges the seizure of the phone incidental to her arrest, the search warrants authorizing the search of the phone, and the reasonableness of the manner of the search.

II. Seizure of the Phone Incidental to Arrest

A. Background

- [3] I set out the general background facts relating to the charges in question in my previous ruling regarding voluntariness of Ms. Soranno's statements made to the police on April 28, 2019. Those reasons are indexed at 2022 BCSC 566. I set out further background information in reasons for judgment for the application by Mr. Rigeat for production of documents by the BC SPCA (Voir Dire #1) at paras. 4 through 16.
- [4] Additional background information follows.
- [5] The protesters arrived at the Excelsior Hog Farm in the early morning hours of April 28. The group was very well organized. They arrived in buses. As previously noted, there were about 150 protesters in total. Approximately 48 persons entered a barn at the Excelsior Hog Farm while the other protesters remained somewhere near the entrance to the property, by the road.

- [6] Many of the protesters were recording the day's events on their cell phones. Ms. Soranno was one of the main organizers of the protest, and also served as the group's spokesperson in relation to their dealings with the farm owners and the APD during the course of the day.
- [7] Staff Sgt. Kevin Murray was on patrol, in uniform, that morning. At about 6:45 a.m., he was notified of a large protest taking place at the Excelsior Hog Farm. Two APD officers were on the scene and radioed that they were overwhelmed. Staff Sgt. Murray and S/Sgt. Marcus Senft attended the scene. From the point of view of the police, the protesters were very well organized, but the scene, overall, was chaotic. Staff Sgt. Murray went into the barn while S/Sgt. Senft remained outside. Constables Wiens and Sowatzky were in the barn. They directed S/Sgt. Murray to Ms. Soranno. Staff Sgt. Murray noticed that everyone seemed to have a cell phone on and they were pointed at him. He was being recorded. He spoke to Ms. Soranno, advising her that their activities were illegal. It was an unlawful assembly and a break and enter. She acknowledged this. She was asked to leave, with the group, but politely declined.
- [8] Staff Sgt. Murray was of the view that arresting the individuals and removing them forcibly was not a practical option, given the limits of available police manpower. Ms. Soranno advised that the group's demands were to allow a media tour, with cameras, of the facility. The farm's owners, the Binnendyk family, were initially against this, but were persuaded by S/Sgt. Murray to allow this to occur. Details of the plan were worked out. Authority was obtained from APD's senior officers. Veterinarians were called in to advise and monitor the tour. All of this took considerable time. The plan was agreed to at about 9 a.m. The tour itself took about 20 or 25 minutes. Ms. Soranno was the only protester who participated in the tour. After the tour, Ms. Soranno was escorted back to the remaining protesters in the barn. She told them that she was satisfied with the tour. The remaining protesters were happy, according to S/Sgt. Murray.
- [9] After the tour, S/Sgt. Murray collectively advised all of the protesters in the barn that they were under arrest in respect of charges of unlawful assembly, under s. 63 of the Criminal Code, R.S.C., 1985, c. C-46 [Code]; breaking and entering, under s. 348 of the Code; and mischief, under s. 430 of the Code. He advised them that they would be processed on scene by providing the police with their identity information, and would then be free to leave. Staff Sgt. Murray also advised the group at the time of their arrest of their s. 10(b) rights to retain and instruct counsel.
- [10] The group arrest occurred at 10:26 a.m. All of the protesters were cooperative.
- [11] Ms. Soranno recorded many of S/Sgt. Murray's interactions with her and with the protesters on her cell phone. She testified that her recording of the day's events were intended as a "live stream" record, to be released to the public.

- [12] As it was clear to S/Sgt. Murray that Ms. Soranno was the ringleader of the group, in addition to the spokesperson, he decided that she should not be released on scene. Instead, she would be transported to the APD station, and released on an undertaking to ensure that she did not organize further such events, for example at other farms. As he noted in his evidence, Abbotsford is an agricultural community.
- [13] Ms. Soranno was taken to the APD station without being handcuffed, by Cst. Wiens.
- [14] Staff Sgt. Murray noted that Ms. Soranno was constantly on her phone during the events of the day, either filming, or talking to others. Specifically, she was talking to Dan Moskaluk, the apparent leader of the outside protester group.
- [15] Staff Sgt. Murray made his way back to the station and arrived at 12:55 p.m. Ms. Soranno was in the APD counsel room speaking on the telephone with a lawyer. When she emerged, she said she was satisfied with the advice that she received.
- [16] Staff Sgt. Murray decided to seize Ms. Soranno's phone incidental to arrest. Most likely, he made that decision while he was driving back to the APD station. He advised her that the police would be seizing her telephone. He told her that he expected evidence related to the offence or offences would be found on the cell phone.
- [17] Ms. Soranno was surprised about the news that her cell phone would be seized. She explained "my whole life is on that phone". She was anxious to have it returned as soon as possible. She asked how long it would take before she got her phone back. Staff Sgt. Murray said that he could not answer that question. He told her a judicial authorization would be required to search the phone. He also advised her that they might have to send the phone to Ottawa in order to "crack" (access) the phone, unless she was willing to provide her passcode. He advised her that the police would not be examining the phone's contents without a search warrant. According to S/Sgt. Murray, he expressly stated that she was not obliged to provide her passcode; however, doing so would speed up the process. Ms. Soranno provided the cell phone's passcode.
- [18] The cell phone contained several videos apparently recorded in February and March 2019, and which the Crown will rely on to establish that the defendants broke and entered the Excelsior Hog Farm as well as other farms in order to place hidden cameras, or to check on, replace, remove, or take recorded video data.
- [19] The cell phone also contains several video recordings with sound, at some considerable length, of the events of April 28, 2019, the day of the mass protest. The lengthiest video chronicles the events of the day, beginning with the arrival of Ms. Soranno and the rest of the protestors at the farm in the early morning (prior to the arrival of the police), the break in to the barn, the animals inside the facility, the occupation of the facilities by the protestors, and Ms. Soranno's interactions with the police and the farm operators. Ms. Soranno narrates the video. She seems to be familiar with the facility.

[20] Noteworthy items found on the phone included:

- a) several videos recorded in February and March 2019, apparently inside the barns at Excelsior Hog Farm;
- b) video recording of the events of April 28, 2019;
- c) several images related to the charges: aerial (satellite) imagery of the Excelsior Hog Farm, marked up to show where the bus would drop off personnel; where the "inside team" and "outside team" would be stationed; where the farmer's residence was; where media would be located, etc.;
- d) newspaper articles relating to the release to the media of video by PETA; and
- e) group chat text messages among the defendants, concerning planning for the protest event.

B. Legal Principles - Search, and Search Incidental to Arrest

[21] In *R. v. Serban*, 2015 BCSC 1427, I stated:

[43] Section 8 of the Canadian Charter of Rights and Freedoms [Charter] states that, "Everyone has the right to be secure against unreasonable search or seizure."

[44] Section 24 of the Charter provides for the exclusion of evidence obtained in a manner that infringed or denied rights or freedoms guaranteed by the Charter, if it is established that the admission of the evidence would bring the administration of justice into disrepute, having regard to all the circumstances.

[45] In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 161(a), Mr. Justice Dickson held that where it is feasible to obtain authorization prior to a search, such authorization is a pre-condition for a valid search and seizure. In most cases, judicial authorization for a search and seizure requires proof of a belief, on reasonable and probable grounds, established upon oath, that an offence has been committed, and that there is evidence to be found at the place of the intended search. A search without prior authorization by warrant is presumed to be unreasonable and hence in violation of s. 8 of the Charter: *Hunter v. Southam* at p. 161(g).

[46] If a search is made without a warrant then the Crown has the burden of showing that the search was nonetheless reasonable on a balance of probabilities.

[47] Pursuant to *R. v. Collins*, [1987] 1 S.C.R. 265 at 278(c), a search will be reasonable if three conditions are met:

1. The search is authorized by law;
2. The law authorizing the search is reasonable; and
3. The manner in which the search is carried out is reasonable.

- [22] In this case, the phone was obtained prior to a search warrant being issued. No searches of the phone's contents occurred until after a search warrant was issued on May 23, 2019.
- [23] The principles relating to a search incidental to arrest were recently reviewed in *R. v. Stairs*, 2022 SCC 11, as follows:
- [34] The common law standard for search incident to arrest permits the police to search a lawfully arrested person and to seize anything in their possession or the surrounding area of the arrest to guarantee the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at pp. 180-81). This search power is "extraordinary" because, unlike other police powers, it requires neither a warrant nor reasonable and probable grounds (*Fearon*, at paras. 16 and 45).
- [35] The common law standard for search incident to arrest is well established. As explained in *Fearon*, at paras. 21 and 27, it requires that (1) the individual searched has been lawfully arrested; (2) the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose connected to the arrest; and (3) the search is conducted reasonably.
- [36] Under the second step, valid law enforcement purposes for search incident to arrest include (a) police and public safety; (b) preventing the destruction of evidence; and (c) discovering evidence that may be used at trial (*Fearon*, at para. 75).
- [37] The police's law enforcement purpose must be subjectively connected to the arrest, and the officer's belief that the purpose will be served by the search must be objectively reasonable (*R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 19). To meet this standard, the police do not need reasonable and probable grounds for the search. Instead, they only require "some reasonable basis" to do what they did (*Caslake*, at para. 20). This is a much lower standard than reasonable and probable grounds.

C. Analysis - Seizure of the Cell Phone

1. The Seizure

- [24] There was no judicial authorization to seize the cell phone. Thus, seizing the phone was a warrantless search.
- [25] The applicant does not dispute that S/Sgt. Murray had grounds to arrest her on April 28, 2019.
- [26] Unlike in *R. v. Fearon*, 2014 SCC 77, in this case the contents of the phone were not examined prior to obtaining a search warrant.
- [27] I have no difficulty concluding that the search was "truly incidental to the arrest" in the sense that it was for a valid law enforcement purpose connected to the arrest. Valid law enforcement purposes include preventing destruction of evidence and discovering evidence that may be used at trial.

- [28] It was obvious that the cell phone would contain evidence connected to the arrest, and specifically, to several possible offences including breaking and entering, and mischief. Ms. Soranno was video recording the events of the day including her own interactions with S/Sgt. Murray. As noted, he observed her speaking on the telephone to other people, such as Mr. Moskaluk, another apparent organizer of the protest.
- [29] The applicant argues that seizure of the phone was unnecessary, since the police already had abundant evidence regarding the break and enter, including the evidence of S/Sgt. Murray himself. However, S/Sgt. Murray testified, and I accept, that he expected the phone would provide corroborative evidence, or additional evidence. The potential charges were not only breaking and entering. He noted that Ms. Soranno was chronicling everything. In his view, the cell phone could provide evidence of planning, co-conspirators, or additional evidence regarding the break and enter, mischief, or other charges. He testified that as a police officer, he seeks to collect all available evidence. The evidence is clear that S/Sgt. Murray had in mind valid law enforcement purposes for seizing the phone that were connected to the arrest. The purposes that would be served by the search were objectively reasonable.
2. The Passcode
- [30] The applicant argues that the manner in which S/Sgt. Murray obtained Ms. Soranno's passcode was improper. The applicant characterized this as another, further, seizure. She argues that S/Sgt. Murray made untruthful statements to her in order to obtain the passcode.
- [31] The applicant alleges that S/Sgt. Murray stated: (1) the police would be able to search her phone whether she provided the passcode or not; and (2) the phone would be returned to her the next day if she provided the passcode. She does not allege these were deliberate lies.
- [32] Staff Sgt. Murray told Ms. Soranno that she was not obligated to divulge the phone's passcode. Ms. Soranno did not dispute this in her testimony.
- [33] By the time S/Sgt. Murray spoke to Ms. Soranno about her cell phone, she had received legal advice and told S/Sgt. Murray that she was satisfied with it.
- [34] S/Sgt. Murray acknowledges telling Ms. Soranno that she would likely have her phone returned to her more quickly if she provided the passcode. He told her that if she did not provide the passcode, the police would send the telephone to Ottawa to be unlocked or accessed. He testified on the voir dire that he did not believe that he told her that the police were definitely going to be successful in "cracking" the phone, as he was not sure about that himself.
- [35] I do not accept that S/Sgt. Murray stated that the police would definitely be able to access the phone's contents whether they obtained the passcode from Ms. Soranno or not. However I accept that this would probably have been a fair inference on the part of Ms. Soranno.

- [36] I do not accept that S/Sgt. Murray promised Ms. Soranno that she would get her phone back the next day if she divulged her passcode. He told her that a search warrant would be obtained before the phone's contents would be searched. He knew that obtaining a search warrant would take some time. He clearly did say, however, that she would get her phone back sooner if she divulged the passcode.
- [37] The applicant argues that, in obtaining the passcode, the search incidental to arrest was abusive. The applicant cites *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 [Cloutier]. In that case, the court dealt with the topic of "frisk" searches incidental to arrest. The court held:
3. The search must not be conducted in an abusive fashion and in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.
- [38] Cloutier is of no assistance to the applicant, in my view. The passcode conversation was not abusive in any sense nor did it constitute a search accompanied by physical or psychological constraint.
- [39] Staff Sgt. Murray had a bona fide factual basis for his comments. Staff Sgt. Murray was not guilty of any deliberate lies. To S/Sgt. Murray's knowledge, the police could send the phone to a forensics lab to be accessed, but that process would be time-consuming. In fact, the APD subsequently did so in the case of Mr. Rigeat's Samsung cell phone. On September 20, 2019, the police obtained a search warrant to search Mr. Rigeat's cell phone. Mr. Rigeat declined to provide his passcode for the phone. The police sent the phone to Cellebrite Forensics Lab in Ottawa, who utilized custom software to gain access to the phone's contents.
- [40] In submissions, counsel suggest that because Ms. Soranno's phone was an Apple brand phone, the forensics lab might not have been able to access it. There is no actual evidence on this point. There is no reason to suppose that the matter of the brand of cell phone could have affected S/Sgt. Murray's thinking.
- [41] While I have some concerns that Ms. Soranno may have been left with false impressions about whether the police could definitely obtain access to her telephone without the passcode, and about when exactly she would have her phone returned to her, I do not characterize S/Sgt. Murray's conduct as abusive or improper, in all of the circumstances.
- [42] The applicant does not argue that her s. 10(b) rights were breached in relation to the passcode discussion.
- [43] Failure to allow access to counsel before seeking or demanding the passcode could have been a breach of s. 10(b): *R. v. Boutros*, 2018 ONCA 375, at para. 14. Those are not the facts of this case.

- [44] Some cases have addressed the question of whether a second right to counsel must be afforded before the police can ask for a passcode: *R v. Azonwanna*, 2020 ONSC 5416; *R v. Bucknell*, 2021 BCPC 308; *R v. Subia*, 2021 ONSC 6628. These are all child pornography cases in which incriminating evidence was found on the accused's cell phone. The cases turn on whether, in the circumstances, the request for the passcode triggers a right to a second consultation, pursuant to the decision of the Supreme Court in *R. v. Sinclair*, 2010 SCC 35 [Sinclair].
- [45] In *Sinclair*, the court held that in some cases, s. 10(b) requires that the police provide a detainee with a reasonable opportunity to consult counsel a second time where developments in the course of the investigation make this necessary to serve the purpose underlying section 10(b): para. 2. A change of circumstances may make the opportunity for a second consultation necessary to fulfill the purpose of s. 10(b) of the Charter of providing the detainee with legal advice on his or her choice of whether to cooperate with the police investigation or decline to do so: para. 55.
- [46] As no such argument is made in this case, I do not need to address this issue. However, I would in any event hold that in the circumstances of this case, there was no change of circumstances that would have required a second consultation with legal counsel. Ms. Soranno was not facing a change in jeopardy and there were no reasons to believe that the legal advice she received was deficient. Ms. Soranno knew she had a choice as to whether to give up the passcode or not. I would not characterize asking for the passcode for a potential warranted search of the cell phone as a new, non-routine procedure or investigative technique. Given that Ms. Soranno had herself been video recording her interactions with the police, and this was obvious to the police, the warranted search of her phone for evidence was routine. The request for the passcode was part of that planned investigation.

3. The Police Caution

- [47] S/Sgt. Murray acknowledged that he neglected to provide the usual "police caution" to the protesters at the time of the group arrest. He acknowledged this was an oversight.
- [48] S/Sgt. Murray was a patrol officer at the time. He was not expecting to be involved in subsequent investigations. He was not planning to interrogate Ms. Soranno, and did not do so, except in relation to obtaining the passcode. Ms. Soranno's rights under s. 10(b) were fully complied with.
- [49] Section 7 of the Charter recognizes a right to remain silent, however failure of the police to so advise a person is not per se a breach of s. 7: *R. v. Van Den Meerse*, 1989 CanLII 7133, 53 C.C.C. (3rd) 449 (B.C.C.A.).

- [50] Sections 7 and 10(b) of the Charter work together. The suspect is entitled to speak to legal counsel so that the suspect is made aware of their right not to speak to the police and to obtain appropriate advice with respect to the choice they face: *R. v. Hebert*, [1990] 2 S.C.R. 151, 1990 CanLII 118 [Hebert], at pp. 176-7. I can presume that counsel would have informed Ms. Soranno of the right to silence: *Hebert*, at 185 (per McLachlin J.); *R. v. Singh*, 2007 SCC 48 [Singh], at para. 33.
- [51] The police caution can become important as a factor in relation to the question of voluntariness of statements: *Singh*, at para. 31. I have already ruled that Ms. Soranno's statements to the police on April 28, 2019 at the farm were voluntary. There is no issue in this case about police interrogation of Ms. Soranno.
- [52] Ms. Soranno had exercised her right to speak with legal counsel. She was not in fact interrogated by the police. The lack of a "police caution" is of no practical consequence in this case.
- [53] In conclusion, I find that the seizure of the cell phone and obtaining the passcode from Ms. Soranno were lawful.

III. Validity of the Search Warrant

- [54] A warrant is presumed valid. The onus is upon the applicant to demonstrate that the ITO is insufficient: *R. v. Wilson*, 2011 BCCA 252, at para. 63; *R. v. Campbell*, 2011 SCC 32, at para. 14.
- [55] The applicant makes facial and sub-facial challenges to the search warrant. The distinction is discussed by Watt J.A. in *R. v. Sadikov*, 2014 ONCA 72:
- [37] A facial validity challenge requires the reviewing judge to examine the ITO and to determine whether, on the face of the information disclosed there, the justice could have issued the warrant: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 19. The record examined on a facial review is fixed: it is the ITO, not an amplified or enlarged record: *R. v. Wilson*, 2011 BCCA 252, 272 C.C.C. (3d) 269, at para. 39.
- [38] Sub-facial challenges go behind the form of the ITO to attack or impeach the reliability of its content: *Araujo*, at para. 50; and *Wilson*, at para. 40. Sub-facial challenges involve an amplified record, but do not expand the scope of review to permit the reviewing judge to substitute his or her view for that of the authorizing judicial officer: *Araujo*, at para. 51; and *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421, at p. 1452. The task of the reviewing judge on a sub-facial challenge is to consider whether, on the record before the authorizing justice as amplified on the review, the authorizing justice could have issued the warrant: *Araujo*, at para. 51; and *Garofoli*, at p. 1452. The analysis is contextual: *Araujo*, at para. 54. The reviewing judge should carefully consider whether sufficient reliable information remains in the amplified record, in other words, information that might reasonably be believed, on the basis of which the enabling warrant could have issued: *Araujo*, at para. 52.

- [56] In this case, the Crown did not oppose allowing the applicant to cross-examine the affiant of the information to obtain (ITO) for the search warrant, Constable N. Reddemann. I granted leave to the applicant to cross examine the affiant. The Crown did not examine Constable Reddemann to seek further amplification evidence.
- [57] Constable N. Reddemann's initial search warrant application on May 22 was rejected by a judicial justice, who stated, " there is nothing in the ITO to satisfy me the item to be searched is the same as the one belonging to the person of interest". Constable Reddemann made some changes to the ITO, and the search warrant was issued by a provincial court judge on May 23.
- [58] In the ITO, Cst. Reddemann stated that she had reasonable grounds to believe that the offences of break and enter and mischief had been committed. She described the events of April 28, 2019 (the protests at the Excelsior Hog Farm).
- [59] The search warrant authorized a search of the cell phone for the following items:
- a) Any incoming or outgoing text messages associated to the alleged offences between March 1, 2019 and April 29, 2019.
 - b) Any incoming or outgoing phone calls between March 1, 2019 and April 29, 2019.
 - c) Any digital photographs depicting the alleged offences;
 - d) Any video footage depicting the alleged offences; and
 - e) Any messaging application that has incoming or outgoing messages associated to the alleged offences between March 1, 2019 and April 29, 2019.
 - f) Any social forums that include a messaging application or ability to post messages about the alleged offences between March 1, 2019 and April 29, 2019.
 - g) Any calendar applications which display plans associated to the alleged offences between March 1, 2019 and April 29, 2019.

A. Was the Search Warrant "Overbroad"?

- [60] The applicant argues that the search warrant was "overbroad". As noted in my ruling with respect to Voir Dire #7, this is essentially an argument that the warrant failed to limit its search categories and thereby provided the executing officers with excessive discretion, or a sweeping authority to search. I adopt here my discussion of that issue in that ruling.
- [61] The applicant makes three primary arguments in this respect:
- a) there was no need to obtain the search warrant at all, as the police already had abundant evidence regarding the noted offences;

- b) the search warrant authorized searches unconnected with the alleged offences, in that it authorized searches for text messages and other data spanning March 1 to April 29, 2019, whereas only the events of April 28, 2019 were relevant; and
- c) the authority to search for digital photographs or video depicting the alleged offences would necessarily entail a search of other photos or video.

[62] The applicant takes too narrow a view of the purpose of search warrants.

[63] Search warrants can be used not only to obtain "evidence" of criminal activity that can be placed before a court, but also to gather information to assist in the investigation of such activity: *R. v. Vu*, 2011 BCCA 536 [*Vu* (BCCA)], at para. 29 (aff'd: 2013 SCC 60). In *Vu* (BCCA), Frankel J.A. added:

[29] As Mr. Justice Lamer, as he then was, stated in *Descôteaux v. Mierzewski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860 at 891:

[A] search warrant is not only a means of gathering evidence but also an investigative tool. Therefore a determination of what is reasonable in each case will take into account the fact that a search makes it possible not only to seize evidence but also to ascertain that it exists, and even sometimes that the crime was in fact committed and by whom. Seizure makes it possible to preserve the evidence.

[30] In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, 1999 CanLII 680 (SCC), [1999] 1 S.C.R. 743, Mr. Justice Major said this in discussing the search warrant provisions of the Criminal Code:

20 ... The point of the investigative phase is to gather all the relevant evidence in order to allow a responsible and informed decision to be made as to whether charges should be laid.

21 At the investigative stage the authorities are charged with determining the following: What happened? Who did it? Is the conduct criminally culpable behaviour? Search warrants are a staple investigative tool for answering those questions, and the section authorizing their issuance must be interpreted in that light.

22 The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out - that decision is the role of the courts. The function of the police, and other peace officers, is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities. To that end an unnecessary and restrictive interpretation of s. 487(1) defeats its purpose. [citation omitted.]

[31] Also apt is the following from *R. v. Canadian Broadcasting Corp.* (1992), 1992 CanLII 12752 (ON SC), 77 C.C.C. (3d) 341 at 351 (Ont. Ct. (G.D.)), wherein Mr. Justice Moldaver, as he then was, rejected a submission that a justice of the peace must be satisfied, on reasonable grounds, that the items sought would afford evidence of the actual commission of the offence under investigation:

The proper interpretation [of s. 487(1)(b) of the Criminal Code] was set out many years ago by Chief Justice McRuer in the case of *Re Bell Telephone Company of Canada* (1947), 1947 CanLII 374 (ON SC), 89 C.C.C. 196, 4 C.R. 162, [1947] O.W.N. 651 (Ont. H.C.). At p. 198, the Chief Justice said:

As I view it, the object and purpose of these sections is to assist the administration of justice by enabling the constable or other properly designated person to go upon the premises indicated for the purpose of procuring things that will in some degree afford evidence of the commission of an alleged crime. It is not necessary that the thing in itself should be evidence of the crime, but it must be something either taken by itself or in relation to other things, that could be reasonably believed to be evidence of the commission of the crime.

[*Italic emphasis by Moldaver J.*]

See also: *Weins v. The Queen*, 1973 CanLII 1634 (MB QB), [1973] 6 W.W.R. 757 at 763 (Man. Q.B.).

[*Emphasis in original*].

[64] The contention that the police had no need to obtain the search warrant is the same as the argument that the police had no need to seize the cell phone at all. I have already rejected that contention. It is inconsistent with *Vu* (BCCA) and the authorities cited therein by Frankel J.A.

[65] The applicant contends that since only the events of April 28, 2019 were being investigated, there was no basis to allow searches for any information beyond that particular occasion. However, I accept the Crown's contention that evidence of planning and preparation would also be potentially relevant to the charges. The evidence presented to the authorizing judge showed clearly that the protest and large-scale break-in was a highly planned and well-organized event. The ITO also referred to the fact that the Binnendyk family reported that the farm was broken into a few weeks earlier and someone had installed secret cameras.

[66] Ms. Soranno's *mens rea* is relevant to the offences. Breaking and entering with intent to commit an indictable offence is an included offence to breaking and entering and committing an indictable offence, pursuant to s. 660 of the Code. Section 430, the mischief charge, requires wilful conduct, and an absence of a legal justification or excuse or colour of right: s. 429(2).

[67] Accordingly, it was reasonable for the police to seek, and for the authorizing judge to issue, a search warrant seeking information beyond only the events of April 28, 2019.

- [68] It would be impossible for the police to actually limit their search to photographs or video "depicting the alleged offences". Clearly, in conducting the search, they would be required to view photos and video that do not pertain to the alleged offences, in a cursory manner at least. This was necessarily implicit in the search warrant, as with any other search warrant that authorizes a search for specific things pertaining to specific offences.
- [69] To the extent the police are required to examine a file or folder on the computer to reasonably accomplish the authorized search, they are entitled to open files and folders to examine them, at least in a cursory fashion, in order to determine whether they are likely to contain evidence of the type they are seeking: *R. v. Jones*, 2011 ONCA 632 [Jones], at para. 44. The warrant need not specify detailed search protocols: *R. v. Vu*, 2013 SCC 60 [Vu, SCC], at para. 59. The search warrant is not required to specify the manner of the computer search in advance: *Vu*, SCC, at paras. 53, 54.
- [70] However, the police are obliged to carry out their search in a reasonable manner; obtaining a search warrant does not entitle them to scour devices indiscriminately: *Vu*, SCC para. 61. The search must be no more intrusive than reasonably necessary to achieve its objectives: *Vu*, SCC, at para. 22; *R. v. Dadmand*, 2021 BCCA 250 [Dadmand], at para. 56.
- [71] In this case, each item or category specified in the search warrant was limited by a reference to the alleged offences. The time frame was reasonable, in the context of the information known to the police at the time.
- [72] In the circumstances, therefore, the search warrant was not overbroad.

B. Failure to Disclose, or Deception in the ITO

- [73] The applicant also argues that the affiant misled the authorizing judge by failing to disclose that the police were searching for evidence in respect of other offences, namely, the previous break-in at the barn to install the hidden cameras.
- [74] The affiant must set out the facts fully and frankly for the authorizing judge in order that he or she can assess whether these rise to the standard required in the legal test for the authorization. A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers: *R. v. Araujo*, 2000 SCC 65 [Araujo], at paras. 46-47; *R. v. Morelli*, 2010 SCC 8 [Morelli], at paras. 44-45, 131.
- [75] My role as a reviewing justice is limited. In *Vu* (BCCA), Frankel J.A. stated:
- [33] The test to be applied in determining whether a search warrant (or wiretap authorization) was properly issued is well known. It is often referred to as the Garofoli test, as it was first articulated by the Supreme Court of Canada in *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421 at 1452. That test has been affirmed and applied by that Court in a number of cases: *R. v. Bisson*, 1994 CanLII 46 (SCC), [1994] 3 S.C.R. 1097; *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343 at para. 30; *Morelli* at para. 40. In *R. v. Bacon*, 2010 BCCA 135, 285 B.C.A.C. 108 at para. 25, leave to appeal ref'd [2011] 1 S.C.R. v, Mr. Justice Donald adopted the

following as a succinct statement of that test:

The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant. While evidence of fraud, material non-disclosure, or misleading information are all relevant to this enquiry, their sole impact is to determine whether there is a continuing basis to support the warrant: [citations omitted.]

See also: *R. v. Whitaker*, 2008 BCCA 174, 254 B.C.A.C. 254 at para. 43, leave to appeal ref'd [2008] 3 S.C.R. x.

[Emphasis in original].

[76] The test is also discussed in *R. v. Shivratten*, 2017 ONCA 23 (leave to appeal ref'd: [2017] S.C.C.A. No. 93):

[26] On a sub-facial challenge, counsel argues that the material placed before the reviewing judge should result in the excision of parts of the ITO that are shown to be misleading or inaccurate. The warrant's validity must then be determined by reference to what remains in the ITO. On a sub-facial challenge, counsel may also argue that the augmented record placed before the reviewing judge demonstrates that the affiant deliberately, or at least recklessly, misled the issuing judge, rendering the entire ITO unreliable as a basis upon which to issue a warrant: see *Morelli*, at paras. 40-41; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421, at paras. 37-38; *Crevier*, at para. 74; and *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 57.

[77] On the voir dire, Constable Reddemann denied that her purpose in seeking the warrant was to determine if the applicant was involved in placing the hidden cameras at the farm. However the ITO does not fail to mention the facts about the presumed break in.

[78] Constable Reddemann's obligation was to provide full and frank disclosure of material facts regarding the basis for her assertion that she had reasonable grounds to believe that the offences of break and enter and mischief had been committed, and that information stored on the Soranno cell phone would afford evidence of those offences. The ITO should be clear and concise; the affiant need not include every minute detail of the police investigation: *Araujo*, at para. 46.

[79] The applicant does not argue that anything in the ITO itself is false or misleading, or should be excised.

[80] The ITO provided ample, reliable evidence to support Constable Reddemann's assertions.

[81] In my view, even if Constable Reddemann may have thought there was a possibility the cell phone would afford evidence of an earlier break in offence, in the circumstances of this case, she was not obliged to specifically so state in the ITO. It would have barely been relevant, at best. Failing to so state certainly does not rise to the level of trickery or deception.

[82] In summary, I conclude that the search warrant was valid.

IV. Reasonableness of the Manner of the Search

[83] The Court in *Dadmand*, after referring extensively to *Vu*, SCC, summarized as follows:

62 In sum, an accused's s. 8 challenge to a police search and seizure considers whether an authorized search is no more intrusive than is reasonably necessary to achieve its objective. This requires an ex post review of whether the search was reasonable in all the circumstances, including whether it was authorized by the terms of a search warrant.

A. Background

[84] The search warrant issued May 23, 2019 authorized the search of the cell phone. It authorized the search for the "things" set out in the appendix to the search warrant, which I set out previously in these reasons.

[85] The wording of the search warrant followed Form 5, permitted under s. 487(3) of the Code. The wording of s. 487 and of Form 5 do not fit very well in the case of a search of a cell phone. The section authorizes search of a "building, receptacle or place". The search warrant authorized entry to a certain physical location in Abbotsford between 6 a.m. on May 23 and 9 p.m. May 24, 2019, to search for the "things" set out in the appendix.

[86] In *Vu*, SCC, at para. 44, Cromwell J. observed that the phrase "building, receptacle or place" set out in s. 47(1) is not a meaningful limitation with respect to computer searches. Similarly, the time parameters set out in the search warrant were not meaningful in this case, given the manner in which the search was conducted, which I infer would be fairly typical for police searches of cell phones.

[87] Search date parameters are not particularly pertinent in the case of a computer search: *Jones*, at para. 34.

[88] Special Constable Samuel Ward, a digital forensic analyst with the APD, received the search warrant and executed it on the device.

[89] As he explained, he used two tools to do so: (1) GrayKey, a device that extracts all of the raw data from the phone, and which produces a very large "zip" file; and (2) Cellebrite Physical Analyser software, used to process the data obtained utilizing GrayKey.

[90] The Cellebrite software parses the data, and groups it into various categories, such as images, videos, messages, and so on.

- [91] In extracting the data using Cellebrite, the officer has only two available search parameters: (1) beginning and end date; and (2) the category of data. Constable Ward prepares an extraction report which is then turned over to the investigating officers.
- [92] In this case, he set the search parameters at March 1 and April 29, 2019, in keeping with the search warrant parameters.
- [93] Detective J. Mitchell of the APD began reviewing the extraction report prepared by S/Cst. Ward on May 31, 2019.
- [94] The applicant argues that the Crown failed to establish on the voir dire that the extraction from the cell phone occurred during the permitted hours on May 23 and 24, 2019.
- [95] However, in her testimony, Det. Mitchell confirmed her statement in a report she prepared stating that S/Cst. Ward downloaded the video file on May 23, 2019.
- [96] In addition, Detective Mitchell's ITO for a production order in respect of the cell phone of the accused Nicholas Schafer is in evidence, and also confirms that S/Cst. Ward downloaded the contents of Soranno's cell phone and generated an extraction report on May 23, 2019.
- [97] In summary, the police complied with the ill-suited time parameters set out in the search warrant.
- [98] The search warrant specified a date range for items to be searched; the range was between March 1 and April 29, 2019, except in the case of digital photographs and video footage. For those two items, the search warrant specified that the photographs and video footage to be searched for were those "depicting the alleged offences". The alleged offences noted were the break and enter and mischief taking place April 28, 2019.
- [99] On June 4, 2019, while reviewing videos from the download of the applicant's cell phone, Det. Mitchell noted a number of videos preceding April 28, 2019. Several of the videos appeared to show a male person, later identified by Det. Mitchell as the accused Nicholas Schafer, apparently placing cameras inside a pig barn. Several of the videos appeared to be dated early March 2019, but one of the videos appeared to be dated February 10, 2019. On two of the videos, Det. Mitchell noted a female's voice who could be heard speaking to the male. She formed the view that the female was Ms. Soranno, based upon similarity to Ms. Soranno's voice as heard on Ms. Soranno's April 28, 2019 video.
- [100] On June 4 and July 11, 2019, Det. Mitchell sent screenshots from the February and March videos to Raymond Binnendyk, who confirmed that the barn in the screenshot photos belonged to the Excelsior Hog Farm.
- [101] On July 23, 2019, while continuing her search of the Cellebrite extraction report, Det. Mitchell noted that part of a group chat message she was viewing extended to dates prior to March 1, 2019. She stopped reviewing the extraction report, and contacted S/Cst. Ward.

- [102] In his testimony, S/Cst. Ward stated that he discovered there was a flaw in the Cellebrite software in that the extraction report would capture any group chat message sequence where part of the text conversation was within the date parameters specified. Therefore, the group chat conversation included some material prior to March 1.
- [103] Detective Mitchell directed Cst. Reddemann to apply for a new search warrant to cover the period from January 1, 2019 to April 28, 2019. A second search warrant was issued August 13, 2019. This second search warrant authorized search of the extraction report previously prepared by S/Cst. Ward. It also provided for a search in respect of a further offence, a break and enter at the Excelsior Hog Farm on March 22, 2019. Special Constable Ward prepared a further extraction report, manually filtering out any data not within the January 1 to April 29 date range.

B. Analysis - Reasonableness of the Search

- [104] The applicant raises a number of issues in respect of the reasonableness of the search.

1. Time of the Search

- [105] I am satisfied that the search was executed on May 23, 2019, in accordance with the search warrant, in the sense that S/Cst. Ward extracted the raw data using the GrayKey tool on that date, and prepared the first Cellebrite extraction report on the same date. However, as previously noted, in the context of a cell phone search, the precise time parameters for the search is practically immaterial.

2. Overinclusive Extraction Report

- [106] Special Constable Ward extracted Ms. Soranno's contact list from the cell phone, although the search warrant did not authorize a search for contacts.
- [107] The search warrant authorized a search for text messages, phone calls, and messaging application data, in items a, e and f. According to S/Cst. Ward, text and chat messages downloaded would be useless without the contact information, because the identity of the participants would not be revealed. Detective Mitchell was aware that the search warrant did not authorize a search for contact information.
- [108] While it is possible that a search for related contact information could be inferred in connection with the authorized searches for text messages, Detective Mitchell did not take that position, and neither does the Crown on this application.
- [109] I conclude, therefore, that the search of contact information was not reasonable, was unauthorized, and a breach of s. 8.

3. Photographs and Video Preceding April 28

- [110] The applicant argues that a search of any photographs or video other than those that actually depict the events of April 28, 2019 was unauthorized.

[111] As Dadmand emphasizes (para. 56) the manner of the search must be reasonable, and no more intrusive than reasonably necessary to achieve its objectives. However, as noted previously, a search warrant is not only a means of gathering evidence, but also an investigative tool. In that context, I do not construe the words "depicting the alleged offences" as narrowly as the applicant suggests. As previously noted, the offences included not only the actus reus, but also the possible mens rea aspects such as planning and coordination. In my view, therefore, it was not unreasonable for the police to search for photographs and video beyond the specific events of April 28, 2019.

[112] However, Detective Mitchell apparently imposed on herself a date restriction of March 1 to April 29, 2019, in relation to photographs and video. This restriction is not specified in the search warrant, but is consistent with the other date parameters set out in the search warrant.

[113] While reviewing the videos, Det. Mitchell inadvertently looked at a video apparently recorded February 10, 2019. Subjectively, she formed the view that this video was outside the scope of the search warrant. Arguably, then, this could be considered a breach of s. 8. If viewing the video was a breach, then creating screenshots and sending them to Raymond Binnendyk in order to identify their location exacerbated the breach.

4. Chat Messages Outside the Date Range Specified

[114] The date range for chat or text messages was specified in the search warrant. Therefore, Det. Mitchell recognized that chat messages outside the range should not be viewed. When she inadvertently found some chat messages outside the range, she directed Cst. Reddemann to apply for a further search warrant, which expanded the range.

5. Second Extraction Report

[115] The applicant argues that the second warrant did not authorize the creation of a new extraction report. It only authorized further searches of the existing extraction report prepared by S/Cst. Ward. As noted, it also authorized a search of the extraction report in respect of a further offence, a break and enter at the farm on March 22, 2019.

[116] The evidence is vague, but it appears Det. Mitchell continued to review the first extraction report, even before receiving the second search warrant. Detective Mitchell agreed that once she became aware that there were matters in the extraction report that were outside the scope of the warrant (i.e., beyond the date range), she should have stopped reviewing the extraction report, and she ought not to have made use of any such information. What is not clear is the extent to which Det. Mitchell discovered new information after realizing that some text messages were beyond the date range, on July 23. The second search warrant was issued August 13, 2019, and authorized a search of other text messages.

V. Should The Evidence Be Excluded?

[117] In summary, I have concluded:

1. the search for Ms. Soranno's contact list and utilization of the contact list was a breach of s. 8;
2. viewing the February videos (pre-March 1) was arguably a breach of s. 8; and
3. examining chat messages prior to March 1 was a breach of s. 8.

[118] R. v. Grant, 2009 SCC 32, established that there are three lines of inquiry that must be considered in assessing whether evidence should be excluded under s. 24(2) of the Charter.

[119] The analysis was reviewed recently in R. v. Tim, 2022 SCC 12 [Tim]. The three areas to be considered are (Tim, para. 74):

- a) the seriousness of the Charter infringing state conduct;
- b) the impact on the appellant's Charter protected interests; and
- c) society's interest in the adjudication of the case on the merits.

[120] The final step in the s. 24(2) analysis involves balancing the factors under the three lines of inquiry: Tim, at para. 98.

A. The Seriousness of The Charter Infringing State Conduct

[121] In Tim, the court stated as follows:

[82] The first line of inquiry under s. 24(2) considers the seriousness of the Charter-infringing state conduct. It asks whether the police engaged in misconduct from which the court should dissociate itself (see Grant, at para. 72). The concern of this inquiry is "not to punish the police", but rather to "preserve public confidence in the rule of law and its processes" (Grant, at para. 73). The court must situate the Charter-infringing conduct on a "spectrum" or a "scale of culpability" (Grant, at para. 74; Paterson, at para. 43; Le, at para. 143). At the more serious end of the culpability scale are wilful or reckless disregard of Charter rights, a systemic pattern of Charter-infringing conduct, or a major departure from Charter standards. Courts should dissociate themselves from such conduct because it risks bringing the administration of justice into disrepute. At the less serious end of the culpability scale are Charter breaches that are inadvertent, technical, or minor, or which reflect an understandable mistake. Such circumstances minimally undermine public confidence in the rule of law, and thus dissociation is much less of a concern (see Grant, at para. 74; Le, at para. 143; R. v. Harrison, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22).

[122] I view these breaches as being at the lower end of the scale. The contact list information is connected to the text or chat messages, the search for which was expressly authorized. According to S/Cst. Ward, without the contacts, the message would have displayed telephone numbers, which also would have been personal identifiers for the participants.

[123] Viewing the February 10th video was only arguably outside the scope of the terms of the search warrant.

- [124] Inclusion of some of the chat messages from outside the date range from prior to March 1 occurred as a result of a technical glitch in the software. There was nothing deliberate about including those messages in the extraction reports. When Det. Mitchell noted that some of the messages were beyond the range specified, she took steps to rectify the matter, thus making a reasonable effort to respect the applicant's Charter rights.
- [125] The creation of a second extraction report appears to have been as a result of a misunderstanding by Det. Mitchell and S/Cst. Ward about what was in the second search warrant. The second extraction report was prepared in a good faith effort to comply with the new search warrant. Creation of the second report appears to have had no practical consequences.
- [126] There is no evidence of flagrant disregard of Charter rights, or of systemic problems in this case. The police sought and obtained a reasonably restricted search warrant, and were generally careful to respect the applicant's Charter rights. When it became clear that some of the chat messages were outside the date range, a further search warrant was obtained.

B. Impact on The Appellant's Charter Protected Interests

[127] In *Tim*, the Court described this part of the analysis as follows:

- [90] The second line of inquiry under s. 24(2) considers the impact of the breach on the accused's Charter-protected interests. It asks whether the breach "actually undermined the interests protected by the right infringed" (Grant, at para. 76; Le, at para. 151). This involves identifying the interests protected by the relevant Charter rights and evaluating how seriously the breaches affected those interests (see Grant, at para. 77). As with the first Grant line of inquiry, the court must situate the impact on the accused's Charter-protected interests on a spectrum, ranging from impacts that are fleeting, technical, transient, or trivial, to those that are profoundly intrusive or that seriously compromise the interests underlying the rights infringed. The greater the impact on Charter-protected interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. This is because "admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute" (Grant, at para. 76; see also Le, at para. 151; Harrison, at para. 28).
- [128] I do not characterize the breaches as profoundly intrusive or seriously undermining the applicant's Charter-protected interests. In substance, the police went somewhat beyond the scope of the search that was Charter compliant. This is not a case where the evidence obtained was only discoverable through a Charter breach.
- [129] The evidence in question consists largely of Ms. Soranno's own chronicling of her activities. As she acknowledged in her evidence on the voir dire, her purpose in chronicling the events of April 28, 2019 was to publicly release the recording in order to influence public opinion. She acknowledged that the activities of the protestors on that day were criminal in

nature, but she maintained that they were morally justified. The other alleged offences are closely related to the events of April 28. The events of April 28 were the culmination of the previous events.

C. Society's Interest in The Adjudication of The Case on The Merits

[130] In *Tim*, the Court states:

[96] The third line of inquiry considers factors such as the reliability of the impugned evidence and its importance to the Crown's case. It asks "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion" (Grant, at para. 79). Reliable evidence critical to the Crown's case will generally pull toward inclusion (see Grant, at paras. 80-81; Harrison, at paras. 33-34).

[131] As is often the case, this line of inquiry favours admission of the evidence. Here, the evidence is reliable, and critical to the Crown's case in respect of several of the counts.

[132] Although the point received very little attention on the voir dire, on the basis of Det. Mitchell's report to Crown counsel, it appears that the videos on Ms. Soranno's cell phone in February and March, and therefore preceding the April 28 date, are important and likely critical to the Crown's ability to prove the offences set out in Counts 1 to 3 on the indictment (the break-ins in mischief charges relating to February and March 2019). The videos may also be critical to the Crown's case in respect of Counts 6 and 7 (break-in and mischief charges relating to two other farms).

D. Final Balancing

[133] In *Tim*, the Court explained:

[98] The final step in the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term reputation of the administration of justice. Such balancing involves a qualitative exercise, one that is not capable of mathematical precision (see Grant, at paras. 86 and 140; Harrison, at para. 36). Each factor must be assessed and weighed in the balance, focussing on the long-term integrity of, and public confidence in, the administration of justice (see Grant, at para. 68). The balancing is prospective: it aims to ensure that evidence obtained through a Charter breach "does not do further damage to the reputation of the justice system" (Grant, at para. 69). The balancing is also societal: the goal is not to punish the police, but rather to address systemic concerns by analyzing "the broad impact of admission of the evidence on the long-term reputation of the justice system" (Grant, at para. 70; see also Le, at para. 139).

[134] As I have said, the Charter infringing state conduct is at the lower end of the scale, as is the impact on the applicant's Charter-protected interests, while the evidence is reliable and critical to the Crown's case. In my view, admission of the evidence would not bring the administration of justice into disrepute, while its exclusion would be more likely to do so.

VI. Conclusion

[135] The application to exclude evidence is dismissed.

"Verhoeven J."

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