
CANADA / JUDGMENT

R. v. Sundman

2018 BCSC 2039

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Supreme Court of British Columbia

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2018 BCSC 2039 R. v. Sundman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sundman,

2018 BCSC 2039

Date: 20181119

Docket: 42212

Registry: Prince George

Regina

v.

Darren Caley Daniel Sundman, Kurtis Riley Sundman and

Sebastian Blake Martin also known as Sebastian Blake Thomas

Before: The Honourable Mr. Justice Williams

Voir Dire Ruling: Darren Sundman Search

Counsel for the Crown:

J. Temple

A. Norlund

Counsel for the Accused,

Darren C. D. Sundman:

J. Gustafson

Counsel for the Accused,

Kurtis R. Sundman:

B. Smith

Counsel for the Accused,

Sebastian B. Martin:

J. Heller

Place and Date of Trial/Hearing:

Prince George, B.C.

March 20-24, 27-31, 2017;

April 3-7, 10-12, 18-21, 24-27, 2017;

and May 15-19, 2017

Place and Date of Judgment:

Prince George, B.C.

November 19, 2018

- [1] The applicant Darren Sundman is charged, together with Kurtis Sundman and Sebastian Martin, with having committed the first-degree murder of Jordan McLeod at or near Prince George on January 16, 2015.
- [2] In this application, Mr. Sundman seeks an order excluding from evidence a number of items which were found during searches of his residence in Vanderhoof, BC and his vehicle. He challenges the validity of search warrants that were used to effect those searches and says as well that the police seized a number of items that were beyond the scope of the warrant's authorization. Additionally, he takes issue with the process whereby the justice issued the warrant.

Background

- [3] The investigation into this matter began in the late evening of January 16, 2015. Responding to a report of shots fired, police attended at a location on Upper Fraser Road near Prince George where they discovered evidence of bleeding, multiple spent firearm cartridges, tire impressions and footprints. Although no victim was found at the scene, investigators were reasonably sure that serious foul play had occurred.

- [4] As the matter progressed, the police came to believe that the events of January 16 were connected to the reported disappearance of a Prince George man, Jordan McLeod. As investigative efforts continued, it became the theory of the police that Mr. McLeod had been murdered at the scene on Upper Fraser Road.
- [5] On January 17, 2015, police in Quesnel became involved in an apparently unrelated investigation of an attempted theft of a quad recreational vehicle, following which shots were fired and a motor vehicle pursuit ensued. In the course of that, three persons were arrested: Darren Sundman, Kurtis Sundman and Staci Stevenson. As that investigation moved forward, police made certain observations. Included among those were that Darren Sundman had in his pocket a spring which resembled a recoil spring from a handgun. As well, the shoes of Staci Stevenson and Kurtis Sundman were believed to have relevance to the investigation of a suspected homicide. Additionally, a stolen pickup truck was seized in relation to the Quesnel events.
- [6] While she was in custody, Staci Stevenson made a number of statements to police investigators. She was released within a fairly short time, but the Sundmans remained in custody in Quesnel.
- [7] In the ensuing investigation, police conducted three searches of a house trailer located on Grants Frontage Road in Quesnel; those were done on January 21st, January 23rd, and February 12th. That trailer was the residence of Darren Sundman. As well, police conducted two searches of a Chrysler automobile that was located in Vanderhoof; those took place January 28th and 29th. The owner of that motor vehicle was Darren Sundman.
- [8] All of those searches were conducted under the authority of search warrants. The police obtained those warrants after filing Informations to Obtain a Search warrant ("ITOs"). The successive ITOs are similar in that the main body is repeated in the subsequent iterations, but those subsequent iterations contain updated information.

The Position of the Applicant

- [9] Mr. Sundman says that certain portions of the ITOs that were filed are misleading and should be excised, and says as well that certain material facts were left out of the ITO.
- [10] He says further that the police exceeded the scope of the search warrants that were issued on January 21 and 23, 2015. He says that on those occasions, items were seized that were not listed in the warrant, and that seizure of those items was not otherwise authorized.
- [11] Finally, with respect to the warrant authorizing the search of January 21, 2015, Mr. Sundman submits that the issuing judicial officer participated improperly in the process of issuing the warrant by altering the scope of the warrant from what was requested by the police.

The Position of the Crown

[12] The Crown submits that there was no impropriety in the manner in which the search warrants were executed. Furthermore, the Crown says that the police acted in accordance with the authority of the warrants when conducting their searches. Finally, the Crown submits that there was no impropriety in the manner in which the issuing judicial officer processed the ITO and issued the warrant.

Discussion

1. Misleading/Overstated Material

[13] Mr. Sundman points to four separate aspects of the ITO where he says the affiant has made assertions that are either misleading or overstated. I will deal with those individually.

Issue 1: Ammunition

[14] The ITO made reference to the police having found four spent Blazer .40 calibre shell casings and one expended PDX1 shotgun shell at the scene on Upper Fraser Road. Reference is also made to the police having arrested Darren Sundman in Vanderhoof on December 12, 2014, and at that time locating a partial box of .40 calibre Blazer ammunition and three PDX1 shotgun shells. There is also reference to a search conducted of Mr. Sundman's residence on Grants Frontage Road in Vanderhoof on December 12, 2014, at which time the police located a box of Blazer .40 calibre ammunition and three PDX1 shotgun rounds. Reference was also made to ammunition, no further detail provided, being located in the Silverado vehicle seized in Quesnel following the arrest of the Sundman brothers and Stevenson. Finally, there is reference to a search by Vanderhoof RCMP in December 2014, and specific reference to ammunition, no further detail provided, being found at the residence on Grants Frontage Road.

[15] Mr. Sundman says that it is clear, both implicitly and explicitly, that the police urged a conclusion on the justice that the ammunition found at the crime scene was similar to that associated to Mr. Sundman from other occasions.

[16] In the course of the voir dire, police witnesses were questioned with respect to their knowledge of the availability of these two types of ammunition in the general market. The evidence established that officers had subsequently spoken with an employee of a local gun store and determined that Blazer ammunition was a popular brand, available and sold in that store. The evidence also established that PDX1 shotgun shells, although not sold in that location, were commercially available on the civilian gun market. Mr. Sundman observes that no further information was included in the ITO with respect to the availability or prevalence of either of these types of ammunition.

[17] Mr. Sundman says that the failure to disclose the prevalence of these two different types of ammunition lends artificial significance to the similarity between ammunition found at the scene and that previously found on Mr. Sundman and in his residence. He submits that the

matter of the availability of these types of ammunition should have been included in the ITO and that its absence represents a material nondisclosure. In the circumstances, Mr. Sundman says that the issuing judicial authority was left with the distorted view of the similarity of the ammunition found at the scene to that which had been previously found on Mr. Sundman or at his residence.

Issue 2: Recoil Spring

- [18] At the time of Mr. Sundman's arrest in Quesnel, police found a spring in his jacket pocket. The item was located by Constable Takhar. On the voir dire, Constable Takhar testified that he is a small arms aficionado, that he personally owned a .40 calibre Glock handgun and that it was his belief that the recoil spring which he found appeared similar to that used in the Glock pistol. That opinion was based on his personal experience and not any training or special expertise. The officer agreed that the spring was not labelled or marked to indicate conclusively that it was a Glock product or the calibre of the weapon to which was associated.
- [19] Mr. Sundman submits that the most that could have been fairly stated about the spring is that it appeared consistent with a Glock recoil spring.
- [20] In the ITO, the affiant stated that "a recoil spring for a 40 calibre Glock handgun was located in the pocket of Darren Sundman when he was arrested."
- [21] In Mr. Sundman's submission, there are two aspects to the issue with respect to the spring. The first is that the ITO overstates the value of Constable Takhar's opinion when he states that the item resembled a Glock recoil spring. Mr. Sundman says that, given the fact this opinion was based on personal experience without any special training or expertise, it is an assertion of dubious value. Furthermore, Mr. Sundman says that the affiant exacerbated the misrepresentation by stating that the spring was in fact a recoil spring for a .40 calibre Glock handgun.

Issue 3: Score Sheets

- [22] In the ITO, the affiant states his belief that a search of Mr. Sundman's residence will result in the location of score sheets and drug trafficking documentation that will establish the extent of the drug dealing relationship between Darren Sundman and Jordan McLeod. The affiant articulated the basis for his belief by saying:

Stevenson stated to Constable Rantala that Sundman and McLeod were dealing drugs together. From my experience as a drug investigator, I know that most drug dealers maintain some type of written documentation of their drug trafficking and who they deal with.

- [23] Mr. Sundman's objections to this component of the ITO are twofold. Firstly, he says the affiant's conclusion that score sheets were likely to be found at the trailer is misleading, as it is based entirely on Ms. Stevenson's statement that Darren Sundman and Jordan McLeod

were "in business together" dealing drugs, coupled with the affiant's personal experience as a drug investigator. Mr. Sundman says that Ms. Stevenson provided little information about the specifics of the relationship between Mr. Sundman and the deceased and did not make specific mention of score sheets or other documentation. Accordingly, the basis for the affiant's conclusion that score sheets would probably be found is based on his understanding of the general propensities of drug dealers.

- [24] The affiant was cross-examined on the voir dire. He conceded that there is no common format for recording information or common practice for what type of information would be included on score sheets, and he agreed that it was rare that individuals would be identified by name.
- [25] In the result, Mr. Sundman says that the affiant's claim that score sheets more likely provide evidence of the drug trafficking relationship between Darren Sundman and Jordan McLeod is a significant overstatement of the facts. He says it would in fact have been unlikely to find score sheets that identified specific individuals or the nature of the relationship.

Issue 4: Samsung Galaxy Phone

- [26] In the ITO, the affiant listed a number of items that he stated he believed would afford evidence of the murder of Jordan McLeod and that the items would be located in Mr. Sundman's residence. Among those he listed the "Samsung Galaxy cellular phone of Staci Stevenson". The affiant made reference to his belief that the contents of the phone (to be searched by way of a forensic examination) would afford details of communication between Ms. Stevenson and Jordan McLeod to establish the extent of their relationship; the phone calls and text messages would help establish the timeline associated to Ms. Stevenson's meeting with Jordan MacLeod; and phone calls and text messages between Staci Stevenson, Darren Sundman and Kurtis Sundman would help establish the extent of their relationship. The ITO indicated that Ms. Stevenson had last communicated with Mr. McLeod on her Samsung Galaxy cell phone on January 8, 2015 and that the phone was located inside the trailer.
- [27] Mr. Sundman submits that both of those points are misleading. He points to the testimony of Constable Rantala on the voir dire; he is the officer who had interviewed Ms. Stevenson. He testified that, with respect to the specific type of cell phone, Ms. Stevenson was uncertain as to what type of cellular phone she was using at the time. The suggestion that the phone was a Samsung Galaxy was put to Ms. Stevenson by the officer in the interview. It appears that she was struggling to remember the specific phone that she used, but she seemed to agree with the officer's suggestion.
- [28] With respect to the location of the telephone, in her interview with Constable Rantala, Ms. Stevenson was somewhat unsure as to the location of the telephone. She struggled to recall where she had left it and stated that it "might be" at her residence (that is, the residence she shared with Darren Sundman on Grants Frontage Road).

- [29] In Mr. Sundman's submission, the information as summarized in the ITO gives the impression that Ms. Stevenson had clearly stated she had used a Samsung Galaxy phone and that it was in the trailer. In fact, in the submission of Mr. Sundman, Ms. Stevenson was not sure what type of phone she had used or where she had left it.

Analysis and Conclusion

- [30] As indicated earlier, there were a number of ITOs prepared by the police, seeking further search warrants as the investigation progressed. The points that Mr. Sundman raises, and which I have detailed here, concern components of the first ITO, and which appeared in the subsequent iterations.
- [31] A threshold issue on an application of this nature is whether or not the applicant has standing. In this case, there is no question that Mr. Sundman has the appropriate standing to maintain this application.
- [32] An important issue is the standard of review. There is in fact a substantial body of jurisprudence which addresses the jurisdiction of the reviewing court. The test was stated succinctly by Sopinka J. in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 where he said this at 1452:

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

- [33] To be clear, the review is not concerned with whether this Court, the reviewing court, would have issued the authorization; a *Garofoli* application is not a hearing *de novo*. It is only where the reviewing court determines that there was no basis upon which the authorizing judge could be satisfied that the preconditions for the granting of the authorization existed that the reviewing court will find s. 8 of 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 has been breached.
- [34] The reviewing judge is to show deference to the issuing judge at the outset and throughout its review.
- [35] The obligations imposed upon an affiant in an application for a search warrant are not in dispute. The affiant is obliged to make full and frank disclosure of material facts. See *R. v. Ling*, 2009 BCCA 70; and *R. v. Araujo*, 2000 SCC 65.
- [36] As stated in *Araujo* at para. 58, in looking for evidence that might reasonably be believed on the basis of which the authorization could have issued, the reviewing court must exclude erroneous information. However, if it was erroneous despite good faith on the part of the police, then amplification -- that is, additional evidence presented at the *voir dire* regarding

these errors -- may correct this information. As the Court goes on to state, while amplification cannot be used to turn the warrant authorization into a sham, it may appropriately be used in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made some minor, technical error in the drafting of their affidavit material: para. 59.

- [37] Dealing with the specific issues that have been raised by Mr. Sundman, my conclusions are as follows.
- [38] As regards the ITO contents respecting ammunition, I am not satisfied that there was any material failure to disclose by the affiant. Firstly, I am not persuaded that there was a duty upon the police to investigate the issue of the availability of those ammunition types in the general market. Furthermore, on a fair reading of the ITO, I do not consider that the affiant has presented the material concerning the ammunition in a way that seems to suggest that it was especially rare and difficult to obtain, and therefore supporting an inference that greater significance should be attached. The fact is, the police made reference to evidence from the crime scene and as earlier found associated to Mr. Sundman, and the similarity was self-evident.
- [39] The ITO at para. 48.9 states that "a recoil spring for a 40 calibre Glock handgun was located in the pocket of Darren Sundman when he was arrested." The basis for that statement is found at para. 34.7, where the affiant states as follows:

Following the arrest of D. Sundman, Constable Takhar located a recoil spring which appeared to be for a Glock pistol in the single breast pocket of the black Athletic Works jacket worn by D. Sundman. Constable Takhar seized this recoil spring.

- [40] I find that the statement contained in the conclusion section of the ITO overstates the finding. As regards the significance of the fact that Constable Takhar's belief was not valid because he was not a true scientific expert, I am not prepared to conclude that was a significant deficiency nor was it any attempt to mislead the justice.
- [41] In the circumstances, I proceed on the basis that amplification of this information is appropriate, given the minor, technical nature of the statement not attributing Constable Takhar's conclusion regarding the Glock spring to his own personal knowledge. Upon amplification, revising this statement to reflect that the conclusion was made based on the unverified opinion of Constable Takhar, the evidence is of less certainty but of some reasonable informative value. In any event, even this component of the ITO is struck, it has no material impact on the soundness of the ITO as a whole.
- [42] With respect to the contents of the ITO tendered to support the affiant's stated belief that score sheets and drug trafficking documentation will be located in Mr. Sundman's residence and will establish the extent of the drug dealing relationship between Darren Sundman and Jordan McLeod, I accept that there was an element of speculation involved, but it was based upon a reasonable premise, namely that there was a drug dealing relationship between the

two men and the fact that police drug investigators frequently locate score sheets or similar documentation which may afford evidence of specific transactions.

- [43] With respect to the affiant's statement that he believes Staci Stevenson's Samsung Galaxy phone will be located in the Sundman residence (also, I note, the residence of Staci Stevenson), the basis for that is found at para. 38.19, where the affiant adverts to information provided by Stevenson to Constable Rantala. Specifically, at para. 38.19, the affiant and says that Stevenson communicated with McLeod on her old phone - a Samsung Galaxy which is at her place in Vanderhoof.
- [44] It is apparent that the statement attributed to Stevenson was less than perfectly clear and certain. In fact, I find that Constable Rantala asked Staci Stevenson if her Samsung telephone was at the Sundman residence and she indicated that it might be.
- [45] On that basis, for the purpose of this review, I will excise that assertion of fact from the ITO.
- [46] In the result, and with those considerations taken into account, I have reviewed the ITO carefully. It is my view that, notwithstanding the deletions I have indicated, that the contents of the ITO provide a solid basis upon which the authorizing justice could be satisfied that it was appropriate to grant the search warrant.
- [47] Accordingly, I find no basis to conclude that there has been a breach of the s. 8 rights of Mr. Sundman with respect to the issuance of the warrant.

2. Judicial Officer's Involvement in the Preparation of the Warrant

- [48] In this case, the affiant Constable Pelletier prepared his ITO and at approximately 5:15 a.m. on January 21st, 2015 transmitted it electronically to a judicial centre located in Vancouver. The material as submitted consisted of a draft of the search warrant which was being sought, together with an ITO of some 20 pages length and some other related material, not relevant to the present discussion.
- [49] Based upon the evidence adduced in the voir dire, I conclude that the justice, having reviewed the material that had been submitted, called Cst. Pelletier by phone and explained to him that the material was being returned to him and that a warrant had been issued. The justice explained the cross-outs that he had made to the material and also advised him that the request for photos, etc., as sought in para. 49.1.5 was not being authorized. Examination of the material, exhibit 31 on the voir dire, shows that the justice made some handwritten notations on the ITO, and then made certain changes on the search warrant draft that had been submitted.
- [50] Essentially, it appears the justice simplified or streamlined the warrant somewhat. With respect to the items which the police were permitted to search for, the justice appears to have copied one page of the ITO which set out the list of the items that the affiant sought to have included in the warrant. The justice renumbered the contents of the list and struck out one element that the affiant had sought to be included. Additionally, whereas the original

document particularized the type of ammunition to be sought, the justice crossed out the portion of the document that limited or made specific what was to be sought and left it so that it permitted the search for ammunition, without qualification. That list then became the list of items for which search and seizure authority was granted.

- [51] Significantly, in the ITO introductory page, and in the paragraph setting out the specific items for which a warrant was sought, para. 49, the affiant had sought authority to search for certain items which were not included on the warrant as issued - computer devices, clothing and surveillance equipment. These were the last three items listed. When the justice copied and noted up that page from the ITO, and then attached it to the search warrant to indicate the items to be searched for, these items were not on the list. Accordingly, while the precise circumstances of the non-inclusion are not clear, the fact is that the warrant did not authorize a search for these items.
- [52] In the matter at hand, Mr. Sundman has characterized the process that occurred as "the issuing judicial officer had some communication with the affiant, and following that redrafted the warrant by crossing out the items listed by police and replacing that list with a different list of items, taken from the ITO and rewritten by the JJP." The essential submission of Mr. Sundman is that there was an impermissible collaboration between the affiant and the issuing justice.
- [53] As Mr. Sundman concedes, there are two divergent lines of authority with respect to this issue in the Canadian jurisprudence. In *R. v. Gray*, [1993] M.J. No. 248, the Manitoba Court of Appeal addressed a practice which had apparently evolved in that jurisdiction, whereby the issuing judicial officer would review a draft ITO with the requesting police officers. The justice would then recommend any necessary changes and would at times aid in preparing the final version of the ITO to be submitted.
- [54] The court found that practice undermined the impartiality of the issuing judicial officer. In a subsequent Manitoba Court of Appeal decision, *R. v. Gordon*, [1999] M.J. No. 421, the court once more expressed a restrictive view of any interaction between the police and the issuing judicial authority. In that decision, the court held that there would be no need for any communication between the police and the judicial officer.
- [55] The British Columbia Court of Appeal has endorsed a different approach. In *R. v. Clark*, 2015 BCCA 488 at paras. 48-49 the Court declined to follow the Manitoba approach and expressed the view that it is permissible for a judicial justice to provide some advice and/or direction to an officer applying for a warrant.
- [56] Thus it is clear that our Court of Appeal has rejected the strict view found in the Manitoba authorities prohibiting any interaction between the police and the justice. At the same time, our Court accepted that there is a sensible limitation to be imposed on such interactions.

[57] Mr. Sundman concedes that the British Columbia authority is applicable in the facts of this matter. He submits that, applying Clark, "there must be limits to interaction between the police and the judicial officer" and "the issuing judicial officer must remain in a detached and impartial role." He says the principle is violated when the issuing judicial officer becomes involved in the rewriting of the warrant or assists the police in achieving their desired ends. In the matter at bar, he says the issuing justice appears to have rewritten the items by altering a portion of the ITO and that the rewritten warrant expands the scope of the warrant by delimiting the search for ammunition.

[58] In my respectful view, there was no objectionable interaction between the police and the justice. It seems to me quite plain and sensible that the justice is entitled to make some changes to the warrant as he or she sees fit, based upon the material contained in the ITO. In this case, the justice evidently saw fit to do that.

[59] In the result, I am unable to accept Mr. Sundman's contention that the issuing justice overstepped his role as an impartial arbiter and became an assistant to the police.

3. Seizure Beyond the Scope of the Warrant

[60] Mr. Sundman's first contention is that, in executing the search on January 21, 2015 the police seized items that were not specified in the warrant.

[61] The warrant as issued authorized the police to search for and seize the following items:

1. The Samsung Galaxy Phone of Staci Stevenson and a forensic examination of its contents indicating:

- A. Communication between Staci Stevenson and Jordan McLeod that establish the extent of their relationship;

- B. Phone calls and text messages that help to establish the timeline associated to Staci Stevenson's meeting with Jordan McLeod;

- C. Phone calls and text messages between Staci Stevenson, Darren Sundman and Kurtis Sundman that help to establish the extent of their relationship;

- D. Photographs, videos, and other data that establish the relationship between Staci Stevenson and Jordan McLeod.

2. Score sheets and drug trafficking documentation that will establish the extent of the drug dealing relationship between Darren Sundman and Jordan McLeod;

3. Documentation that establishes the ownership and occupancy of 102 Grants Frontage Road, Vanderhoof;

4. Ammunition; and

5. Photo albums and pictures that establish the relationship between Jordan McLeod, Staci Stevenson, Darren Sundman, and Kurtis Sundman.

[62] In fact, the police located and seized a number of items as described in the warrant. Additionally, other items were seized, items which Mr. Sundman says were not within the scope of the warrant:

1. Money orders and travelers cheques;
2. Miscellaneous papers;
3. Clark's bag (a single round of 9mm ammunition was found in this bag);
4. Hitachi 120 GB; and Seagate 80 GB;
5. Seagate 500 GB external drive;
6. Alcatel Cellphone;
7. Sony Xperia Cellphone;
8. Motorola phone;
9. iPod Nano;
10. Samsung flip phone; and
11. Motorola Nexus phone.

[63] In Mr. Sundman's submission, the police substantially exceeded the scope of what had been authorized by the justice. Specifically, although the warrant was limited to a single phone, the police seized five cell phones (none of them a Galaxy) and 3 computer type items. In the submission of Mr. Sundman, that seizure was unreasonable in the circumstances.

[64] There is a second dimension to Mr. Sundman's complaint: when the police executed the warrant and conducted their search on January 21, 2015 they did not find nor seize a Samsung telephone. On January 23, they had obtained a second warrant, authorizing them to search for hair, blood and other bodily substances, clothing items, firearms and a bottle of chlorine. While conducting that search, police located a white Samsung phone and seized it. In Mr. Sundman's submission, this phone falls outside the description of the items that were listed in the warrant that was being executed that day and accordingly, he says that the seizure of the phone was unauthorized and unreasonable in the circumstances.

[65] Strictly construed, some of the items seized by the police when they executed the warrant were not specifically set out in the warrant.

[66] As regards the first three items on the above list, that is, miscellaneous papers, money orders, travellers cheques and a bag in which was contained ammunition, I conclude that those fall within the ambit of the warrant.

- [67] More problematic are the seizures of computing devices and cellphones found at the Sundman residence. None of those can be properly characterized as being authorized by the search.
- [68] The Crown contends that the seizure of those items was justified on the basis of s. 489 of the Criminal Code, R.S.C., 1985, c. C-46. Mr. Sundman disputes that basis of seizure, arguing that there was no evidence tendered on the voir dire that the seizing police officers had the requisite belief on reasonable grounds that the items they seized had been used in the commission of an offence or would afford evidence in respect of an offence.
- [69] Mr. Sundman also points out that it is particularly troubling that the police saw fit to seize the computer type devices (the "Computer Devices"), when in fact the request for a search warrant to authorize such seizure had been denied.
- [70] I conclude that it is appropriate to find there was an over-seizure in regard to the Computer Devices given that the warrant provided no authority to take these items. Section 489 does not apply, as it is my view that the officers did not have reasonable grounds to believe that the Computer Devices had been obtained by the commission of an offence, had been used in the commission or an offence, or would afford evidence in respect of an offence. Accordingly, the seizure constitutes a breach of the s. 8 rights of Mr. Sundman and it is therefore necessary to consider the admissibility of the evidence in accordance with the analysis under s. 24(2).
- [71] Before doing that, I will deal with one other dimension of Mr. Sundman's submission under this head, namely, the fact that the police did not find Ms. Stevenson's Samsung Galaxy telephone when they searched on January 21, but, when they were back in the premises pursuant to another warrant two days later, they did encounter the telephone and seized it at that time. Mr. Sundman argues that the seizing of the Samsung Galaxy pursuant to the second search also constituted a breach of his s. 8 rights, as a search for this item was not authorized by the second search warrant. In my view, s. 489 applies to allow the lawful seizure of the Samsung Galaxy on the grounds that it would afford evidence in respect of an offence as outlined in detail in the first warrant. Accordingly, I find there is no s. 8 breach in regard to the seizure of the Samsung Galaxy.
- [72] In the event I am wrong on the application of s. 489, I am prepared to accept that the seizing of this phone during the second warrant was also a violation of Mr. Sundman's s. 8 rights. In my view, such an approach prevents the potential mischief that might be occasioned by holding that a search warrant remains active for an indefinite amount of time after the search pursuant to that warrant is executed. If the police wished to search for the phone as part of the second warrant, authorization to that effect could have been sought. I will deal with the matter of the Samsung Galaxy seizure under s. 24(2), along with the matter of the seizure of the Computer Devices.
- [73] Section 24(2) of the Charter provides as follows:

- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
- [74] The analytical framework which has been prescribed to determine whether or not evidence should be excluded or admitted has been authoritatively prescribed by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32. The court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:
- (1) the seriousness of the Charter-infringing state conduct;
 - (2) the impact of the breach on the Charter-protected interests of the accused; and
 - (3) society's interest in the adjudication of the case on its merits.
- [75] Regarding the first factor, both the Computer Devices and the Samsung Galaxy were seized during an otherwise valid search pursuant to a judicially -authorized warrant. Based on the evidence on the voir dire, I find it most likely that the searching officers somehow believed that their authority to seize extended to the additional phones and the Computer Devices, although those items were not listed on the warrant. On that basis, I conclude that they were mistaken, although I am not prepared to find that they acted in bad faith. One point that I find relevant is that, while the ITO sought authority to search for computer devices, and the issuing justice did not see fit to include that, there is no reason to find that any of the officers who were executing the warrant knew that. From their perspective, the warrant was silent about computing devices. While that does not excuse the seizure of the items, it does lessen the seriousness of the Charter-infringing state conduct.
- [76] Regarding the Samsung Galaxy and the second search, it was the subject of the previous search warrant. The most plausible explanation was that its seizure was a good faith error based on the honest, reasonable, but mistaken belief that the phone could be seized either pursuant to the first warrant or that it had been identified as an offence related item.
- [77] Most logically, it seems to me that these seizures were a matter of inadvertence in a fast-moving investigation of a serious criminal offence. While inadvertence is distinct from good faith, it is a factor that mitigates the seriousness of a Charter violation: *R. v. Caron*, 2011 BCCA 56 at para. 38. Regardless of how the seizure is characterized, it was, in my view, in the moderate range of the seriousness spectrum. The seizure was neither deliberately or recklessly rights-infringing. As stated in *Grant* at para. 74, admission of evidence obtained through inadvertent or minor violations of the Charter lie on the less serious end of the spectrum, and may minimally undermine public confidence in the rule of law. I find this is the case in regard to both the Computer Devices and the Samsung Galaxy, which favours its admissibility under this factor.

- [78] As for the second factor, this category calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed -- the focus is on the magnitude or intensity of the individual's reasonable expectation of privacy, and on whether the search demeaned their dignity: Grant at paras. 76-78; R. v. Cole, 2012 SCC 53 at para. 91.
- [79] It is my view that the seizure is of moderate impact on Mr. Sundman's Charter-protected interests. While the search involved a dwelling house, there was no affront to human dignity nor overly invasive nature to the search. All the items were located by the police in the course of executing a judicially authorized warrant of the premises. Nor can it be said that the search involved Mr. Sundman's person; those types of search generally attract a more robust concern as to impact. Ultimately, I conclude that the seizure of both the Computer Devices and the Samsung Galaxy were of moderate significance in terms of the impact on Mr. Sundman's Charter-protected interests.
- [80] Lastly, there is the matter of society's interest in an adjudication on the merits. I find this favours the admissibility of the evidence. The impact of failing to admit this evidence would unduly impair the truth-seeking function of the court, and public perception of the administration of justice. This evidence is real and reliable, and the search did not undermine the reliability of the evidence. Furthermore, the Samsung Galaxy, or more accurately, the information stored on the phone, the evidence was relevant and it was important to the Crown's case. The long-term reputé of the justice system, as discussed in Grant at para. 84, is not damaged by the admission of this evidence.
- [81] Applying these three factors to the evidence in question leads to the conclusion that both the Computer Devices and the Samsung Galaxy should be admitted into evidence.

Conclusion

- [82] In conclusion, I find that there has been no breach of Mr. Sundman's rights with respect to the issuance of the warrant, or in regard to the modification made to that warrant by the issuing justice. While the seizure of the Computer Devices and the Samsung Galaxy phone violated Mr. Sundman's s. 8 rights, they are admissible under s. 24(2).

"J. Williams J."

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