IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. DeWolfe, 2006 NSPC 9

Date: March 24, 2006
Docket: 1399447
Registry: Halifax

Her Majesty the Queen

v.

Christopher Lee DeWolfe

Judge:	The Honourable Judge Barbara J. Beach
Heard:	November 10, 2004; July 14, 2005; October 14, 2005; December 22, 2005; February 9 and 10, 2006, in Halifax, Nova Scotia
Written decision:	March 24, 2006 (s. 52 of the *Constitution Act* application)
Charge:	s. 5(2) CDSA
Counsel:	Mark J. Covan, for the Crown Roger A. Burrill, for the Defence

By the Court:

Introduction

[1] This is a ruling on the application by Christopher Lee DeWolfe ("the Applicant") under s. 52 of the *Constitution Act, 1982* to have certain search and entry provisions of the *Controlled Drugs and Substances Act* (*"CDSA"*) declared unconstitutional. The Applicant argues that ss. 11(1) and 12(b) of the *CDSA* are inconsistent with s. 8 of the *Canadian Charter of Rights and Freedoms* (*"Charter"*) and are of no force or effect to the extent of their inconsistency. For the reasons stated below, I am unable to accept the Applicant's arguments. I find that ss. 11(1) and 12(b) of the *CDSA* meet the minimum standards of s. 8 of the *Charter*.

[2] I note at the outset that nothing in these reasons precludes the Applicant from challenging the validity of the particular warrant in operation in this case or the manner of the search that was executed by the Halifax Regional Police. Written arguments filed by both counsel speak to a s. 24(2) motion to exclude evidence in addition to the s. 52 motion, but it was agreed in oral argument that any s. 24(2) issue would be addressed at a later stage, if necessary. These reasons pertain only to the s. 52 motion and I have formed no opinion about the admissibility of the evidence resulting from the search.

[3] Section 11(1) of the *CDSA* allows a justice to issue a warrant authorizing police to search a specified place "at any time", based on reasonable grounds to believe evidence of a drug offence will be found there, and to seize any such evidence. The Applicant says that s. 8 of the *Charter* requires that if the warrant is to be executed at night and the place to be searched is a dwelling house, then the justice must specifically authorize a night-time search, based on reasonable grounds, and if a night search is not specifically authorized, then the warrant may only be executed during the daytime. Essentially, the Applicant wants a rule like that in s. 488 of the *Criminal Code* to be recognized as a constitutional minimum standard under s. 8 of the *Charter*.

[4] Section 12(b) of the *CDSA* permits the police officer authorized by a s. 11 warrant to use as much force as necessary in the circumstances in order to execute the warrant. The Applicant says that s. 8 of the *Charter* requires police, when they know in advance that force will be used to effect entry into a home, to obtain specific authorization in the warrant to make a forced entry. Essentially, the Applicant wants s. 8 of the *Charter* to be understood as requiring police to obtain prior authorization to violate the common law knock/notice rule.

[5] There are therefore two issues to be decided: (i) whether s. 11(1) of the *CDSA* is inconsistent with s. 8 of the *Charter*, and (ii) whether s. 12(b) of the *CDSA* is inconsistent with s. 8 of the *Charter*. I will address each of these issues in turn, after a few preliminary matters.

Relevant Legislation

[6] For ease of reference I reproduce the statutory and constitutional provisions relevant to this decision:

Controlled Drugs and Substances Act, S.C. 1996, c. 19, as amended.

> 11. (1) Information for search warrant - A justice who, on *ex parte* application, is satisfied by information on oath that there are reasonable grounds to believe that
> (a) a controlled substance or precursor in respect of which this Act has been contravened,
> (b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,
> (c) offence-related property, or
> (d) any thing that will afford evidence in respect of an offence under this Act
> is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.
>
> ...
>
> 12. Assistance and use of force - For the purpose of exercising any of the powers described in section 11, a peace officer may
> (a) enlist such assistance as the officer deems necessary; and
> (b) use as much force as is necessary in the circumstances.

Criminal Code, R.S.C. 1985, c. C-46, as amended.

> 488. Execution of search warrant - A warrant issued under section 487 or 487.1 shall be executed by day, unless
> (a) the justice is satisfied that there are reasonable grounds for it to be executed by night;
> (b) the reasonable grounds are included in the information; and
> (c) the warrant authorizes that it be executed by night.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982.*

> 8. Everyone has the right to be secure against unreasonable search or seizure.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
> ...

Standing

[7] The Applicant gave notice of the constitutional challenge to s. 11 (1) of the *CDSA* on July 19, 2004 in accordance with the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89. In subsequent argument and written submissions, it became clear the Applicant was also challenging s. 12(b) of the *CDSA* and both counsel have addressed their arguments to both sections. I understand the Crown not to object to the expanded terms of this constitutional challenge. (Indeed, it was the Crown who initially expanded the question to include s. 12 of the *CDSA* , in the Crown's brief dated October 21, 2004.)

[8] I am satisfied that the Applicant was resident at the premises in question and that his interests are directly affected by the search at issue here. The Applicant is charged with an offence as a result of evidence obtained through the execution of a warrant issued under s. 11(1) of the *CDSA*. In the course of executing that warrant, force was used, thus implicating s. 12(b) of the *CDSA*. I find the Applicant has standing to challenge the constitutionality of s. 11(1) and s. 12(b) of the *CDSA*.

Facts

[9] Although extensive evidence was heard, in anticipation of a s. 24(2) motion challenging the manner of search, it is not necessary for the Court to make detailed findings of fact for the purposes of the present s. 52(1) motion. At this

stage, I must assess the impugned sections of the statute and decide whether they are in themselves inconsistent with the Constitution. It is the law itself, and not the manner of its application in this specific case, that must be examined for the purposes of the motion presently before the Court.

[10] The following facts are sufficient to assess the present motion. I take these facts to be uncontested.

[11] A warrant dated January 26, 2004 purported to authorize Detective Constable Carlisle of the Halifax Regional Police to enter and search the premises at 2408 Adams Avenue in Halifax "at any time", and to seize drugs, drug precursors, drug containers and offence-related property. The warrant was issued by Justice of the Peace Kelly Shannon on the basis that there were reasonable grounds to believe there would be evidence in the specified premises of possession of cocaine for the purposes of trafficking. Justice of the Peace Shannon's reasonable grounds were derived from an "Information to Obtain a Search Warrant" of the same date, sworn to by Detective Constable Carlisle. That "Information to Obtain" cited three anonymous sources who alleged the Applicant was dealing crack cocaine from the specified premises, as well as a police database indicating the Applicant resided at those premises.

[12] The search warrant did not explicitly authorize police to enter at night, apart from saying the search could be done "at any time", and did not explicitly authorize police to use force to enter the premises.

[13] Members of the Halifax Regional Police, including Detective Constable Carlisle, entered the named premises on January 27, 2004, at about 2:20 a.m. No prior notice was given to the occupants of the house. (Evidence was led that officers yelled, "Police, search warrant," as they were entering, but it is not necessary for me to make a finding on that point for the purposes of this motion; concurrent notice is not prior notice.) Police broke open the door using a battering ram and conducted a search. The Applicant and other members of the household were inside. Police seized a number of articles they took to be evidence of an offence. The Applicant was charged with possession of cocaine for the purposes of trafficking, contrary to s. 5(2) of the *CDSA*, and it is before this Court on that charge.

***CDSA* s. 11(1) and Night Searches**

[14] The Applicant urges this Court to recognize a new aspect of the rights protected by s. 8 of the *Charter*. He says that s. 8 requires that if a warranted search of

a person's home is to be carried out by agents of the state during the night, then permission to employ that manner of search – a search at night – must be specifically authorized in the warrant.

[15] The rule the Applicant seeks to elevate to constitutional status is essentially the rule embodied in s. 488 of the *Criminal Code*, requiring that a search warrant must be executed by day unless the justice is informed and satisfied there are reasonable grounds justifying a search at night, and the warrant specifies that the search may be done at night. In the case of *R. v. Saunders*, 2003 NLCA 63 (affirmed on other grounds, 2004 SCC 70), the Newfoundland and Labrador Court of Appeal found unanimously, as a matter of statutory interpretation, that s. 488 does not apply to the *CDSA* (paras. 30-34, para. 93) and therefore a justice issuing a search warrant under s. 11(1) need not be persuaded that a night-time search is necessary so long as the search itself is based on reasonable grounds. The British Columbia Court of Appeal adopted that finding in *R. v. Dueck*, 2005 BCCA 228 at para. 21. However, the constitutionality of *CDSA* s. 11(1) was not in issue in either *Saunders* or *Dueck*.

[16] The power to issue "any time" search warrants was reviewed in *R. v. Barnhill*, 2006 BCSC 42, a constitutional challenge to s. 11(1) of the *CDSA* much like the present application. In that decision, Justice Joyce of the B.C. Supreme Court found that s. 11(1) complies with the *Hunter v. Southam* requirements and is not inconsistent with s. 8 of the *Charter*. I adopt that finding for the following reasons.

[17] In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Supreme Court of Canada ruled that in order to comply with s. 8 of the *Charter*, a warrant to search must meet three criteria: (i) prior authorization of the search by an independent official acting judicially, based on (ii) evidence given on oath to establish (iii) reasonable and probable grounds to believe that evidence of an offence will be found in the place to be searched. I agree with Justice Joyce that s. 11(1) of the *CDSA* meets these requirements. Section 11(1) permits a justice – an independent official acting judicially – to authorize a search when persuaded, by information given on oath, of reasonable grounds to believe evidence of a drug offence will be found in the place to be searched. The three criteria of *Hunter v. Southam* are met. The fact that s. 11(1) permits a search to be authorized for execution "at any time" does not detract from its compliance with *Hunter v. Southam*.

[18] My finding on this point is also consistent with *R. v. Duncan*, 2002 MBQB 240, a decision on a motion to quash a search warrant in which the constitutionality of s. 11(1) was reviewed for compliance with *Hunter v.*

Southam standards. After reviewing the standard to be met, Justice Schulman wrote at para. 16:

> Applying these authorities, I conclude that s. 11 of the *C.D.S.A.* meets the minimum requirements of s. 8 of the *Charter*, in that it establishes a system of prior authorization with an objective standard or criteria for the grant of a warrant and that the evidence must be assessed by a neutral and independent arbiter.

(A Crown appeal arising out of another motion in the same case was dismissed by the Manitoba Court of Appeal, 2004 MBCA 64, affirming 2002 MBQB 275.)

[19] I have found, in agreement with *Duncan* and *Barnhill*, that s. 11(1) of the *CDSA* meets the three-part *Hunter v. Southam* standard. However, the Applicant urges that a "fourth pillar" should be added to the requirements of s. 8 of the *Charter* such that the *manner of search* must be authorized in advance by the judicial officer who issues the warrant. Specifically, in the present case the Applicant says that where a search is to be executed at night, s. 8 should be understood to require that reasonable grounds be provided to show the need to search at night.

[20] While I agree that the security of a person's home from intrusion by the state is one of our society's highest values, repeatedly recognized in both common law and *Charter* jurisprudence, I find that this interest is adequately respected by s. 11(1) of the *CDSA*, for two reasons. First, the justice hearing the application for a search warrant is permitted, not required, to issue a warrant to search "at any time" and retains the discretion to deny the warrant sought by police, or to issue a warrant on more restricted terms. This discretion includes the ability to limit the search warrant to daytime execution or, indeed, any other appropriate span of time. Second, the manner in which the search is executed must be reasonable if it is to comply with s. 8 of the *Charter*.

[21] On the first point, it is clear in my reading of s. 11(1) that the provision does not *require* a justice to do anything. The section says a justice may, not shall, issue a warrant. It follows that a justice has discretion to deny a warrant. This residual discretion is a requirement of s. 8 of the *Charter* (see *Baron v. Canada*, [1993] 1 S.C.R. 416) because, without this discretion, the justice could not be said to be acting independently and judicially.

[22] The Applicant correctly points out that having residual discretion to deny a warrant is not sufficient to prove that the provision complies with s. 8 of the *Charter*. I agree. Residual discretion is a necessary but not a sufficient condition for achieving compliance with s. 8. However, the point here is that

a mechanism exists to ensure s. 8 rights are protected even though explicit justification of a night-time search is not required by s. 11(1). That protection is that police cannot search (barring special circumstances that are not relevant to this case) unless they can convince a neutral and independent judicial officer in advance that a search should be allowed. The role of the justice hearing the application for a warrant is to protect people's rights against unnecessary state intrusion. A unanimous Supreme Court of Canada described the role of the authorizing judge thus (albeit in reference to *Criminal Code* wiretap warrants) in *R. v. Araujo*, 2000 SCC 65 at para. 29, *per* Justice LeBel:

> ... [T]he authorizing judge must look with attention at the affidavit material, with an awareness that constitutional rights are at stake and carefully consider whether the police have met the standard. All this must be performed within a procedural framework where certain actions are authorized on an *ex parte* basis. Thus, the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the material submitted by the applicant. He or she should not be reluctant to ask questions from the applicant, to discuss or to require more information or to narrow down the authorization requested if it seems too wide or too vague. The authorizing judge should grant the authorization only as far as need is demonstrated by the material submitted by the applicant. ... (emphasis added)

Consonant with the obligation to "act judicially", the justice receiving an application for a *CDSA* search warrant must make an independent assessment of the evidence and authorize a search only to the extent that is justified, if at all. The justice *may* approve the warrant sought by police if it is supported by reasonable grounds, but the justice is also free to deny a warrant or to issue a warrant on narrower terms than those sought by police – even if there are reasonable grounds to support the warrant sought (*Baron v. Canada*, cited above).

[23] It is well recognized in law that the privacy interest in a person's home is to be highly protected. This privacy interest, in my view, is even stronger during the night when everyone should be entitled to reasonably expect freedom from unwelcome intrusion into their own home. In *R. v. Sutherland* (2000), 53 O.R. (3d) 27, [2000] O.J. No. 4704 at paras. 22-24, the Ontario Court of Appeal endorsed the statement of Justice Marshall of the U.S. Supreme Court (from his dissenting reasons in the case of *Gooding v. United States*, [1974] 416 U.S.

430) that, "In my view, there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night." Although the comment was originally made in relation to the Fourth Amendment of the U. S. Constitution, the Ontario Court of Appeal found it was also apt with respect to s. 8 of our *Charter*.

[24] More recently, in *R. v. Tessling*, 2004 SCC 67, Justice Binnie wrote on behalf of the unanimous Supreme Court of Canada:

> [14] The midnight knock on the door is the nightmare image of the police state. Thus it was in 1763 that in a speech before the British Parliament, William Pitt (the Elder) famously extolled the right of everyone to exclude from his private domain the forces of the King:
>
> > The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter!- all his force dare not cross the threshold of the ruined tenement!
> >
> > (Lord H. Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (1855), vol. I, at p. 42)
>
> [15] It is perhaps a long spiritual journey from Pitt's ringing pronouncements to the respondent's attempt to shelter a marijuana grow-op in the basement of his home in Kingsville, Ontario, but the principle is the same. Building upon the foundation laid by the common law, s. 8 of the Charter creates for "[e]veryone" certain areas of personal autonomy where "all the forces of the crown" cannot enter. ...

[25] The importance of the right to privacy in one's own home at night, in my view, means that warrants issued under s. 11(1) of the *CDSA* must not automatically be made out to authorize a search "at any time". In keeping with the role of the justice receiving application for a search warrant, *i.e.*, to act judicially and to protect rights, a justice who is prepared to issue a *CDSA* warrant has the obligation to consider when the proposed search should be permitted. In saying this, I echo the comments of Judge Gorman in the trial-level *Saunders* decision, [2002] N.J. No. 159, and Justice Schulman in *R. v. Duncan*, 2002 MBQB 240. In the *Saunders* trial decision, Judge Gorman stated at para. 12:

> Though the information to obtain [a search warrant under the *CDSA*] does not have to comply with section 488(b) of the Criminal Code, there must at the very least be something in the information to obtain from which the justice can draw an inference that the request to search at night has a reasonable basis.

Judge Gorman's decision was overturned by the Newfoundland and Labrador Court of Appeal (2003 NLCA 63, aff'd on other grounds, 2004 SCC 70) because that Learned Court found that requiring a basis for a night search to be demonstrated in the Information to Obtain had exactly the effect of importing s. 488 of the *Criminal Code* into the *CDSA*. Having found that Parliament intentionally did not apply the s. 488 rule to *CDSA* search warrants, the Court of Appeal reversed Judge Gorman's decision. Thus, his decision was overturned on the basis of statutory interpretation; a constitutional question was not before that court.

[26] Without disagreeing with the statutory interpretation result relied upon by the Newfoundland and Labrador Court of Appeal, I would adopt Judge Gorman's comments that there must be some basis in the Information to Obtain to support the inference that a search is reasonably justified. I come to this view not because I interpret s. 488 to apply to s. 11 of the *CDSA*, but because of the constitutional requirement from *Hunter v. Southam* that an official issuing a warrant must "act judicially". An official acting judicially has the duty to see that rights are infringed only to the extent that is reasonably necessary. A search warrant is an instrument that authorizes the infringement of rights. It is my view that a justice issuing a warrant that permits a search at night, or "at any time", does not respect that duty unless there is some information before that justice upon which one could infer a reasonable basis for searching at night.

[27] In this vein, I would also endorse the words of Justice Schulman in the trial-level *Duncan* decision, cited above. Justice Schulman reviewed Judge Gorman's reasons in *Saunders*, and the decision of Wells J. (as he was then) in *R. v. Peddle*, [1997] N.J. No. 287 (S.T.D.) (finding that a night search under *CDSA* s. 11(1) was reasonable on the facts in that case), then stated:

> [19] I agree with the above quotations from *R. v. Peddle* and *R. v. Saunders*. In my view, it is incumbent on every justice who has before him or her an application for a search warrant under s. 11 of the *C.D.S.A.*, to give consideration, based on evidence, to the questions of whether it is appropriate to permit a warrant to be executed during the day, ... or at night, ... or at any time, that is during the day or night, and the hours during which the warrant should be executed. For the reasons stated by Wells J. in *R. v. Peddle*, night searches may often be issued under the *C.D.S.A.*, but the issue must be considered by the judge in each case, based on evidence. ...

[28] I note that in the *Barnhill* decision, cited above, Justice Joyce (whose result in that case I adopt) criticizes the passage I quote from *Duncan*, on the basis that

Justice Schulman makes the same mistake that Judge Gorman is said to make in *Saunders*, that is, to read s. 488 of the *Criminal Code* into the *CDSA*. However, it should be clear by now that my agreement with Judge Gorman and Justice Schulman is not based on reading s. 488 into the *CDSA*, but rather on the obligation of the justice considering a search warrant application to act judicially and to authorize the violation of constitutional rights only to the extent that can be supported by the information before that justice. Understood on that basis, my view is that Judge Gorman was correct in stating "there must at the very least be something in the information to obtain from which the justice can draw an inference that the request to search at night has a reasonable basis."

[29] To summarize my first point about s. 11(1), the rights of people who may be living in the place to be searched are protected by the *Hunter v. Southam* requirement that the justice issuing a search warrant must "act judicially". That requirement includes a duty to consider to what extent the state's intrusion into a *Charter*-protected private sphere is justified by the information before the justice, bearing in mind the higher expectation of privacy that people reasonably have in their own homes during the night. If a *CDSA* warrant is issued to allow a search of a home at night, or "at any time", I would expect to find some basis in the Information to Obtain to support an inference that the justice turned his or her mind to the existence of a need to search at night, consistent with the requirement on the justice to "act judicially". A justice, acting judicially, will authorize the infringement of people's *Charter*-protected rights only to the extent there is a reasonable basis in the sworn information before that justice to believe the infringement is justified. The fact that this judicial safeguard stands between the police drug squad and a search at night of someone's home is one of the reasons s. 11(1) of the *CDSA* is within *Charter* limits.

[30] The second reason I find that s. 8 *Charter* rights are adequately respected by s. 11(1) of the *CDSA* can be put more briefly. The reason is that *Hunter v. Southam* is not the sole test for compliance with s. 8 of the *Charter*. In *R. v. Collins*, [1987] 1 S.C.R. 265 at 278, Lamer J. (as he was then) stated, "A search will be reasonable if it is authorized by law, if the law itself is reasonable and *if the manner in which the search was carried out is reasonable.*" (emphasis added) This means that even a search authorized by warrant will violate the *Charter* if not carried out in a reasonable manner. If there is no reason on the facts to execute a *CDSA* search warrant at the time it is executed, whatever time that may be, the search may violate the rights of the person whose privacy is

invaded. That person would be entitled to seek the exclusion of evidence obtained through the search, if charges resulted, and could seek return of the items seized, if they were legally possessed in the first place.

[31] In stating that the ability to challenge the manner of search is adequate protection of a person's rights, I acknowledge that vindication of one's rights after the fact gives less protection of those rights than authorization in advance. Justice Dickson (as he was then) explained in *Hunter v. Southam* (cited above, at 160) that the purpose of s. 8 of the *Charter* is

> ... to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.

The Supreme Court of Canada confirmed the importance of the state obtaining prior authorization before invading a person's home in *R. v. Feeney*, [1997] 2 S.C.R. 13, to give one prominent example. However, I am presuming in the present discussion that there *was* a warrant to search, authorized in advance, and that only the manner of search was potentially unreasonable. In my view, prior authorization of a search combined with after-the-fact assessment of the manner of search is an appropriate balance. If police can convince a justice there are reasonable grounds to believe evidence of a crime will be found in a place and obtain a warrant to search, the police should be allowed the latitude to conduct the search using means that are reasonable in the circumstances (and subject to whatever limits are imposed by the justice in the warrant). It is usually not practical to anticipate in advance all the circumstances that will arise in executing a search warrant such as would justify, or fail to justify, a particular manner of searching. My view is that while the reasons for searching a place should be justified in advance, the manner of search is more appropriately assessed after the fact, once all the circumstances are known and can be put before a court. I do not accept the Applicant's contention that s. 8 of the *Charter* requires the manner of search to be anticipated in advance and given prior judicial authorization by warrant.

[32] To conclude this portion of my decision, s. 11(1) of the *CDSA* allows a justice to issue a warrant to search where there is a reasonable basis for issuing the warrant. The warrant may authorize a search "at any time", or during a narrower span of time, as appropriate in the independent view of the justice, bearing in mind the interests at stake. Section 11(1) does *not* purport to allow

searches to be conducted in an unreasonable manner. Since the provision complies with the *Hunter v. Southam* requirements and since police executing the warrant are authorized to search only in a manner that is reasonable in the circumstances, I find that s. 11(1) of the *CDSA* meets the minimum standards of s. 8 of the *Charter*. Parliament has chosen not to apply the rule in s. 488 of the *Criminal Code* to the *CDSA* and that choice is within the purview of Parliament to make.

CDSA s. 12(b) and the Knock/Notice Rule

[33] The second branch of the Applicant's argument is that s. 8 of the *Charter* should be understood to require police to get authorization in advance if they intend to force their way into a home to execute a search. The Applicant urges that the common law knock/notice rule should be recognized as a constitutional principle under s. 8 of the *Charter*, so that a law which purports to authorize searches not in compliance with the knock/notice rule would be contrary to the minimum standards of the *Charter*.

[34] The "knock/notice rule" is restated in *Eccles v. Bourke*, [1975] 2 S.C.R. 739, 19 C.C.C. (2d) 129 at 133-134, where Justice Dickson (as he was then) summarized the long-established common law position:

> Except in exigent circumstances, the police officers must make an announcement prior to entry. There are compelling considerations for this. An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance.
>
> ...
>
> In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry. Minimally they should request admission and have admission denied although it is

> recognized there will be occasions on which, for example, to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required.

Having announced themselves and their purpose, and waited a reasonable time to allow occupants to answer the door, police could be justified at common law in breaking open the door if either no response came or if entry was explicitly denied. On the other hand, if police did not knock, give notice of their purpose and wait a reasonable time for a response, they could not with lawful authority break down the door.

[35] The knock/notice rule is without a doubt the standard for forced entry at common law. The question put before this Court by the Applicant is whether prior judicial authorization is required, as a constitutional minimum, when police circumvent the knock/notice rule.

[36] I have been referred to the case of *R. v. Gimson* (1990), 54 C.C.C. (3d) 232, where the Ontario Court of Appeal decided (under the old *Narcotic Control Act*) that the knock/notice rule at common law is abrogated in respect of drug search warrants. Justice Finlayson wrote on behalf of the Court at page 242:

> In my opinion, the trial judge was in error in imposing a requirement that the police officers announce their presence and produce the search warrant before effecting entry by force or otherwise. As is evident from the trial judge's reasons, no sensible instruction could be given to police officers on how much notification was required in every circumstance. I am persuaded that Parliament, in enacting the special entry and search provisions of the *Narcotic Control Act*, was well aware of the need for unannounced entry in order to allow police to surprise the occupants of a dwelling house who they had reason to believe were dealing in drugs.
> ...
> In my opinion, the right to search and seize given by a search warrant is in derogation of the common law rights of a person in possession of real property. The detailed provisions of the *Narcotic Control Act* authorizing lawful entry and permitting the use of force in the exercise of that authority supplants the common law rules requiring notice of presence, intent and purpose. Trespass is not a factor when acting pursuant to a valid search warrant under this Act. (emphasis added)

[37] The appeal court's order for a new trial was affirmed on appeal as of right to the Supreme Court of Canada, [1991] 3 S.C.R. 692, but in a brief oral decision that court decided not to decide the question: "... this is not the proper case to

address the question as to whether there is a blanket authorization to enter without a prior demand in drug searches." Since the Ontario Court of Appeal decision does not bind this Court, *Gimson* does not resolve the issue before me.

[38] I have been provided with a number of recent cases in which police executed warranted searches that violated the knock/notice rule and the manner of search was later found to be unreasonable.

[39] In the following decisions, police used forced entry to execute a valid search warrant, the manner of search was found to be unreasonable, and the evidence was excluded under s. 24(2): *R. v. Lau*, 2003 BCCA 337 (*CDSA* warrant); *R. v. Schedel*, 2003 BCCA 364 (*Criminal Code* warrant; early morning forced entry); *R. v. Brown*, [2003] O.J. No. 5089 (S.C.J.) (*CDSA* telewarrant was invalid, and manner of search unreasonable); *R. v. Ngo*, 2004 BCSC 1414 (*CDSA* warrant); *R. v. K.C.F.*, 2004 NSPC 70 (*CDSA* warrant; police had a key, use of force found to be unnecessary); *R. v. Mac*, [2005] O.J. No. 858 (S.C.J.) (*CDSA* warrant); *R. v. Mai*, 2005 BCSC 29 (*CDSA* warrant; police knocked first but waited only a few seconds before breaking in). In all these cases, a failure to comply with the knock/notice rule was remedied by finding the manner of search to be unreasonable and excluding the evidence.

[40] Additionally, in *R. Markowska*, 2004 ONCJ 332, (*Criminal Code* search warrant, executed with unnecessary force) several police officers rushed into a massage parlour with guns drawn; the Court found the manner of search was unreasonable and entered a stay of proceedings.

[41] I have also been directed to some recent cases in which the manner of search was found to be unreasonable for violating the knock/notice rule but the evidence was admitted under s. 24(2): *R. v. Li*, [2005] O.J. No. 267 (S.C.J.) (*CDSA* warrant; evidence admitted because a grow-op was set up in a home in order to exploit *Charter* protection against searches); *R. v. Normore*, 2005 ABQB 345 (*CDSA* warrant; police entered unannounced, for "a valid reason" in the Court's view, by opening an unlocked door); *R. v. Vukelic*, 2005 BCPC 156 (*CDSA* warrant; the presence of firearms justified the surprise entry).

[42] The effect of reviewing all these cases is to persuade me that a warranted search which violates the knock/notice rule will generally violate s. 8 of the *Charter*, because the manner of search is unreasonable. It is unnecessary for prior authorization of this manner of search to be a constitutional requirement, because the Constitution already requires that searches be reasonable. In the absence of exigent circumstances, a reasonable search of a dwelling will comply with the common law knock/notice rule.

[43] If I were to adopt the Applicant's position, *i.e.*, that s. 8 of the *Charter* requires the manner of search to be authorized in advance, the only result in warrant-authorized searches would be that forced entry would have to be justified before the search instead of after. In my view, this is an undesirable result. It would place too high a burden on police, who must be flexible in dealing with an infinite variety of real-world situations that cannot usually be anticipated at the time a warrant is sought, but would add very little protection to the s. 8 rights of private citizens who would still be subject to forced-entry searches where police could explain in advance why surprise seemed necessary. This is a poor trade-off.

[44] Entry and search of a residence must be authorized in advance in accordance with *Hunter v. Southam* standards, but the manner of search should be reviewed after the fact, with the benefit of full knowledge of the circumstances. As I discussed above, in my analysis of the night search issue, I recognize that after-the-fact review is less protective of rights than authorization in advance, but I think the appropriate balance has been achieved in the current law. It is too difficult a task to anticipate in advance what circumstances will present themselves. Whatever actual circumstances evolve in the execution of a search warrant, the manner of search must be reasonable relative to those circumstances. As illustrated by the cases cited above, if the manner of search is unreasonable for violating the knock/notice rule, then the person who is subjected to a search will have recourse to s. 24(2) of the *Charter*.

[45] Turning to the question of whether s. 12(b) of the *CDSA* is consistent with the Constitution, it is evident to me that this provision relates to the *manner* of searches. Section 8 of the *Charter* requires the manner of search to be reasonable in the circumstances. If a police officer executing a *CDSA* search warrant uses only "as much force as is necessary in the circumstances," I cannot see how that amount of force would be unreasonable. I find that s. 12(b) of the *CDSA* is consistent with s. 8 of the *Charter*.

[46] I am comforted in this conclusion by the interpretive principle which says Parliament is presumed to enact laws that are consistent with the Constitution. "If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted," quoting Chief Justice McLachlin in *R. v. Sharpe*, 2001 SCC 2 at para. 33. Even if s. 12(b) could be read as authorizing the excessive use of force in executing search warrants, I would apply this interpretive principle and find that the section only authorizes the use of necessary force to the extent that force is also reasonable, consistent with the *Charter* requirement that the manner of search must be

reasonable. I do not think *CDSA* s. 12(b) is ambiguous, but even if I did think so, the presumption of constitutionality would resolve the ambiguity in favour of the Crown.

[47] I must address one further case that was brought to my attention: *R. v. Melanson*, 2005 NBPC 10, a decision of Judge P.W. Arsenault of the New Brunswick Provincial Court. This was a case in which a police Emergency Response Team was assembled to execute a *CDSA* search warrant of the defendants' home, out of a well-founded concern that the male defendant would be a violent hazard to the police. The team entered the home at 9:25 a.m. firing three stun grenades through the windows; one ignited a fire in the bedroom. The police did not announce themselves until they were inside. The Court decided that since the police planned the forced entry in advance, s. 8 of the *Charter* required them to seek authorization from the justice issuing the warrant for that manner of search. To quote from the decision:

> [39] In my opinion, both *Hunter [v. Southam]* and *Feeney* are helpful in analyzing the issue in this case. Although in the case at hand the police had a prior authorization in the form of a valid search warrant to enter and search the premises of Mr. and Mrs. Melanson for drugs, it appears to me that in keeping with the Supreme Court's general approach there are compelling reasons to hold that <u>they ought to also have obtained a special authorization to enter in the manner they did</u>, unannounced and with considerable force. To quote Sopinka, J. in *Feeney*: "... the protection of privacy does not end with a warrant" (paragraph 50).
>
> [40] Such an approach would, in my view, also conform to one of the central themes in the Court's rulings in both *Hunter [v. Southam]* and *Feeney*, namely the requirement of prior judicial authorization where it is practical to do so. It also appears to me to be totally in tune with a broad and purposive interpretation of the rights protected under s. 8 and would ensure a measure of judicial control over what in this case amounted to a particularly intrusive and highly invasive raid into the accused's home.
>
> [41] Moreover, if as determined in *Feeney*, <u>proper announcement prior to entry is a constitutional requirement</u>, then it seems to me to be totally consistent with such a Charter guarantee that if there is to be derogation from the need for announcement and it is feasible to do so, prior judicial authorization should be obtained. Obviously, there will be situations that arise where the need for a forcible no-notice entry could not be predicted

> and the police would then have to take immediate appropriate action. But such is not the case here.
> (emphasis added)

[48] With respect, I disagree with my colleague Judge Arsenault. Section 8 of the *Charter* requires a search to be authorized in advance where possible but it does not require the manner of search to be prescribed in the warrant. What s. 8 does require is that the manner of search be reasonable. Judicial assessment of whether a search was reasonable in the circumstances cannot realistically be undertaken until the actual circumstances are known – in other words, after the fact. I would prefer to be cautious in applying *Feeney* to *CDSA* searches. The *Feeney* decision is indeed about police entry into dwelling houses, but, more specifically, it concerns arrest without a warrant, not search with a valid warrant. If a relevant principle can be drawn from *Feeney*, it is that proper announcement prior to entry into a dwelling house is a constitutional requirement *where exigent circumstances are not present*. Whether exigent circumstances are present is something that can only be properly assessed in the full factual context, in my view. This means police must have a certain discretion to determine, as the situation evolves, the manner in which they will execute the search warrant. Police executing a search warrant must make their decisions in the field concerning manner of search, and the courts will review those decisions in full view of the facts.

[49] To summarize my conclusions about s. 12(b) and the knock/notice rule: Section 12(b) speaks to the manner of search that may be employed under the authority of a *CDSA* warrant. Whether use of force was actually necessary is a question of fact to be assessed in light of all the circumstances. If the use of force by police under s. 12(b) amounts to a circumvention of the common law knock/notice rule, potential *Charter* violations will be assessed in a challenge to the manner of search, generally within a s. 24(2) motion. There is nothing in s. 12(b) of the *CDSA* that purports to authorize unreasonable searches. The impugned provision is consistent with s. 8 of the *Charter*.

Conclusion

[50] Since ss. 11(1) and 12(b) are not inconsistent with s. 8 of the *Charter*, the trial will go forward. Mr. DeWolfe is free to pursue a s. 24(2) application to exclude evidence based on an unreasonable manner of search, or to challenge the validity of the search warrant, if he wishes to do so. I have not formed an opinion on the merits of either course of action.

[51] If, in the alternative, I am wrong, and s. 11(1) or s. 12(b) of the *CDSA* is inconsistent with the right to be free from unreasonable search and seizure, the burden would then fall on the Crown to justify that violation under the *Oakes* test. Justification has not been argued at this stage, so I am not in a position to make this assessment. If either or both of the impugned sections violate s. 8 of the *Charter*, it would be necessary to continue these proceedings in order for the Crown to present argument attempting to justify the violation. If the Crown were unable to justify the violation, I would then have to consider the appropriate remedy.

[52] I have concluded that ss. 11(1) and 12(b) of the *CDSA* are consistent with s. 8 of the *Charter* and, therefore, the s. 52 application fails.

Order accordingly,

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Barbara J. Beach
Provincial Court Judge