IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R v. Hill, 2006 NSSC 401

Date: 20061017
Docket: Cr. S.D. No. 263076
Registry: Digby

Between:

Roger Jameson Hill

Applicant

v.

Her Majesty the Queen

Respondent

D E C I S I O N

Judge:	The Honourable Justice A. David MacAdam
Heard:	October 16 and 17, 2006, in Digby, Nova Scotia
Oral Decision:	October 17, 2006
Written Decision:	January 31, 2007
Counsel:	Darren MacLeod, for the Applicant Oliver Janson, for the Respondent

MACADAM, J.: [Orally]

[1] On October 1, 2004 Constable Christian Thibodeau, then a member of the Digby Detachment of the Royal Canadian Mounted Police, after obtaining a *Controlled Drugs and Substance Act*, 5 C. 1996, c. 19 (herein referred to as the "CDSA") telewarrant, attended with other police officers at the residence of Roger Hill in Weymouth Mills, Digby County, Nova Scotia. Counsel for Mr. Hill, has filed a Notice of Application to the effect that his rights pursuant to Section 8 of the *Canadian Charter of Rights and Freedoms*, being Part 1 of the *Constitution Act.* 1992 (herein referred to as "the *Charter*"), "to be secure from unreasonable search and seizure was infringed".

[2] Mr. MacLeod, counsel for Mr. Hill, suggests there are numerous issues regarding the "facial validity of the search warrant, sufficiency of the information to obtain the search warrant, the conduct or manner in which the search was carried out, and the use of a telewarrant in the circumstances." Counsel suggests, in view of the various breaches of Section 8, the evidence obtained as a consequence of the search should be excluded in accordance with Section 24(2) of the *Charter*.

BACKGROUND

[3] Prior to obtaining the search warrant Constable Thibodeau completed an Information to Obtain based primarily on the evidence of three separate confidential informers or sources. In effect, he relied on the evidence of one source, (herein referred to as “Source B”) with the evidence of the other two sources being confirmatory. The other sources, (herein referred to as “Source A” and “Source C”) by themselves would have been insufficient. However, the information from Source “B” is detailed and specific in respect to his/her alleged knowledge of activities being conducted at or near the residence in Weymouth Mills. However, Source “B”, according to Constable Thibodeau, has never previously provided information that he has acted upon. On the other hand, Source “C”, whose information was obtained from another member of the Royal Canadian Mounted Police, has apparently provided information on other occasions that has resulted in search warrants and charges being laid. Also identified in the Information to Obtain is the fact that Source “C” has received financial payment on 23 occasions. In respect to Source “A”, Constable Thibodeau indicated this source has provided information that has resulted in charges being laid on two occasions.

[4] Constable Thibodeau said he had also carried out an investigation in order to confirm various aspects of the information provided by the three confidential

sources, and as a result of the information from the sources, and his own investigation, he had completed the Information to Obtain a search warrant. The Information was submitted by telephone pursuant to Section 11(2) of the *CDSA*, which provides that an Information may be submitted by telephone or other means of telecommunication pursuant to Section 487.1 of the *Criminal Code*.

[5] Upon receipt of the telewarrant, Constable Thibodeau, together with other police officers, attended at the residence in Weymouth Mills. He and Constable Coughlan proceeded to execute on the warrant while the others remained to await the signal to join them inside. Constable Thibodeau testified he knocked on the door, said "Police", received no reply, and knocked again. He and Constable Coughlan proceeded to push open the door and to enter the premises. After entering he observed the accused, who he knew from previous meetings, standing. He advised him he was executing a search warrant.

[6] Mr. Hill, on the other hand, testified that he was in the washroom when he heard a knock on the door and replied "Just a minute"; then he heard a louder knock and replied louder "Just a minute" and proceeded towards the door, when he heard a crash and stepping sideways, his front door "flew open". He said

Constable Thibodeau entered and said “Police”. Prior to this occasion he denied hearing the word “Police” at any time. He agreed Constable Thibodeau on entering said they were there to search the premises and that he was then told he was under arrest. Constable Thibodeau testified it was probably between 20 and 30 seconds from the first knock to his entry into the residence.

[7] During the course of the search the police found marijuana buds, marijuana clippings and what Constable Thibodeau described as discarded marijuana plants. It is Constable Thibodeau’s opinion that what was located on the property was a “marijuana processing operation” involving the drying of marijuana plants, removal and drying of the buds and packaging into ½ and l lb. plastic bags. The drying of the buds on screens was located in a room accessible from inside the residence as well as from outside. There were found 4.1083 kilos of marijuana buds in the process of final drying and packaging into the ½ and l lb. plastic bags. There was also cash found, as well as 35 unregistered firearms.

[8] Mr. Hill was charged with one count of unlawfully having possession, for the purpose of trafficking, of in excess of 3 kilograms of cannabis marijuana, possession of a prohibited firearm, to wit: a six shot handgun, without being the

holder of the required license to possess the same, and 34 counts of storing a firearm without holding registration certificates for the same.

Facial Validity of the Search Warrant

[9] The search warrant as issued by the Justice of the Peace left blank the space for identifying the name of the Peace Officer on whose sworn information it had been issued. Defence counsel referenced Chief Justice Dickson in *Genest v. The Queen*, [1989] S.C.J. No. 5 at para. 46, to the following effect:

> ... Common sense suggests that if a form is used, it should be properly filled out, especially when the form itself states that certain details are to be inserted in the blanks.

[10] Counsel acknowledges, however, the further comments of Chief Justice Dickson, at para. 47:

> ... These defects may not be enough in themselves to justify exclusion of the evidence, but at the least they suggest carelessness on the part of the police officers.

[11] Crown counsel in his submission on this application notes in *R v. Genest*, supra, there were a number of defects in the warrant used by the police. The warrant apparently did not name the officer who was to execute the warrant, the time limits associated with the warrant, or list the objects to be searched for. Crown counsel observes that the only item missing in the warrant executed by Constable Thibodeau was the name of the Officer on whose information it had been obtained. In this regard, I refer to the further comments of Chief Justice Dickson, at para. 42:

> I do not agree that the defects in the warrant can be described as simply technical. The major defect was that the warrant did not name the officer who was to execute the warrant, as required by s. 10(2) of the Narcotic Control Act. That requirement is an important one. It is a special condition for drug searches of dwelling-houses. It is not found in the general Criminal Code search provisions. To ignore this special Parliamentary directive for searches of dwellings is not merely a technical defect. Parliament has stated that searches of dwellings for drugs are special. The complete absence of times of execution or a listing of the objects to be searched for is a further indication of the worthlessness of the warrant in this case. I think it could be said that the justice of the peace issued a fishing licence, not a search warrant.

[12] In the present instance, I am satisfied the omission, although another instance of carelessness, does not render this warrant, as suggested by defence counsel, “null and void”. The omission is not as serious as the omissions in *R v. Genest*, supra, and the information omitted was known to the Justice issuing the

warrant. It would also be no surprise to Mr. Hill, since it was Constable Thibodeau who was the lead officer in executing the warrant itself. Carelessness in completing forms that may lead to the invasion of private residences is of course a serious matter in itself. Nevertheless, I am not satisfied that in the present instance this defect is sufficient to warrant a declaration that the search warrant was null and void.

Sufficiency of the Information to Obtain the Search Warrant

[13] Defence counsel suggests that insufficient information was placed before the Justice of the Peace to support the issuance of the search warrant. Counsel references the observations of Justice Cromwell in *R v. Morris* (1998), 134 C.C.C. (3d) 539 at p. 551:

> ... If the right to be free of unreasonable search and seizure is to have meaning, unreasonable searches must be *prevented*, not simply condemned after the fact. Thus, the process of prior authorization is fundamentally important for the *prevention* of unreasonable searches. It is no mere formality. As Sopinka J. said in *R. v. Feeney*, [1997] 2 S.C.R. 13 at 47, 115 C.C.C. (3d) 129:
>
> The purpose of the *Charter* is to prevent unreasonable intrusions on privacy, not to sort them out from reasonable intrusions on an *ex post facto* analysis.

[14] Both counsel, in their written submissions, agree the test to be applied by a court in reviewing the authorization for a search warrant, is outlined by the Supreme Court of Canada in *R v. Garofoli* (1990), 60 C.C.C. (3d) 161. Defence counsel references p. 188:

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

[15] Defence counsel then references the reasons of Justice Fichaud, on behalf of the Court, in *R v. Shiers*, [2003] N.S.J. No. 453, at para. 15:

> Based on these principles, the reviewing judge should have applied the following test. Could the issuing judge, on the material before her, have properly issued the warrant? Specifically, was there material in the Information from which the issuing judge, drawing reasonable inferences, could have concluded that there were reasonable grounds to believe that a controlled substance, something in which it was contained or concealed, offence-related property or any thing that would afford evidence of an offence under the CDSA was in Mr. Shiers' apartment?

[16] To similar effect, Crown counsel in his submission cites the decision of the Newfoundland and Labrador Court of Appeal in *R v. Saunders* (2003), N.L.C.A. 63, and in particular at para. 5:

> As the trial judge, I am not to substitute my view, on the sufficiency of the grounds, for that of the Justice that issued the search warrant *R v. Veinot* [1995], 144 N.S.R. (3d) 288 (C.A.). The standard of review has been described as a 'limited' one (*Re Times Square Book Store and the Queen* [1985] 21 C.C.C. (3d) 503 (Ont. C.A.) at p. 514). If the grounds are such that the Justice 'could have' issued the warrant the trial judge should not interfere *R. v. Grant* [1993] 3 S.C.R. 223 at page 251;

[17] Crown counsel further observes that in *R v. Saunders* (supra), the Court commented that the trial judge had engaged in a "critique" of the Information to Obtain - almost as if he were correcting a student's term paper - and not an assessment of the sufficiency of the Information in the "totality of the circumstances."

[18] Counsel suggests that in the present instance, on the totality of the circumstances, there was sufficient information to authorize the warrant, noting there were three separate sources of information, and the three sources had similar information, and as well the Constable had conducted his own investigation on Mr. Hill.

[19] Defence counsel suggests there was not the detail, particularly in reference to Source "B", as is required in order to justify the issuance of the warrant, that there did not appear to be an indication as to the source of his knowledge, or how current the information was in reference to the date on which the warrant was executed. Counsel cites from the decision of Justice Rosenberg in *R v. Hosie* (1996), 107 C.C.C. (3d) 385 where, at p. 392:

> ...In my view, the information supplied is far from detailed and could not be described as compelling, in the sense referred to by Wilson, J. in *Debot*. There is no indication as to the informer's source of knowledge or how current the information is. There is no way to know whether the informer has obtained this information through personal observation as opposed to rumour or second or third-hand information. The use of phrase 'very hightech' does not advance the case in any real sense. Had the informer provided information as to the type of equipment and similar details then the justice might have been able to infer that the informer had obtained the information first-hand. That kind of detail, however, is lacking.

[20] In the present instance, the information provided by Source "B", as summarized by Constable Thibodeau in paragraph 14 of the Information to Obtain is detailed as to the alleged conduct of Mr. Hill, the interior of the residence and the nature of the operation as well as some dates when Mr. Hill was observed in possession of marijuana. As observed by Crown counsel, this was not a circumstance similar to *R v. Hosie*, supra, where the information from the source

was not the result of apparent direct dealings with the accused person. Clearly, some of the information detailed by Constable Thibodeau, as obtained from Source "B", could only have been learned as a result of direct dealings between the source and Mr. Hill.

[21] Having regard to the "totality of the circumstances" there was more than sufficient information to justify the issuance of a warrant. The application, on this ground is therefore dismissed.

The Manner of the Search

[22] Constable Thibodeau testified he knocked twice and said "Police" on each occasion, before entering the premises. However, his notes as well as his report to the prosecution do not detail his having said the word "Police" after the first knock and before the second knock. Mr. Hill testified he heard the first knock and replied "Just a minute" and heard nothing until the second knock, at which time Constable Thibodeau entered and said "Police".

[23] The detail in the notes created by Constable Thibodeau shortly after these events, suggest the probability that he did, in fact, fail to say “Police” upon first knocking on the door and prior to the second knock and his entry.

[24] Defence counsel again references the decision of Chief Justice Dickson in *R v. Genest*, supra, where at para. 42 he refers to the position of the Court in *Eccles v. Bourque*, [1975] 2 S.C.R. 739 at pp. 746-47:

> Except in exigent circumstances, the police officers must make an announcement prior to entry. There are compelling reasons for this. An unexpected intrusion of a man’s property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance. No precise form of words is necessary.

[25] On the question of a peace officer entering premises without first announcing their presence, counsel refers to the decision of the British Columbia Court of Appeal in *R v. Lau* (2003), B.C.J. No. 1307 where Justice Ryan, on behalf of the Court, at paras. 29-31, observed:

> 29 The Controlled Drugs and Substances Act does not contain a provision similar to s. 14 of the Narcotic Control Act. The new Act makes it clear that the police may use force in executing a warrant only where exigent circumstances are present. Section 12 provides: 12. 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.
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> 30 This section permits the police to enter a home with a certain degree of force, without announcing their presence, if the circumstances make it necessary for them to do so.
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> 31 In *McAllister*, supra, Mr. Justice Wong said this about exigent circumstances at paras. 84-5: Likewise, there will exist exigent circumstances where there will be a need for officers to act and enter without giving prior notice. These will include fear of safety for persons within the premises, and concern for the destruction of evidence, as well as, at times, concern for the officer's own safety. In this case no evidence was provided that the officers had knowledge particular to the situation, but were acting only from very general information pertaining to grow operations. I therefore must conclude the manner of the search was unreasonable.

[26] Counsel refers to the issue of force commented on by Chief Justice Dickson, in assessing whether under Section 24(2) of the *Charter* the evidence obtained in the search in *R v. Genest,* supra, should be excluded. Chief Justice Dickson, at para. 56, concluded:

> ...The courts should be reluctant to admit evidence that shows the signs of being obtained by an abuse of common law and Charter rights by the police. The infringement of s. 8 in this case was serious enough to lead ineluctably to the conclusion that the admission of the evidence would bring the administration of justice into disrepute.

[27] Having regard to the present circumstances, I am satisfied that on a balance of probability, there was a failure by Constable Thibodeau to announce the presence of the "Police" when he first knocked on Mr. Hill's residence in Weymouth Mills, and there were not such exigent circumstances as to justify entry without first announcing their presence. The issue, therefore, as reviewed in *R v. Genest*, supra, is whether the evidence obtained as a result of the entry should be excluded from the trial. This will require a review of the factors outlined in *R v. Collins* [1987], S.C.J. No. 15.

The Telewarrant

[28] It is clear that an Information to obtain a search warrant may be submitted by telephone or other means of telecommunication, if in accordance with Section 487.1 of the *Criminal Code*. Section 487.1(1) provides that in circumstances where a police officer believes an indictable offense has been committed and

> ... that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with sections 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

[29] As already noted, Section 487.1 provides certain circumstances for the submission of the information "on oath by telephone or other means of telecommunications to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter." In the Information to Obtain Constable Thibodeau stated:

> My grounds for believing that it would be impracticable to appear personally before a Justice to make application for this warrant in writing are as follows: Instructions received from the local Justice is to contact the J.P. Center in Dartmouth. There is only one Judge of the Provincial Court in this area and he has requested that Police Officers seeking Search Warrants to contact the J.P. Center in Dartmouth to obtain a Search Warrant. This is a preventive measure to avoid the permanent local Judge to become disqualified from hearing trials on matters in which he signed the Search Warrant.

[30] In his written submission counsel for Mr. Hill suggests the explanation does not address why it would be impracticable to attend before another Judge or Justice of the Peace in person. However, in these circumstances, where the local presiding judge has directed that search warrants, of the nature involved in this application, should be obtained from the Justice of the Peace Center in Dartmouth, it was not practicable for the officer to proceed otherwise.

[31] However, it would not seem to be a long-term solution to have all warrants obtained in this manner, since it precludes the opportunity for the issuing Judge or

Justice to examine the officer on whose information the warrant is being sought, in person, and to raise whatever questions may be considered appropriate. Although a telewarrant would not preclude such an exchange it obviously would make it less practicable and less likely to occur. The serious invasion of the privacy of the citizenry that arises from the execution of a search warrant, necessitates that before granting such a warrant, it be done after careful consideration and, where necessary, questioning of the officer seeking this authority. This is particularly so in view of the fact that there is no one appearing to question or oppose the issuance of the warrant.

[32] In *R v. Morris*, supra, at pp. 551-552, Justice Cromwell observed:

> The prior authorization process, however, is quite fragile. When the police attend before a Justice of the Peace, no one, for obvious reasons, is there as an advocate of the interests of the target of the search. The justice of the peace will usually not be a lawyer or a judge. The circumstances under which the warrant is sought may be urgent and the process, of necessity, quite informal. This simply demonstrates that the process depends on two things: the honesty, good faith and diligence of the police when they gather and present their grounds for consideration and the independence and caution of the Justice of the Peace deciding whether to authorize the proposed search.
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> The nature of the process demands candour on the part of the police. They are seeking to justify a significant intrusion into an individual's privacy. This is especially so when it is proposed to search a dwelling house which has long been recognized as the individual's most private place. The requirement of candour is not difficult to understand; there is nothing technical about it. The person

> providing the information to the justice must simply ask him or herself the following questions: 'Have I got this right? Have I correctly set out what I've done, what I've seen, what I've been told, in a manner that does not give a false impression?' See *R v. Dellapenna* (1995), 62 B.C.A.C. 33 (B.C.C.A.), *per* Southin J.A. at para 37.
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> In reviewing police conduct during the prior authorization process, the court's attention cannot focus solely on the particular search under consideration. It is tempting to do so, especially where, as here, police suspicions proved to be well founded. However, the purpose of the prior authorization requirement must be kept in mind. As noted, that purpose is to prevent unreasonable searches, not to condemn them after the fact. If the prior authorization process is not vigorously upheld by the courts, it will lose its meaning and effectiveness. That process is in place to protect everyone from unreasonable intrusions by the state. In considering this, or any other s. 8 case, the court must not only protect the rights of *this* individual, but also protect the prior authorization process which helps assure that the rights of *all* individuals are respected before, not after, the fact.
>
> In summary, the requirement of reasonable grounds to believe sets the balance between individual privacy and effective law enforcement. The requirement of prior authorization prevents searches where it is not demonstrated to an independent judicial officer that such grounds exist.

[33] The importance of the process is not to be diminished by the regular avoidance of the "in person" application normally associated with obtaining search warrants. The Province of Nova Scotia is not so remote as to justify in all instances the use of the telewarrant. I am satisfied that Constable Thibodeau proceeded correctly, in view of the advices received from the Chief Judge; however, the appropriate authorities should re-examine the necessity of putting into place properly trained individuals who can examine applications for search

warrants and ensure there is an appropriate “balance between individual privacy and effective law enforcement.”

Should the evidence be excluded under Section 24(2) of the Charter?

[34] In *R v. Buhay* (2002), 174 C.C.C. (3d) 97, Justice Arbour, on behalf of the Court, in reference to an assessment of whether evidence obtained in the circumstances of a Charter breach should be excluded, noted that in *R v. Collins*, [1987] S.C.J. No. 15, the Court had grouped the factors to be considered into three categories:

> (1) the effect of admitting the evidence on the fairness of the subsequent trial,
>
> (2) the seriousness of the police’s conduct, and
>
> (3) the effects of excluding the evidence on the administration of justice.

(1) The effect of admitting the evidence on the fairness of the subsequent trial - trial fairness

[35] As to this factor, Justice Arbour, at para. 50 noted:

> The evidence obtained in violation of the Charter which does not emanate from the accused but rather existed independently of the violation is classified as non-conscriptive evidence. Its admission will not affect adjudicative fairness, but the second and third sets of factors may militate towards its exclusion: Stillman, supra; *R. v. Evans*, [1996] 1 S.C.R. 8, 104 C.C.C. (3d) 23, 131 D.L.R. (4th) 654.

[36] In *R v. Buhay*, supra, Justice Arbour agreed with the trial judge's conclusion that the admission of the marijuana seized following a search of a locker did not affect "adjudicative fairness". Justice Arbour, at para. 51, continues:

> The appellant has not been conscripted against himself in the creation of evidence and the evidence pre-existed the violation of the Charter. Furthermore, the evidence was clearly 'discoverable' without any infringement of Charter rights. Thus, as the marijuana is non-conscriptive, 'discoverable' evidence, its admission would not render the trial unfair. The admissibility of the marijuana therefore turns on a balancing of the factors relevant to the second and third questions - - how serious was the breach, and would exclusion of the evidence discredit the justice system?

[37] Similarly, in the present instance, the marijuana and firearms discovered were "non-conscriptive", "discoverable" evidence and their admission would not render the trial unfair.

(2) The seriousness of the police conduct - Seriousness of the Breach

[38] This relates to the seriousness of the police's misconduct. In this regard, Justice Arbour, at para. 52, made the following observations:

> The seriousness of the police's conduct depends on 'whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant' *Therens*, supra, at p. 652. It is also relevant to consider whether the violation was motivated by a situation of urgency or necessity: Therens, at p. 652; *R v. Silveira*, [1995] 2 S.C.R. 297 at p. 367, 97 C.C.C. (3d) 450, 124 D.L.R. (4th 193; Law, supra, at para. 37. Also pertinent is whether the police officer could have obtained the evidence by other means, thus rendering her or his disregard for the Charter gratuitous and blatant: Collins, supra, at p. 285; Law, supra, at para. 37. The court may also look at some or all of the following factors: the obtrusiveness of the search, the individual's expectation of privacy in the area searched and the existence of reasonable and probable grounds ®. *v. Caslake)*, [1998] 1 S.C.R. 51, 121 C.C.C. (3d) 97, 155 D.L.R. (4th) 19, at para. 34). As we have seen, the trial judge is entitled to considerable deference on this point: Law, supra, at para. 38.

[39] In the present instance I am satisfied that there was no bad faith. The omission was inadvertent and to some extent merely technical and it was not deliberate, wilful nor flagrant. The officer, in my view, simply omitted to refer to the presence of the "Police" after the first knock and only did so following the second knock on the door. The breach is not serious having regard to all the circumstances.

(3) The effects of excluding the evidence on the admission of justice.

[40] In this regard Justice Arbour at paras 67-68:

> The third question from Collins is whether excluding the evidence would have a more serious impact on the repute of the administration of justice than admitting it. This factor is generally related to the seriousness of the offence and the importance of the evidence to the case for the Crown. In Law, supra, at para. 39, the Court summarized this inquiry as follows: 'In general, this turns on whether the unconstitutionally obtained evidence forms a crucial part of the Crown's case and, where trial fairness is not affected, the seriousness of the underlying charge.'
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> In this case, the conviction turned on the admissibility of the evidence. It was thus essential to the Crown's case. As for the seriousness of the offence, in *Kokesch*, supra, at p. 34, Sopinka J. said: The offences with which the appellant is charged are serious offences, though narcotics offences involving marijuana are generally regarded as less serious than those involving 'hard' drugs such as cocaine and heroin.
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> These factors favour admitting the evidence. For the trial judge, however, they were outweighed by his concerns about the police officers' disregard for the appellant's Charter rights and the longer-term effects of the attitude they displayed in this case: 'The court is concerned at the casual approach that the police took in infringing the accused's rights in these circumstances. It is this court's view and concern that if the evidence was to be admitted in this trial that it may encourage similar conduct by police in the future.'

[41] I am satisfied in the present instance that the exclusion of this non-conscriptive evidence would indeed bring the administration of justice into disrepute.

[42] In the present instance the evidence is of course essential to the Crown's case, as indeed it was in *R v. Buhay,* supra. Justice Arbour said the question should be considered under Section 24(2) as:

> ... whether the system's repute will be better served by the admission or the exclusion of the evidence ...

[43] At para. 73 in referencing the Court in *R v. Simmons,* [1988] 2 S.C.R. 495 at p. 534 Justice Arbour observed:

> The decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial system on the other: ...This was well put by Doherty, J.A. in a recent decision of the Court of Appeal for Ontario, *R v. Kitaitchik* (2002), 161 O.A.C. 169, 166 C.C.C. (3d) 14, at para. 47: 'The last stage of the *R v. Collins,* supra, inquiry asks whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth seeking goal of the criminal trial.'

[44] I am satisfied that in the present circumstance the evidence should not be excluded, having in mind the factors of trial fairness, the non-seriousness of the breach and the balancing between the interests of truth on one side and the integrity of the judicial system on the other.

J.