CR 02518

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ROGER WALLACE WARREN

RULING ON A MOTION TO QUASH A SEARCH AND SEIZURE AND TO EXCLUDE EVIDENCE

Ruling on motion to quash a search and seizure and exclude evidence pursuant to s.24(2) of the *Canadian Charter of Rights and Freedoms* dismissed.

Heard at Yellowknife on October 24th 1994

Judgment filed: October 31st 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

PUBLICITY BAN

PUBLICATION AND BROADCASTING OF THIS RULING AND THE REASONS FOR IT HAVE BEEN PROHIBITED BY ORDER OF THE COURT DATED OCTOBER 3RD 1994 PENDING CONCLUSION OF THE PROCEEDINGS BEFORE THE COURT IN THIS CASE.

Counsel for the Crown: Peter W.L. Martin, Q.C.
David W. Guenter

Counsel for the Accused: Glen Orris, Q.C.
Gillian Boothroyd

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This motion was dismissed from the bench on Monday, October 24th 1994, following argument, with reasons to follow. These appear below.

Although the notice of motion speaks of the accused applying "to set aside" the search and seizure of certain boots by police on October 16th 1992, as being in violation of s.8 of the *Canadian Charter of Rights and Freedoms*, it is apparent that there is nothing in terms of court process or any judicial decision or action which can, in the usual sense, be set aside in that respect. I assume, therefore, that what is sought instead is a judicial declaration or determination that the search and seizure mentioned were, in law, contrary to s.8 of the Charter, which states:

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

The grounds of the application are that the search and seizure mentioned were effected without any warrant of authority, either pursuant to the *Criminal Code* or otherwise; and, furthermore, that the accused at the time was a suspect in the eyes of

the police with respect to the killing of nine miners at Giant Mine on September 18th 1992, as evidenced by his being a subject of an authorization to intercept his private communications on October 16th 1992, none of which was disclosed to him so that he could make an informed choice with respect to a waiver of his constitutional rights at the time that the boots were handed over by him to the police.

4 In addition, the motion seeks relief under s.24(2) of the Charter, which provides:

> 24. (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.

5 The relief sought is the exclusion from the evidence, at the accused's trial on nine counts of first degree murder, of the search and seizure by police of a pair of boots from the possession of the accused at his home in Yellowknife on June 18th 1993 pursuant to a search warrant. It is the accused's submission that this was in effect a warrantless search, since the warrant was legally invalid. And, in this instance, the boots were not handed over by the accused; instead, they were delivered to the police by his daughter, acting on the warrant and without his authority.

6 In addition, the accused seeks to have all evidence of the warrantless search and seizure allegedly made on October 16th 1992 likewise excluded pursuant to s.24(2) of the Charter.

7 The unconstitutionality of that earlier search and seizure is furthermore relied upon by the accused in support of his submission that the sworn information, relied upon by the Territorial Judge who issued the search warrant on June 18th 1993, was deficient in substance. It is the accused's submission that this was not the only deficiency in the substance of the sworn information leading to issuance of the warrant.

I. FACTS

1. Background

8 The underground explosion in which nine miners met their deaths at Giant mine near Yellowknife on September 18th 1992 gave rise to a shock of horror which reverberated not only throughout Yellowknife and the mining community beyond but across Canada. As the accused himself recognizes in his testimony on the *voir dire*, this regrettable event caused a great many problems, not least in the Yellowknife community. It is consequently apparent that a more than usually onerous burden was thereby thrust upon the Royal Canadian Mounted Police.

9 The police had been present in the vicinity of the mine since a strike lock-out situation had developed there late in May 1992. They had not only been called upon to intervene from time to time on the picket line; but, in particular, they had intervened in force in a situation described as a riot at the main entrance to the mine site on June 14th 1992. The explosion on September 18th 1992 had been preceded by a number of other incidents, none fortunately resulting in loss of life. However, some of those incidents evidently involved the use of explosives.

2. Police investigation before October 16th 1992

10 On September 25th 1992 the accused was interviewed by a member of the R.C.M.P., namely Constable Nancy G. Defer. This was only one of many such interviews then being conducted by police with members of the striking union, the Canadian Association of Smelter and Allied Workers, Local No. 4. In that interview the accused described to her what he had been doing on the morning of the fatal explosion, giving her a description of what he had seen at that time, and what the strikers he saw were wearing, in addition to what he himself had worn then. The accused also marked a map of the mine site to show where he had been that morning and to better describe what he told the officer he had done and seen.

11 On September 27th 1992 the accused was re-interviewed by Cst. Defer to correct some things he had mentioned during the first interview on the 25th. Both of these interviews were audio-recorded, with the tape records and transcripts of each interview being before the Court in this *voir dire*.

3. Police investigation on October 16th 1992

12 According to Cst. Defer, the accused had been seen by an employee then working at the mine on the morning of September 18th 1992. In order to obtain confirmation of that sighting, she and Corporal Dale N. McGowan decided to make a more detailed investigation than had been done during the two interviews on September 25th and 27th 1992. Cst. Defer therefore arranged with the accused for them to visit him at his home in Yellowknife, where he agreed to show them the clothing he had worn on the

morning of September 18th 1992. This was done. The accused was unable to show them the parka he had worn then, however, explaining that it had apparently gone missing when he had left it outside to air after some fuel had stained it. He did show them a baseball cap, the parka hood, and a pair of blue denim coveralls together with a pair of green "Kamik" boots, parts of which had been blackened to reduce the reflection of light at night. The boots were size 11.

13 The police were by then aware that whoever was responsible for setting the explosion was someone who apparently had worn a pair of size 11 "Kamik" boots, from footprints found in the mine during their investigation. They noticed the blackening on the accused's boots and the fact that the soles seemed to have been altered, with what appeared like parts cut off and others melted. They were therefore immediately interested in the boots.

14 Cst. Defer testified that the accused indicated to her and to Cpl. McGowan that they could take the boots for examination, which they did. They likewise obtained the ball cap and green parka hood, but did not take the coveralls. They then had the boots photographed before returning them to the accused, their purpose being to avoid arousing curiosity or speculation and to prevent the public (including the accused) learning at that time about the footprints which they had found in the mine.

15 Neither Cst. Defer nor Cpl. McGowan made any mention, therefore, to the accused on October 16th 1992, that they were in any way more than ordinarily interested in the boots or that the boots might have any particular significance for their investigation. They returned the ball cap and parka hood to him about an hour later along with the

boots.

16 To further assist the police, the accused agreed to go with them out to the mine site that day and show them on the ground where he had been on the morning of September 18th 1992. As requested by them, he wore the boots, the ball cap and the parka hood for this exercise. And before going to the mine site, he helped Cst. Defer to fill out a "robbery suspect" form, to further show what he had worn on the morning of September 18th 1992. Cst. Defer has testified that the accused may not have mentioned the word "Kamik" shown under the heading "SHOES" on the form, although this is what she wrote down based on what he had already told her. He may have merely said "green rubber boots" or "green boots" instead. Nevertheless, the accused at this point also mentioned that he might have been wearing black rubber boots, size 10, and not the green boots earlier mentioned. No black rubber boots were produced to the police by the accused.

17 At the mine site the accused not only showed the police where he had gone and what he had done on the morning of September 18th 1992 out there, but he agreed to being photographed as he walked along a portion of the highway to enable them to show pictures of him to other potential witnesses. And that was done.

18 Following these activities, Cst. Defer interviewed the accused as they sat in the police vehicle, at which time she prepared a written record of what is described as his statement made to her on October 16th 1992 at 4.45 p.m. This written statement, which is signed by the accused, speaks for itself. It has been entered in evidence along

with the photographs of the boots, the boots themselves, and photographs of the accused walking on the highway as mentioned. The statement shows that the accused was given the standard police caution and was informed of his rights to counsel, all of which he understood, but that he did not then wish to exercise those rights. He was questioned as to any knowledge or involvement which he may have had as to "the murder of nine miners on September 18th 1992 at Giant Mine", making denials to each question. There is nothing about the boots in this statement.

19 I mention this statement although it was taken after the boots had been obtained and returned on October 16th 1992, since it highlights the evidence that this is the first indication given to the accused by the police that he was, or might be, a suspect in their investigation. Earlier that day, when he produced the clothing and allowed them to photograph him wearing parts of it, as well as on the two previous interviews, they had pursued their inquiries with him without giving any such caution or mentioning his rights, as with any other potential witness. On this last occasion they had kept concealed from him the impact which the boots had made on them, since they considered it important not to disclose to anyone, at that point, that the boots could prove to be highly significant for their investigation. Others were suspects quite apart from the accused.

4. The search warrant

20 It is apparent that the police investigation into the cause of the explosion on September 18th 1992 and the person or persons responsible had been extremely intensive and wide-ranging but that it nevertheless remained inconclusive on June 18th

1993. This is clearly reflected in the sworn information of that last date submitted by Cst. Defer to His Honour Judge T.B. Davis of the Territorial Court, *ex officio* a justice of the peace, in order to obtain a search warrant that day. The warrant was issued and the police thereupon executed it, seizing a pair of green rubber "Kamik" boots from the accused's residence at Yellowknife the same day. It is not in dispute that these are the identical boots obtained by Cst. Defer and Cpl. McGowan from the accused on October 16th 1992.

21 The material contained in the sworn information leading to the issuance of the search warrant shows that the police were seeking evidence not against the accused but against another individual known as Timothy Bettger. According to the material, Mr. Bettger had been involved with others in illicitly entering the mine on at least one occasion prior to September 18th 1992. The police had found footprints in the mine following the explosion that day from which they concluded that those prints had been made by boots such as those in the possession of the accused. Those boots showed that suspicious alterations had been made to them but that they otherwise appeared to be of the same type as the boots which had made the footprints.

22 Nothing in the material set forth in the sworn information refers to the accused as a suspect in relation to the setting of the September 18th 1992 explosion. The only references to the accused are as follows:

> 20. That Corporal Pat DAUK of the Winnipeg Polygraph Section of the RCMP interviewed Roger WARREN at Yellowknife, N.W.T. on October 9, 1992.
>
> i) WARREN advised in the early hours of September 18, 1992 he was on the Ingraham Trail near the gate commonly referred to as gate 5 1/2 at the Mine.
>
> ii) He saw two people walking on the mine road that parallels the Ingraham Trail.
>
> iii) that he recognized the profile of one of the people as Conrad LISOWAY.
>
> 21. That on October 16, 1992 Roger WARREN showed myself and Corporal Dale McGOWAN the clothing and footwear he had worn on the strike line in the early morning of September 18, 1992. That the boots were size 11, green "Kamik" rubber boots. WARREN allowed us to take the boots with us. The boots were compared with casts and photographs of the footwear impressions left on the route taken in the mine, by the R.C.M.P. Identification. WARREN's boots were photographed by the Identification Section, and initialled inside by Constable DEFER. The boots were the same type, except the soles of WARREN's boots had been altered by numerous melt marks on both soles, cutting out both arch areas of the boot soles, and darkening out the white letters and white sole area of the boots. The boots were turned back over to WARREN on October 16, 1992.
>
> * * *
>
> 29. That based upon statements made by WARREN during interviews conducted by the Royal Canadian Mounted Police on September 25, 1992, attendance at WARREN's residence by myself and Cpl. Dale McGOWAN of the Hay River General Investigation Section of the R.C.M.P. on October 16, 1992, and the interception of his private communications, it is my belief that Roger WARREN resides at Apartment 107 5009 52 Avenue, Yellowknife, Northwest Territories.

23 The foregoing does not detail the considerable remainder of the material contained in the sworn information, which was presumably intended as a basis for the issuance of search warrants other than the warrant of immediate concern. It is enough to say that the warrant with which we are here concerned was issued on the basis of that material and, more particularly, those parts of it which are quoted above.

5. The accused's testimony

24 It is the accused's testimony in the *voir dire* that he concluded that he was a suspect in the police investigation when Cst. Defer cautioned him and informed him of

his rights to counsel on October 16th 1992, as she took the written statement from him that day. This was some time after she and Cpl. McGowan had obtained the boots from him that afternoon.

25 As I noted in the reasons for my earlier rulings in this *voir dire* (filed on October 21st 1994), it is the accused's evidence that this realization of his status as a suspect was what chiefly caused him to co-operate as fully as he did with the police throughout their long investigation. If so, it is noteworthy that he had not yet come to that realization when he allowed the police to remove the boots on the afternoon of October 16th 1992. At that point, he was treated like any ordinary witness by Cst. Defer and Cpl. McGowan.

26 The accused testified that he was positively sure that the boots now in question had not been down in the mine on September 18th 1992. Under cross-examination, he agreed that even if he had been told that the size, shape and pattern on the sole of his boots was the same as those of the footprints found in the mine after the blast that day, he would still have allowed the police to take them for examination so that he could be cleared of all suspicion by the police laboratory. Furthermore, had the police approached him with a request to allow them to examine the boots in their laboratory in 1993, he testified that he was sure he had already told them in August that year that there was no connection between him and Mr. Bettger with respect to anything that had happened on the mine site, so that if they wanted to examine the boots in their laboratory he was perfectly content that they should do so.

II. Discussion

27 Subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, which is referred to in s.24(2) (quoted earlier), reads as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

28 The present application or motion comes within the scope of s.24(1). It is therefore up to the accused, as the applicant, to show on the evidence and a balance of probabilities that "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter". Only if this is first shown is it necessary to consider the remainder of s.24(2).

Was there any infringement or denial of a Charter guaranteed right or freedom?

(a) On October 16th 1992

29 Counsel for the accused submits that there is more than the boots themselves to consider. By producing them to the police, the accused was in effect making a statement: "these are mine". In other words, what is sought to be excluded from evidence at trial is not merely this pair of boots, but any evidence of their production to the police by the accused on October 16th 1992 along with any evidence derived by the police as a result of their obtaining possession of the boots from the accused that day.

30 It is the submission of counsel for the accused that by obtaining the boots from the accused on October 16th 1992 the police conscripted him to give evidence against himself, in breach of his right to silence; since they did not then inform him of the full circumstances or possible consequences of his compliance with their request to examine the boots that day. Cst. Defer and Cpl. McGowan knew that the suspect footprints in the mine had in all likelihood been made by size 11 "Kamik" boots, apparently of the very kind shown to them by the accused as being the boots worn by him on the morning of September 18th 1992. Furthermore, the accused's boots bore suspicious signs of having been deliberately altered to remove part of the instep, in addition to showing other signs of use or wear.

31 The submission does not go so far as to claim that the police visit to the accused's home to view his clothing was a "search", within the meaning of s.8 of the Charter. However, it is the accused's contention that the taking of the boots by the police constituted a "seizure", and indeed an "unreasonable seizure" contrary to s.8 of the Charter. If it was a seizure within the meaning of that section, as the accused contends through his counsel, then it was clearly a warrantless seizure. And, if that is so, the onus shifts to the Crown to show that it was not "unreasonable" within the meaning of s.8: *Hunter & Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97, 91 C.R. (3d) 97, 11 D.L.R. (4th) 641, (1984) 6 W.W.R. 577, 27 B.L.R. 297, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 33 Alta. L.R. (2d) 193, 55 N.R. 241.

32 Accepting that to be the law, there is nevertheless nothing before the Court to suggest that the boots were illegally obtained from the accused by the police on

October 16th 1992.

33 The evidence is, on the contrary, that the accused readily and voluntarily permitted the police to take them for examination, along with one or two other items of the clothing which he had shown them as having been worn by him on the morning of September 18th 1992. While it is true that the police had not obtained a search warrant for the boots, the officers were plainly on duty conducting a criminal investigation; and there was no mystery to the accused as to what their investigation was about. He had already been twice interviewed in that regard by Cst. Defer. The accused must of course have been aware that these items were taken by the police for purposes connected with the investigation. And if, as he has testified, he had no reason to fear that these particular boots could link him to the setting of the explosion, it must be apparent (and there is nothing in evidence to suggest the contrary) that he gave his permission to the police to take and examine them without the slightest reluctance or concern.

34 It is immaterial, in my respectful view, that an authorization had been obtained by police to intercept the accused's private communications (as I assume to have been the case for purposes of this motion, based on a letter sent later to the accused pursuant to s.196 of the *Criminal Code*). In referring to this aspect of the situation, it is enough to say that the granting of such an authorization is not in itself evidence that anyone, other than a solicitor, whose communications are to be intercepted pursuant to it, is or may be implicated in any offence. The granting of any such authorization naming the accused is not alone indicative of the accused's status as a criminal suspect in the eyes of the police in respect of the setting of the explosion on

September 18th 1992.

35 For that matter, while the suspicions of Cst. Defer and Cpl. McGowan were no doubt aroused when, to their surprise, the accused produced the boots in question; the very fact that the boots had been produced to them by the accused, without any reluctance or sign of concern on his part, was such as to allay any direct or immediate suspicion in respect of him which they might otherwise have entertained. Clearly, the prudent and appropriate course for them to take, in the rather peculiar circumstances, was that which they then followed. To now require them to have first obtained a search warrant, to the likely prejudice of the entire investigation, would be to my mind completely unreasonable and wrong.

36 Given the circumstances, this is not a case in which the police were called upon to disclose the possible significance of the boots to the accused before obtaining his consent to their temporary removal for examination, as in fact occurred. Unlike the accused in *R. v. Clarkson*, [1986] 1 S.C.R. 383, 25 C.C.C. (3d) 207, 50 C.R. (3d) 289, 26 D.L.R. (4th) 493, 19 C.R.R. 209, 69 N.B.R. (2d) 40, 66 N.R. 114, the accused in the present instance was not in a state of impairment of any of his mental faculties. Nor were the police at the time in possession of sufficient evidence to require them to place the accused on notice of the potential consequences of his consent to let them have the boots for examination. For that matter, the accused was not at the time either detained or under arrest; and there is no suggestion whatever that the police here were acting, as in *R. v. Clarkson*, in breach of s.10(b) of the Charter. That case does not afford any assistance to the accused in the circumstances of the present case. And it is noteworthy

that counsel for the accused did not see fit to cite or rely upon either *R. v. Mellenthin*, [1992] 3 S.C.R. 615, 76 C.C.C. (3d) 481, 16 C.R. (4th) 273, 12 C.R.R. (2d) 65, 40 M.V.R. (2d) 204, (1993) 1 W.W.R. 193, 33 W.A.C.1, 135 A.R.1, 5 Alta. L.R. (3d) 232, 144 N.R. 50 or *R. v. Kokesch*, [1990] 3 S.C.R. 3, 61 C.C.C. (3d) 207, 1 C.R. (4th) 62, 50 C.R.R. 285, (1991) 1 W.W.R. 193, 51 B.C.L.R. (2d) 157, 121 N.R. 161.

37 I find that what took place in the present instance did not amount to a "search" or a "seizure" within the meaning of s.8 of the Charter. Even if, on the contrary, those terms are to be understood to include what took place when the police obtained the boots from the accused on October 16th 1992, I am unable to find that what they did was in any way either unlawful or unreasonable within the intendment of s.8.

38 Having reached these conclusions, I find it unnecessary to consider the remaining provisions of s.24(2) of the Charter in reference to the evidence of the boots being in the accused's possession on October 16th 1992, or in reference to any further evidence which may have been derived by the police from their obtaining possession of the boots from the accused with his consent that day.

(b) On June 18th 1993

39 To begin with, as to the submission made by counsel for the accused to the effect that I must disregard the material in the sworn information to the extent that it refers to the events of October 16th 1992 and the accused's possession of the boots on that date, that submission must itself be disregarded. The submission rests on the proposition that what occurred on October 16th 1992 was in violation of s.8 of the

Charter. Having rejected that proposition, I conclude that the submission must be rejected likewise.

40 While the sworn information is not as clear as one might wish in respect of the basis for issuance of the warrant to search for and seize the boots, it is nevertheless in my view not so defective in substance or in form that the warrant should not have issued.

41 Subsection 487(1) of the *Criminal Code* reads:

> 487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
> (a) anything on or in respect of which any offence against this Act or any other Act or Parliament has been or is suspected to have been committed,
> (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act or any other Act of Parliament, or
>
> (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer
> (d) to search the building, receptacle or place for any such thing and to seize it, and
> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

42 It was not incumbent upon the applicant for the warrant to adduce evidence in the sworn information so as to link the accused with either Mr. Bettger or the murder alleged against Mr. Bettger. It was enough to show, as was done, that the accused had

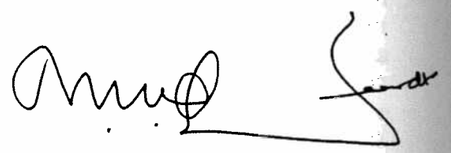
boots in his possession which, in the circumstances disclosed in the sworn information, constituted "anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act". The only link which it was necessary to show was between the boots and the footprints in the mine. It is true that this could have been done more elegantly, completely and precisely; but in my view the omission of further and better particulars is not fatal to the validity of the warrant.

43 The search having been carried out under a valid warrant, the seizure was not unlawful; nor was it unreasonable in the sense of s.8 of the Charter. Subsection 24(2) of the Charter is therefore not engaged.

III. Postscript

44 Before concluding, it may be noted that the *voir dire* in this case (which covered a great deal of other evidence, besides the boots and the police actions in obtaining them from the accused) commenced on September 3rd 1994. Notice of the present motion was filed on September 19th 1994. The *voir dire* concluded on October 14th 1994, by which time submissions had been made on all the other motions then before the Court. My rulings on those motions, with written reasons, were filed on October 21st 1994. It was not until the day of the scheduled trial, October 24th 1994, that the present motion was heard, with a written brief of argument being filed that day on behalf of the accused. Following submissions of counsel on the motion, I reserved my decision for some hours in order to give the submissions full consideration before delivering my ruling, which I did that day. In the circumstances, I felt obliged to reserve

my reasons for that ruling until I could have them prepared in written form.



M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
October 31st 1994

Counsel for the Crown: Peter W.L. Martin, Q.C.
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