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Docket: CR 03482

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

WING TOON LEE

Motion to set aside search warrants and exclude evidence obtained from searches, pursuant to s.24(2) of the Canadian Charter of Rights and Freedoms

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on July 6, 7 & 8, 1998

Reasons filed: July 15, 1998

Counsel for the Crown: Mark Scrivens &
Loretta Colton

Accused (Wing Toon Lee) representing himself

Andrew Mahar appearing as *Amicus Curiae*

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REASONS FOR JUDGMENT

[1] At the commencement of this trial, a motion was made on behalf of the accused, Wing Toon Lee, for an order setting aside three search warrants and excluding evidence obtained as a result of those searches, pursuant to s.24(2) of the Canadian Charter of Rights and Freedoms. It was argued that the accused's right to be secure against unreasonable search and seizure, as guaranteed by s.8 of the Charter, had been violated. At the conclusion of the hearing on this application I stated that the motion was dismissed with reasons to follow. These are those reasons.

Facts:

[2] The accused is charged in a 24-count Indictment with offences of sexual assault, sexual interference, procuring, making and possession of child pornography, and trafficking in a substance held out to be a narcotic. The accused is unrepresented by counsel. A few months prior to trial I appointed Mr. Andrew Mahar, a barrister and solicitor, to act as *amicus curiae* so that the accused's legal interests can be appropriately addressed. It was Mr. Mahar who brought this motion on the accused's behalf. He put all of the arguments that could be made in a most expert way before this court.

[3] In April, 1997, officers of the Yellowknife R.C.M.P. detachment received complaints about gambling activities being carried on in rooms rented by the accused in the Gold Range Hotel. Apparently the accused would allow people to play poker

for cash stakes in one of the rooms. He openly advertised it as a poker club. The police were aware of it. The activities became so blatant, however, that the police decided to conduct an investigation to determine if the activities constituted the keeping of a common gaming house (as that term is used in the Criminal Code). The police brought in an undercover officer who participated in the poker games over a number of days. Subsequent to the undercover operation, Cpl. Eaton of the R.C.M.P. prepared an Information to Obtain Search Warrant and a warrant was issued on May 29, 1997, by a Justice of the Peace.

[4] The warrant was issued under the authority of s.487 of the Criminal Code. It authorized the search of premises described on the face of the warrant as "Room Three, Gold Range Hotel". Cpl. Eaton, however, being the one leading the investigation, testified that he expected to search two rooms, one being the room where the poker games were played, and the other being a separate room, across the hall, used by the accused for his accommodation. This was explained in the Information sworn by Cpl. Eaton as follows:

> Room #3 of the Gold Range Hotel is located on the second floor, and consists to two separate rooms, each one facing the other, on the East and West sides of the hallway. "The Doctor" resides in the Room #3 which is located on the West side of the hallway while The Five Aces Social Club where the poker games are held is located on the East side of the hallway. On the door to LEE'S room is the name of Wing LEE written in capital letters. On the doors to both LEE'S room and The Five Aces Social Club, there is documentation pertaining to The Five Aces Social Club, as well as the number 3. On the wall immediately adjacent to the door of Wing LEE'S room (West side) is telephone #920-4366 written in black on gold number plates.

[5] The accused, who testified on the *voir dire*, acknowledged that he rented both rooms and that the number "3" was on the hallway by the door to each room. He testified, however, that "Room 3" is only the room where the games were played while his accommodation room is actually "Room 4" of the hotel.

[6] The police waited until they knew a game was in progress and then, shortly after 11 P.M. on May 29th, raided the premises. The objects of their intended search were items that could be evidence of illegal gaming. Everyone in the poker room, including the accused, were arrested on gaming charges and searched. The accommodation room was entered, secured and searched at the same time. The police found a loaded semi-automatic pistol in a pouch worn by the accused. The accused was rearrested on a

firearms charge. The search of the accommodation room revealed a large quantity of firearms and ammunition. All of the firearms and ammunition, together with numerous gaming items, were seized by the police.

[7] During the search of these rooms Cpl. Eaton received further information that the accused used a third room (identified as "Room 2") in the same hallway of the hotel. The accused testified that he also rented this room and used it as a storage room. He put his own locks on the door. Cpl. Eaton swore out a further Information and obtained a second warrant to search this room. In addition to gaming paraphernalia, the objects of the search now included firearms and ammunition. Cpl. Eaton testified that he viewed the situation as a public safety issue and, even though the accused had been taken into custody, he wanted to seize all weapons and ammunition that the accused may have access to upon his release.

[8] The police entered Room 2 at approximately 3 a.m. on May 30th. They could not unlock the door with any of the keys they had obtained from the accused so they broke in through the door. Cpl. Eaton testified that he had had no contact with hotel staff at the time of the search or any earlier time because he did not want to risk compromising the security of the operation. He did not elaborate on his meaning.

[9] Inside Room 2 the officers located more weapons and ammunition. They also saw stacks of videotapes in open cartons and boxes filled with photographs. Staff Sgt. Grundy testified that he picked up a booklet of photographs from the top of one of these boxes. He did so because he had already seen photographs found in the earlier search of the accommodation room which showed the accused and others posing with firearms. He looked through the booklet. The first photo he saw was of a nude adult woman. He then saw photos of what appeared to be nude young women (teenagers). He thought he recognized one of the persons depicted. One of the other officers on the scene identified the individual by name and knew her to be 13 years old. The officers noted that some of the videotapes had this individual's name written on them. An officer took one of these and played it on a VCR machine in the accused's accommodation room. It showed the accused and this individual engaging in sexual activity. They then took a sampling of approximately 30 videotapes back to the detachment. Prior to doing so the officers had a discussion about the advisability of obtaining a further search warrant but decided instead to take the samples first. The officers departed the scene shortly after 5 a.m.

[10] Later that same day further information was gathered and a third warrant was obtained. This warrant authorized a search of "Room Two & Three" (as they were described on the face of the warrant) for videotapes, photographs, and pornographic material. The alleged offence on this warrant was sexual assault on the young woman whose identity had been ascertained earlier. This is in contrast to the earlier warrants which alleged the offence of keeping a common gaming house. During the execution of this third warrant the police seized 1305 videotapes (of which, as it turned out, maybe 50 to 60 depicted home-made sex scenes with apparently under-18 year old females), boxes of photographs, more firearms and ammunition as well as gaming devices.

[11] The accused has already been tried on the charges relating to gaming house and firearms offences. The results of those trials are irrelevant to my consideration of the legal issues raised with respect to these charges. The videotapes and photographs of sexual activity are, of course, the relevant evidence the Crown seeks to admit at this trial.

Issues:

[12] There is no issue with respect to the existence of reasonable and probable grounds for issuance of the search warrants. The sufficiency of the information provided to the issuing Justice of the Peace was not contested before me. The issues that were raised dealt with alleged defects in the warrant itself, the manner in which the searches were carried out, and the seizure of items beyond the scope of the warrants.

[13] The facts reveal what I would describe as a "rolling" investigation. The police started out concerned about an illegal gambling operation. The first raid uncovered, in addition to gaming paraphernalia, a significant amount of firearms and ammunition. They also learned that there was a third room used by the accused (the so-called "Room Two"). No one argued that the search of the accused, which resulted in seizure of a handgun, was anything but a lawful search incidental to arrest. The issue is that the initial warrant did not authorize a search of the accused's bedroom. Furthermore, while it was argued that the police had no grounds to obtain a warrant to search Room Two, it was the manner in which that search was conducted and the resultant viewing and seizure of a sample of photographs and videotapes that are said to be particularly objectionable.

[14] I will address the issues as they were identified by counsel.

1. **Information to Obtain Warrant:**

[15] Mr. Mahar, in his role as *amicus*, argued that the Justice of the Peace had no basis upon which to issue the first warrant because at no time did the informant, Cpl. Eaton, state on oath that he actually believed the alleged offence had been committed. He relied on an extract from *Re Christianson and the Queen* (1986), 26 C.C.C. (3d) 391 (Sask. Q.B.), in which it was held that a warrant could not be issued in light of this deficiency in the contents of the Information (at pages 398 - 399):

> Moving on, an examination of the information discloses that the informant attests "that there are reasonable and probable grounds to believe" (1) that an offence has been committed and (2) that certain items will provide evidence related to the offence. He further attests "that he has reasonable grounds for believing" that the items are located in certain places. He then goes on to set out the grounds for belief. Yet at no time does he state on oath that he actually believes the alleged offence has been committed, the items will provide evidence or that they are located in the described places. Likewise, he does not state on oath that he actually and personally believes that the stated facts which form the grounds for belief are true.
>
> In the absence of a positive assertion by the informant that he believed the contents of the information to be true, it was not open to the justice to conclude that they were true. There simply was nothing upon which the justice could properly act and in purporting to do so he exceeded his jurisdiction: see *R. ex rel Hahn v. Royal American Shows Inc.*, [1975] 6 W.W.R. 571 at p.574, and *R. v. Solloway & Mills, supra*, at p. 276.

[16] Mr. Mahar readily acknowledged that there were cases going against his argument. It is important to note that *Re Christianson* dealt with an Information that contained second-hand information and the source was not identified. That was not the situation in this case.

[17] The Information in this case contained a great deal of first-hand knowledge gained by Cpl. Eaton. It also contained a great deal of second-hand information but the source and reliability of the information were clearly identified by Cpl. Eaton. It is correct that there is no clear-cut statement by Cpl. Eaton that he actually believes that an offence has been committed. The Information form, however, being a pre-printed sheet, does contain the following "boilerplate" clauses:

> "The informant says that he has reasonable grounds to believe and does believe that things, namely:
>
> (description of items)
>
> which will afford evidence in respect to the commission of an offence, namely:
>
> (description of offence)
>
> and that he has reasonable grounds for believing the said things, or some part of them are in the:
>
> (description of premises)"

[18] The opening words ("has reasonable grounds to believe and does believe") have been held to be sufficient for the issuing Justice to conclude that the Informant believes the truth of the information conveyed: *R. v Gendron*, [1987] S.J. No. 787 (Q.B.); *R. v Izzard*, [1988] N.S.J. No. 282 (S.C.). As noted in *Gendron*, in *Re Christianson* the informant did not say that he "does believe" after he said that he "has reasonable grounds for believing". The use of "does believe" was held to import a conviction of truth. The same result applies here. As also noted in *Gendron*, the issuance of a warrant is a judicial act; it is not a contest in semantics. The point is whether the Justice of the Peace can be satisfied on reasonable grounds that the warrant should issue, not whether any particular formulaic expression is used. No one argued here that the grounds themselves were insufficient for the warrant. This ground of attack is without merit.

2. **Form of Warrant:**

[19] The second argument related to the form of the warrant in its informational sense. To fully explain this point I have attached as Appendix "A" to these reasons the first warrant to search.

[20] According to the evidence presented on the *voir dire*, the police showed the warrant to the accused when they first raided his poker room. What they showed was the face of the warrant as reproduced in Appendix "A". Two points are readily

apparent. First, the items to be searched for are described simply as: "See Appendix B". The "Appendix B" referred to here was attached to the Information to Obtain, signed by the informant and the Justice of the Peace, and listed all types of things that may be relevant to the gambling investigation. It was not, however, attached to the face of the actual warrant so that the accused could examine it. The same procedure was used for the other two warrants with the only change being that on the second warrant firearms and ammunition were added to the "Appendix B" list while the third warrant referred merely to the pornography-related material. The second notable point is that the premises to be searched are described as "Room Three", i.e., one room, not the two rooms that were actually searched in the first raid.

[21] The argument advanced on behalf of the accused was that the face of the warrant failed to adequately describe the things to be searched for and the place to be searched. This document was the only source of information the accused had as to the scope of the search. Since it was defective, it was submitted, the warrant was vitiated.

[22] There is nothing in the Criminal Code that sets out what the obligations are on the police in terms of providing information to an accused upon execution of a warrant issued pursuant to s.487 of the Code. There are informational and production obligations imposed for some special types of warrants, such as DNA warrants under s.487.07(1) and telewarrants under s.487.1(7), but none for your usual investigatory search warrant. The lack of any express requirement suggests to me that it will depend on the facts of each case. The common law has made clear, however, that an officer, when executing a warrant, should have the warrant with him or her and should produce it, if asked, and permit inspection of it. This is to enable the person being searched to satisfy himself or herself that the search is lawful: J.A. Fontana, The Law of Search and Seizure in Canada (1992, 3rd ed.), pages 166-167.

[23] Is the failure to list the items to be searched for on the face of the warrant a fatal defect? It may be in some circumstances but not in this one. The type of things to be searched for should be readily apparent in this case due to the nature of the alleged offence ("keeping a common gaming house") specified on the face of the warrant. Furthermore, the important aim in specifying the items to be searched for is to assist the searching officers in identifying the things to be seized: see *R v Yorke* (1993), 77 C.C.C. (3d) 529 (N.S.C.A.), at page 538 (leave to appeal to S.C.C. denied). Here the searching officers were aware of what was listed in "Appendix B" to the warrant.

[24] I do not want, however, to be understood as approving this practice. If an appendix or other attachment is referred to on the face of the warrant then it should be attached to it and available for inspection. Section 487 is quite explicit in saying that a justice may issue a warrant to search "for any such thing", such thing being whatever there are reasonable grounds to believe will afford evidence of a crime. That suggests to me that such thing should be specified on the warrant or in such a way that the information is available to the person inspecting the warrant.

[25] It may be argued that the warrant was not complete without the attachment of "Appendix B". In my opinion the warrant itself was complete because the Appendix was before the Justice of the Peace when the warrant was issued. What was incomplete was the information conveyed to the accused when he was shown the face of the warrant. But, in the circumstances of this case, I hold such defect to be immaterial.

[26] The description of the premises was the main thrust of the argument on behalf of the accused. It was submitted that the warrant referred to only one room (the room where the gambling was taking place). There was no basis to a search of the accused's accommodation room. Therefore, it was argued, the search of that other room amounted to a warrantless search.

[27] As I noted in my review of the facts, the police clearly understood that the term "Room Three" referred to two separate rooms on either side of the second-floor hallway. The accused acknowledged that the number 3 was attached in the hallway to each room. It seems to me that it is too late now for the accused to complain that only one of these rooms should be regarded as the real "Room Three". Furthermore, there was ample evidence in the Information of Cpl. Eaton to connect the accused's activities to both rooms.

[28] This point, however, is an important one in terms of what degree of specifity is required in a warrant. The designation of the premises to be searched is extremely important and care must be taken. In *R v Goulet*, [1992] N.W.T.R. 366 (at page 376), I made the point that the case law reveals a tendency to adhere to a strict standard in the description of the premises (especially where, as here, those premises can be regarded in part as a person's home). A search warrant must leave no doubt as to where the authority to search extends and where it does not.

[29] In this case the searching officers knew the two rooms to be searched. It would certainly have been preferable if the description on the face of the warrant had been more reflective of the actual state of affairs but, in the circumstances of this case, the description was sufficient.

3. **Manner of Search of "Room Two":**

[30] The second warrant authorized a search of "Room Two" for gambling paraphernalia and firearms. The officers testified that when they could not open the door to this room with keys obtained from the accused, they forced the door open. It was submitted by Mr. Mahar that (a) there were no reasonable and probable grounds to establish the likely use of Room Two for criminal activity, and (b) there was no justification for the use of force to gain entry.

[31] In my opinion, there were sufficient grounds to connect the accused's control of this room and the alleged criminal activity being carried on in his other rooms. The focus at this point was still on the gaming house offence but the search had expanded to include firearms and ammunition. A significant number of such items had already been seized. Thus it was reasonable to think that a third room, controlled by the accused, may also contain such items.

[32] The use of force to gain entry raises another distinct issue. There was no authorization in the warrant, nor is there any authorization in s.487 of the Code, to the use of force. Crown counsel conceded that there were no exigent circumstances to justify the use of force here. But, Crown counsel also argued that this forcible entry was not a serious breach of the accused's rights. After all, the accused was already in custody and the room was used not as living quarters but as a storage room.

[33] The general rule is that a warrant to enter and search premises implicitly authorizes the use of force if necessary. The established procedure, as set forth in *Eccles v Bourque* (1974), 19 C.C.C. (2d) 129 (S.C.C.), is that, except in exigent circumstances, police officers must, before forcing entry, announce their presence by knocking, give notice of their authority by identifying themselves as police officers, and give notice of purpose by stating their lawful reason for entry. Obviously such formalities would be meaningless if there was no one at the premises. Many cases have refused to conclude that forcing entry into unoccupied premises was an unreasonable

exercise of police powers: see, for example, *R v Parent* (1989), 47 C.C.C. (3d) 385 (Y.T.C.A.), and *R v Grenier* (1991), 65 C.C.C. (3d) 76 (Que. C.A.).

[34] In this case, the police had a legitimate concern about locating any other firearms and ammunition that may be under the control of the accused. They anticipated that he would be released from custody soon on some kind of interim release. They therefore wanted to secure any weapons that may be accessible to the accused. It was acknowledged by the officers that they did not at any time enlist the aid of the hotel management but that was due to fears about compromising their investigation. All of these circumstances incline me to conclude that the police conduct was reasonable.

[35] The cases that have upheld forcible entry into unoccupied premises usually deal with narcotics searches. The fear is that if officers wait then, when someone returns to the scene, the evidence can be easily destroyed. It seems to me that the presence of a large quantity of sophisticated weaponry is a sufficient public safety issue justifying swift police action to uncover additional weapons. As Crown counsel pointed out, the Criminal Code recognizes the significant safety concern by authorizing, in s.103(2), the warrantless seizure of firearms. The safety of the public is surely as grave a risk, if not more so, than the possible destruction of evidence. I also note that the room entered was not used as living quarters. It was used as a storage room in a hotel. Presumably the hotel management could demand access to it. Hence the accused's expectation of privacy must be slightly differentiated from that associated with one's home.

[36] For these reasons I concluded that the conduct of the police in forcing entry into Room Two was not unreasonable.

4. **Seizure of Photographs and Videotapes:**

[37] This last category examines the scope of what is known as the "plain view" doctrine. That doctrine authorizes the seizure of evidence of a crime (or contraband) by police where they are lawfully at a place and such evidence is in plain view. The doctrine originated under the Fourth Amendment to the United States Constitution and has been adopted by Canadian appellate courts: *R v Longtin* (1983), 5 C.C.C. (3d) 12 (Ont. C.A.); *R v Belliveau and Losier* (1986), 30 C.C.C. (3d) 163 (N.B.C.A.); *R v Nielsen* (1988), 43 C.C.C (3d) 548 (Sask. C.A.); *R v Dreysko* (1990), 110 A.R. 317 (C.A.); and *R v Grenier* (supra). Its scope was succinctly explained by Salhany J. in

R v Safety Kleen Canada Inc., [1991] O.J. No. 2348 (Gen. Div.), at page 9:

> What seems to emerge from these authorities is that before the "plain view" principle applies, three requirements must be satisfied. The first is that the initial intrusion was lawful (e.g. pursuant to a valid search warrant). The second is that the police must have inadvertently discovered the incriminating evidence, that is, not knowing in advance that it was in a particular location and intending to rely upon the plain view principle as a pretext to seize it. Finally, the incriminating nature of the items seized must be "immediately apparent" to the officer.

[38] To some extent the "plain view" doctrine has been incorporated into the Criminal Code by s.489(2):

> (2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
>
> (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
>
> (b) has been used in the commission of an offence against this or any other Act of Parliament; or
>
> (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

Counsel concentrated their arguments on the "plain view" doctrine generally, however, due to what I think has been recognized in law as the wider ambit to the doctrine as compared to that of section 489: see *Fontana*, *supra*, at pages 195 - 196.

[39] In this case, prior to the search of Room Two, Staff Sgt. Grundy had seen photographs of the accused with firearms. Other officers testified they saw photographs of women posing with firearms. These items were found, along with firearms and ammunition, in the earlier search of the accused's accommodation room. Sgt. Grundy testified that he picked up a booklet of photos in Room Two to see if there were any similar ones. He said the first photograph was of a nude, apparently adult, woman. He then flipped through some more and came across those of the individual subsequently identified by name and age. The officers then took one of the videotapes

with that individual's name on it, went back to the accused's accommodation room, and watched the tape on the accused's VCR. By this time, the authority to be in the accused's "Room Three" had expired by the first warrant. Then they took a sample of approximately 30 tapes back to the detachment. All of this was done prior to the issuance of the third warrant.

[40] Mr. Mahar submitted that, first, there was no basis for looking at the photographs in the first place since nothing illegal had been depicted in any of the previous photographs, and, second, the viewing of the videotape was beyond any known limit of the "plain view" doctrine. Thus these activities went beyond the authority of the second warrant. Thus the sample tapes must be excluded. And, if these are excluded due to an unreasonable abuse of the authority of the second warrant, the third warrant and all of the seizures made under it are tainted and should also be excluded.

[41] American constitutional law has recognized that the term "plain view" has to be considered in context. The incriminating nature of many objects (such as firearms or narcotics) may be immediately apparent. There are, however, many things that must be examined first to ascertain their incriminating nature. Documents are a perfect example. Computer discs may be another example, as are videotapes. In the above-noted *Safety Kleen* case, Salhany J. reviews many of the American cases that have recognized that a "plain view" seizure is permissible even though the incriminating nature of the thing seized is not readily apparent absent some further examination. The officers, where there is probable cause that something might be evidence of criminal activity, are justified in giving the object a quick perusal or examination.

[42] There is Canadian authority that also recognizes the validity of a seizure where the officer had to make a further investigation beyond merely seeing the object. In the *Dreysko* case (cited above), the police were called to a suspected break-in at the accused's home, where they discovered a large volume of stereo equipment. The officers were immediately suspicious and checked for serial numbers on the equipment. An officer "ran" the serial numbers and discovered that one of the items had been stolen. On this basis a warrant was obtained and executed. [This summary of the facts is taken not from the report of the *Dreysko* case, since it is not repeated there, but from a more recent judgment of the Alberta Court of Appeal following *Dreysko*, that being *R v Smith*, Appeal No. 96-16887, an as yet unreported judgment released on June 9, 1998.]

[43] In *Dreysko*, the Alberta Court of Appeal held that the police were lawfully on the premises and that it was immediately apparent to the officers that the items they observed may be evidence of a crime. In holding the initial search and seizure valid, notwithstanding that further investigations had to be carried out, Kerans J.A. wrote (at page 318):

> We think that the further searches carried on by the officers fall squarely within the definition of the "plain view" doctrine expressed by the New Brunswick Court of Appeal in *R. v. Belliveau and Losier* (1986), 75 N.B.R. (2d) 18; 188 A.P.R. 18; 30 C.C.C. (3d) 163 (C.A.).

The same result, on similar facts, was reached in *R v Mousseau* (1994), 94 C.C.C. (3d) 84 (Ont. Gen. Div.).

[44] In this particular case, the officers had already viewed photographs of the accused and others with firearms. They had already seized a large volume of firearms and ammunition. In my opinion it was perfectly reasonable for Staff Sgt. Grundy to assume that if there were photographs in plain view, even if inside a photo booklet, that those photographs may provide evidence of additional firearms that may be in the accused's possession. So his picking up the booklet and looking at its contents, flipping through them or perusing them, was justified.

[45] Mr. Mahar argued that as soon as Sgt. Grundy saw the first photo, that of a nude adult woman, he should have recognized the extremely private nature of this material and ceased his perusal. However, as Crown counsel noted, there was nothing on the outside of the booklet to indicate its contents and, just because the first photo was of a nude woman, that does not necessarily mean that the other photos would not give evidence of firearms. In my opinion it was reasonable for Staff Sgt. Grundy to flip through the booklet. It was also reasonable, once he saw that one of the people may be underage, to try and identify that individual. This was done on the spot by one of the other officers. No extensive investigation had to be carried out at that point. So the seizure of the photographs was clearly within the scope of the "plain view" doctrine.

[46] Mr. Mahar also argued that the seizure and viewing of the videotape was beyond the authority of the police. He noted that by their nature the contents of a videotape

cannot be considered to be in "plain view". He submitted that the viewing of a videotape must be expressly authorized by a warrant since the Code is silent about it.

[47] In this case the videotape that was taken had written on its outside the same name as that of the person whose identity was noted in the photograph. She was known to the officers at the scene to be under 14 years of age. The photograph itself, under these circumstances, was evidence of a crime ("child pornography") so it was reasonable for the officers to conclude that the videotape may be further evidence of a crime. In my opinion, the viewing of the videotape was a reasonable part of the "plain view" search, no different in effect than the further investigations conducted by the officers in the *Dreysko* case.

[48] The fact that the officers went back into the accused's accommodation room to view the videotape is unfortunate but not fatal. Technically the officers were trespassers at that point. But in my opinion the intrusion was minimal and harmless. I say that because the police had already secured that room, it was empty (the accused was in custody), and the police would simply have viewed that videotape at the detachment if they did not view it on the spot. The result would have been the same.

[49] At this point, however, I think the officers should have obtained the third warrant. The seizure of the sample of approximately 30 more videotapes (only some of which had the same young person's name on the outside) went beyond the scope of "plain view" seizure. As happened in *Dreysko*, once the officers found one allegedly stolen item they obtained a warrant to seize the rest. Here, once the officers viewed one videotape and saw that it not only contained evidence of a possible crime but was itself a criminal item, then they had grounds to obtain a warrant (as they eventually did) to seize all the videotape. In my opinion neither the "plain view" doctrine nor s.489 justifies this seizure. It may have if all the tapes taken were clearly marked with the same person's name. But they were not. It amounted to a "sampling", as the police said, but the danger is that "sampling" is often nothing more than "fishing".

[50] For these reasons I conclude that the warrantless seizure of the approximately 30 videotapes was unjustified. Does that affect the validity of the third warrant? In some cases, such as *R v Grant* (1993), 84 C.C.C. (3d) 173 (S.C.C.), it was recognized that a warrantless search which violates s.8 of the Charter may taint the entire search process even if a subsequent warrant is issued on reasonable and probable grounds (grounds that are distinct from information obtained through the warrantless search).

[51] Furthermore, in this case, there was the possibility that all tapes would be excluded due to the failure of the police to identify those tapes that were seized as part of the sampling. Crown counsel could not tell me if any of the tapes to be used in evidence in support of any of the charges were part of that sampling. I find the failure to properly catalogue each of these tapes to be quite incredible. And, as Mr. Mahar noted, if the sample tapes are to be excluded, and if we have no way of identifying them out of the total seized, then perhaps all of the videotapes are tainted and must be excluded. This is the danger in the lack of proper police identification of each item seized. As it turns out, however, this is not an issue since I concluded eventually that these tapes, taken as samples, should nonetheless be admitted. If I had not, I think it is safe to say that the seizure of all the videotapes may have been jeopardized.

[52] In my opinion, the subsequent warrant justifies the admission of the items seized in the third search. That warrant was obtained, in part, on the seizure of the sample videotapes. But the Information in support of that warrant also contained details obtained through the lawful seizures effected during execution of the second warrant. There were also other items of information justifying issuance of the third warrant.

[53] The discovery and seizure of evidence on the basis of an unreasonable search does not necessarily invalidate a warrant obtained subsequently. In *Grant (supra)*, a warrantless perimeter search had disclosed the smell of marijuana and the presence of the smell was included in the application for the warrant. As the perimeter search violated s.8 of the Charter an issue arose as to the validity of the warrant subsequently obtained. Sopinka J. addressed the issue as follows (at pages 195 - 196):

> In *Kokesch, supra*, this court determined that evidence obtained during a search under warrant had to be excluded under s.24(2) of the Charter where the warrant was procured through an information which contains facts solely within the knowledge of police as a result of a Charter violation. However, in circumstances such as the case at bar where the information contains other facts in addition to those obtained in contravention of the Charter, it is necessary for reviewing courts to consider whether the warrant would have been issued had the improperly obtained facts been excised from the information sworn to obtain the warrant: *Garofoli, supra*. In this way, the state is prevented from benefitting from the illegal acts of police officers, without being forced to sacrifice search warrants which would have been issued in any event. Accordingly, the warrant and search conducted thereunder in the case at bar will be considered constitutionally sound if the warrant would have issued had the observations gleaned through the unconstitutional perimeter searches been excised from the information.

[54] I have concluded that the third warrant was properly issued based on the information presented to the Justice of the Peace after any reference to the seizure of the sample videotapes is excised. Therefore all items seized under the third warrant are admissible.

Should the Evidence be Excluded:

[55] Since I have concluded that the sample of approximately 30 video tapes were improperly seized, I must consider whether they should be excluded from evidence. The Supreme Court of Canada has consistently held, since *R v Collins* (1987), 33 C.C.C. (3d) 1, that the onus lies on the party seeking to exclude evidence to satisfy the test under s.24(2) of the Charter that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute. The Court also set forth three categories of factors that must be considered: the fairness of the trial, the seriousness of the Charter violation, and the effect of admitting or excluding the evidence on the administration of justice.

[56] Whether admitting the evidence will affect the fairness of the trial is usually dependent on whether the evidence was found as a result of conscripting the accused against himself or whether it was otherwise discoverable. The traditional term used for non-conscriptive evidence was "real" evidence. Such evidence was rarely thought to operate unfairly since it exists irrespective of any Charter violation and is usually discoverable without conscriptive measures: see, for example, *R v Evans* (1996), 104 C.C.C. (3d) 23 (S.C.C.), at pages 36 - 37.

[57] The use of the term "real" evidence has fallen out of favour. The distinction now is not so much on whether evidence is real or not, but whether it is conscriptive (obtained as the result of the compelled incrimination of the accused) or non-conscriptive (obtained in the course of police investigation where the accused had not been compelled to participate in the creation or discovery of it). In *R v Stillman* (1997), 113 C.C.C. (3d) 321(S.C.C.), Cory J. described this distinction (at page 352):

> The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterized as "real"or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the *Charter*. Where the accused, as a result of a breach of the *Charter*, is compelled or conscripted to provide a bodily substance to

> the state, this evidence will be of a conscriptive nature, despite the fact that it may also be "real" evidence. Therefore, it may be more accurate to describe evidence found without any participation of the accused, such as the murder weapon found at the scene of the crime, or drugs found in a dwelling-house, simply as *non-conscriptive* evidence; its status as "real" evidence, *simpliciter*, is irrelevant to the s.24(2) inquiry.

Cory J. also made the statement (at page 351) that "the admission of evidence which falls into the 'non-conscriptive' category will...rarely operate to render the trial unfair."

[58] In this case the evidence was clearly non-conscriptive. It had an independent existence and was discoverable by proper methods. This weighs in favour of admission.

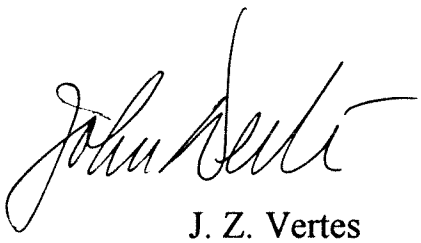
[59] When considering the second category of seriousness of the Charter violation, the courts look at some or all of the following factors: the obtrusiveness of the search, the individual's expectation of privacy in the area searched, the existence of reasonable and probable grounds, and the good faith of the police. In my opinion all of these factors also weigh in favour of admission. The seizure was made after the lawful entry, pursuant to warrant, into a room in a hotel used, not for living purposes, but for storage. There was no question raised about the good faith of the police. They were in the premises to search for evidence of one type of crime and found, to their surprise, a vast amount of material that could be evidence of other crimes. Finally, when the search of the premises for the sex-related material was ultimately carried out it was done so pursuant to a valid warrant. Thus the Charter violation was not sufficiently serious to justify exclusion of the evidence.

[60] In the third category as to the effect of admission or exclusion on the administration of justice, factors to consider are such things as the degree of social evil represented by the crime in question, society's interest in the effective prosecution of crime, whether the evidence is essential to substantiate the charge, and the public perception of the administration of justice. Balanced against these factors, of course, is the vital societal interest in preserving individual rights and protections against unauthorized state power.

[61] In this case the evidence relates to charges of sexual exploitation of young women. Society recognizes the vulnerability of young people to sexual predators and as a result significant sanctions are incorporated into the Criminal Code. The police were not engaged in arbitrary, unauthorized conduct. They had lawful authority to be

on the premises. The most that can be said is that they overstepped their authority by taking the sample videotapes prior to obtaining a further warrant (which they eventually did obtain). In my opinion no reasonable person would consider the admission of this evidence as bringing disrepute to the administration of justice, while its exclusion certainly would.

[62] In the result, I concluded that the evidence is admissible. The motion brought on behalf of the accused was dismissed.



J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 15th day of July, 1998

Counsel for the Crown: Mark Scrivens &
Loretta Colton

Accused (Wing Toon Lee) representing himself

Andrew Mahar appearing as *Amicus Curiae*

APPENDIX "A"

WARRANT TO SEARCH

Form 5
Section 487
Criminal Code

2V

CANADA
Northwest Territories

To the Peace Officers in the Northwest Territories

Whereas it appears on the oath of CPL. MALCOLM EATON

a Peace Officer of the Northwest Territories, that there are reasonable grounds for believing that certain things, namely

DESCRIBE THINGS TO BE SEARCHED FOR AND THE OFFENCE IN RESPECT OF WHICH SEARCH IS TO BE MADE

SEE APPENDIX "B."

which are being sought as evidence in respect to the offence of :

WING LEE,

BETWEEN THE TWENTY-SIXTH DAY OF MAY, 1997, AND THE TWENTY-NINTH DAY OF MAY, 1997 AT OR NEAR THE CITY OF YELLOWKNIFE IN THE NORTHWEST TERRITORIES, DID KEEP A COMMON GAMING HOUSE AT ROOM THREE, GOLD RANGE HOTEL, 5010-50th STREET, YELLOWKNIFE N.W.T., CONTRARY TO SECTION 201(1) OF THE CRIMINAL CODE.

DWELLING-HOUSE, BUILDINGS, RECEPTACLES OR PLACE

are in the PLACE

ADDRESS

at ROOM THREE, GOLD RANGE HOTEL, 5010-50th STREET, YELLOWKNIFE, N.W.T.
hereafter called the premises.

THIS IS, THEREFORE, to authorize and require you to enter into the said premises between the hours of 21:00 97-05-29 and 03:00 97-05-30 to search for the said things and to bring them before me or some other Justice.

Dated this 29 day of MAY
19 97, at YELLOWKNIFE
in the Northwest Territories

Sheila Leonardis

Sheila Leonardis

JUSTICE OF THE PEACE

NWT 5383/0489

CR 0[illegible]62

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

WING TOON LEE

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE J.Z. VERTES