

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

BORIS BLAIR SANGUEZ

**Transcript of the Reasons for Decision of the Honourable Justice
S.H. Smallwood, sitting in Yellowknife, in the Northwest
Territories, on the 24th day of January, 2020.**

APPEARANCES:

M. Fane:	Counsel for the Crown
J. Major-Handsford:	Counsel for the Crown
D. Tarnow:	Counsel for the Defence

Charges under s. 162(1)(b) and s. 271 of the *Criminal Code*

There is a ban on the publication, broadcast or transmission of any information that could identify the complainant pursuant to s. 486.4 of the *Criminal Code*. Some initials have been randomized.

There is a ban on the publication, broadcast or transmission of the evidence taken, the information given or the representations made and the reasons for decision pursuant to s.

648(1) of the Criminal Code.

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1 **(BEGINNING OF EXCERPT)**

2 **(TELECONFERENCE COMMENCES)**

3 THE COURT: All right. So the accused Boris Blair
4 Sanguiez is facing two charges: a sexual assault
5 contrary to section 271 of the *Criminal Code* and
6 voyeurism contrary to section 162(1)(b) of the *Criminal*
7 *Code*. The accused has brought an application for the
8 exclusion of evidence, a memory card from a camera,
9 seized by the police on June 4th, 2017 in Jean Marie
10 River, Northwest Territories. The accused alleges that
11 in seizing and searching the accused's memory card
12 without a search warrant that the police breached his
13 rights under section 7 and 8 of the *Canadian Charter of*
14 *Rights and Freedoms* and that the evidence should be
15 excluded under section 24(2) of the *Charter*.

16 The Crown argues that there was no breach of
17 the accused's *Charter* rights, that the memory card was
18 seized lawfully pursuant to the plain view doctrine or
19 pursuant to section 489(2) of the *Criminal Code* and
20 lawfully accessed by the police thereafter. If there is a
21 *Charter* breach, the Crown argues that the evidence
22 should not be excluded under section 24(2) of the
23 *Charter*.

24 The evidence on the *voir dire* consisted of the
25 testimony of Constable Jonah Candy, Constable Akira
26 Currier, and Constable James Fogerty. There was also
27 a search warrant, information to obtain a search

1 warrant, general warrant, information to obtain a
2 general warrant, and a booklet of photographs entered
3 as exhibits.

4 On June 3rd, 2017, at approximately 9:00 p.m.,
5 Constable James Fogerty received a call from the
6 Operational Communications Centre ("OCC") regarding
7 a sexual assault complaint in Jean Marie River. He
8 asked Constable Candy to look into the complaint
9 because he was dealing with another complaint at the
10 time. Constable Fogerty was working, and Constable
11 Candy was on call, the backup for Constable Fogerty.
12 No one else was working that evening. Both officers
13 were posted to Fort Simpson. The Fort Simpson
14 detachment also polices the communities of Wrigley,
15 Trout Lake, and Jean Marie River.

16 Constable Candy spoke with OCC who advised
17 him of the details of the report which were that A.B, the
18 sister of the victim, had reported that A.B. had been
19 found in Boris Sanguiez' house partially clothed. A
20 camera had also been located, and she believed from
21 viewing the camera that a sexual assault had occurred.
22 Constable Candy then called B.C. and spoke with her.

23 Following this conversation, he believed that
24 A.B.'s boyfriend, T. F., had been looking for her, and he
25 and B.C. had gone to Boris Sanguiez' residence to look
26 for her. Inside the residence, they saw Boris Sanguiez
27 coming out of a room, pulling up his pants. They went

1 into the room and found A.B. passed out with no
2 clothes on from the waist down. B.C. found a camera
3 with a card on it that had pictures that led her to believe
4 that a sexual assault had occurred. They awoke A.B.
5 and took her out of the residence and took the card
6 from the camera.

7 Following the phone calls, Constable Candy
8 spoke with Constable Fogerty and advised what he had
9 learned. Constable Fogerty then contacted Sergeant
10 Donovan and discussed the file with him. In order for
11 Constable Fogerty and Constable Candy to go to Jean
12 Marie River, they had to ensure that there was police
13 coverage in Fort Simpson while they were gone.

14 Constable Candy and Constable Fogerty then
15 drove to Jean Marie River, leaving shortly before 10
16 p.m. The drive to Jean Marie River from Fort Simpson
17 takes an hour and a half and can take up to two hours.
18 In June, there is a river that has to be crossed by a ferry
19 which can affect how long it takes to get to the
20 community.

21 The officers arrived in Jean Marie River around
22 11:50 p.m. and spoke with the victim's father who they
23 encountered on the road. Constable Fogerty testified
24 that they spoke with G.P. and S.P. who told them that
25 A.B. was still at the house and that they offered to point
26 out Boris Sanguiez' residence. The officers followed
27 them to the accused's residence, which the P.'s pointed

1 out, and then they went to the victim's residence.

2 At the victim's residence, there were half a
3 dozen people in and around a black car consuming
4 alcohol. Constable Fogerty spoke with A.B.. Ms. B.
5 was able to speak but was quite intoxicated and was
6 upset. Constable Fogerty asked A.B. if they could take
7 her to the health centre to be examined, but she
8 declined and also did not want to provide a statement
9 that evening.

10 Constable Candy spoke with T.F. who was also
11 drinking but was able to communicate. He advised that
12 he and B.C. were looking for A.B. and went to the
13 accused's house and located A.B. there. A.B. was
14 passed out, and he could not wake her up, and he had
15 to strike her to wake her up.

16 At around 11:55 p.m., the officers knocked on
17 the door and asked to speak to B.C.. Constable Candy
18 and Constable Fogerty both observed that B.C.
19 appeared sober. Constable Candy, Constable Fogerty,
20 and B.C. went into the kitchen. The other people
21 remained outside. On the kitchen table, there was a
22 laptop. B.C. told them that she had taken a card from
23 the camera. She showed the officers the pictures from
24 the memory card she had taken using her laptop.

25 Constable Fogerty testified that he did not know
26 she was going to show them the photographs until he
27 saw the laptop. He also testified that neither he nor

1 Constable Candy directed B.C. to do anything.
2 Constable Candy took notes of what they were looking
3 at. B.C. showed them what was on the card.
4 Constable Candy could not remember if he operated
5 the laptop at all but said it was possible that he may
6 have.

7 Constable Candy saw a series of photos that
8 B.C. said were of A.B. in various positions laying on a
9 bed. There were some photographs where a woman
10 was lying on her back with no clothing from the waist
11 down. It looked like the female was not awake and was
12 sleeping. There were some pictures where there was a
13 closer-up view of the vaginal area. There were also
14 pictures of a penis near or penetrating the vagina and
15 pictures of a hand touching the vagina. A few of the
16 photographs had what looked like a green sleeve or
17 green shirt in the picture with the hand.

18 Constable Candy testified that he asked B.C. if
19 there was a picture of Boris Sanguiez on the card.
20 Constable Candy wanted to see if there was a picture
21 of him on the card and to see what he looked like. B.C.
22 scrolled through the photographs and showed him one
23 of him standing up in a picture. It was an unrelated
24 photograph of the accused fully clothed. Constable
25 Candy could not remember if he or B.C. actually
26 scrolled through the pictures.

27 Constable Fogerty, however, testified that one

1 of the first photographs that B.C. had shown them was
2 a picture of Boris Sanguéz, and it looked like it was at
3 Banff National Park or somewhere similar. After this,
4 Constable Fogerty testified that B.C. scrolled back on
5 the memory card and showed them pictures of what
6 appeared to be a past-out A.B. in various positions.

7 Constable Fogerty testified that B.C. operated
8 the laptop, and that he wasn't sure, but he might have
9 flipped through a couple of the photographs himself.
10 He did not recall if Constable Candy touched the laptop
11 or not. Later, Constable Fogerty testified that he was
12 not sure if they viewed the assault photographs first or
13 the other photographs. Constable Fogerty testified that
14 he did not think that they looked at a lot of the other
15 photographs. He thought it was perhaps 10 photos that
16 they quickly scrolled through. He recalled that there
17 were some scenery photographs and a female with
18 Boris Sanguéz in a couple of the photographs.

19 Constable Fogerty testified that B.C. was
20 distraught after viewing the photos and she said, "Take
21 them. Take this memory card. I don't want it."

22 At 12:09 a.m., Constable Fogerty seized the
23 memory card. Constable Fogerty said he seized the
24 card because it was pertinent to the investigation. They
25 had seen the photographs which in his view depicted a
26 sexual assault, and there was an allegation of sexual
27 assault.

1 Constable Fogerty estimated that they were in
2 the kitchen for 5 to 10 minutes and no more than 10
3 minutes. In the kitchen, Constable Candy testified that
4 there was also a discussion of where Boris Sanguiez
5 lived and trying to get A.B. to a health centre to get
6 examined. This might involve A.B. going to Fort
7 Simpson, and there were transportation issues related
8 to doing so.

9 While in Jean Marie River, Constable Candy
10 testified that he did not consider any expectation of
11 privacy that Boris Sanguiez might have had in the
12 memory card. Constable Candy viewed the contents of
13 the memory, the photographs, as depicting a sexual
14 assault. Constable Fogerty testified that at the time he
15 seized the card, he did not turn his mind to whether
16 Boris Sanguiez had an expectation of privacy in the
17 card. Constable Fogerty described it as follows:

18
19 Question: Had you turned your mind to
20 whether or not Boris Sanguiez would have an
21 expectation of privacy in that memory card at
22 the time you seized it?

23 Answer: At the time we seized it, no. We were
24 given the memory card. And given the situation
25 that we were in with the allegations and -- yeah,
26 I mean, like I say, it was handed to us. It was
27 given to us, so we took it. We obtained it,

1 general warrant. The discussion at the detachment
2 included Sergeant Donovan, Constable Candy,
3 Constable Currier, and Constable Fogerty. Constable
4 Candy testified that he, other than seeing the
5 photographs when B.C. showed him, that he did not
6 view the photographs again.

7 Constable Akira Currier testified that he was
8 the affiant for the warrants in this matter. In October
9 2017, he was asked by Sergeant Donovan to assist in
10 obtaining a general warrant on the file. Constable
11 Currier began by familiarizing himself with the
12 investigation up to that point. He reviewed statements
13 and accessed the memory card and viewed the
14 photographs on the card. There were 879 photographs
15 on the memory card, 68 of which appeared to be of
16 evidentiary value. He then spoke with other officers
17 and counsel. Following these conversations, he
18 realized that Mr. Sanguiez might have a reasonable
19 expectation of privacy in the contents of the memory
20 card, so he decided to first seek a search warrant for
21 the contents of the card before getting a general
22 warrant.

23 Constable Currier drafted an information to
24 obtain and included an appendix entitled "Information
25 Disclosed but Not Relied Upon." This contained
26 information which Constable Currier viewed as the
27 information could be considered as having been

1 improperly accessed, but the officer wanted to include it
2 in the interest of being full, frank, and fair so that the
3 issuing justice would be aware of the entire scope of
4 the police actions, but that the information was not
5 intended to influence the issuing justice's decision as to
6 whether or not the warrant should be granted.

7 On October 19th, 2017, the search warrant was
8 granted. Constable Currier executed the warrant by re-
9 accessing the memory card and copying to a disc the
10 photographs which met the criteria in the search
11 warrant. That disc was then seized as an exhibit and
12 secured.

13 Constable Currier conducted an examination of
14 the card and described the photographs in detail and
15 viewed the time stamps of the photographs. Following
16 this, he completed a Form 5.2 and forwarded it by fax
17 to the issuing justice. Constable Currier then began
18 working on an information to obtain a general warrant.

19 During Constable Currier's review of the seized
20 images, he observed a variety of physical
21 characteristics captured which belonged to the
22 offender. There were images of his penis, scrotum, left
23 hand, parts of his thigh, and abdomen. Constable
24 Currier identified a number of specific things which he
25 believed if photographed on the suspect the police
26 could gather evidence which would help to prove the
27 identity of the offender.

1 Constable Currier decided he could achieve the
2 objective by limiting the photographs to the hand which
3 would be less intrusive than photographing the
4 accused's penis. Constable Currier had identified a
5 scar which ran diagonally along the medial surface of
6 the left index finger, and there also appeared to be a
7 freckle on the same finger.

8 Constable Currier obtained a general warrant
9 on February 13th, 2018. The information to obtain also
10 contained an appendix similar to the search warrant
11 information to obtain. Constable Currier included this
12 appendix for similar reasons.

13 Constable Currier executed the warrant.
14 Constable Currier approached Mr. Sanguiez following
15 Territorial Court and detained him. He transported the
16 accused to the detachment where he provided the
17 accused with a copy of the warrant. Constable Currier
18 explained the warrant to the accused, and the accused
19 was put in contact with counsel and given an
20 opportunity to speak in private with counsel.

21 Constable Currier then took photographs of the
22 accused's left hand. Constable Currier was of the
23 opinion that the scar on the photograph of the
24 accused's hand matched the scar indicated in the
25 offence-related photograph. He also believed that the
26 freckle on the finger was visible on the photographs he
27 took of the accused's hand.

1 Counsel agree for the purpose of the *voir dire*
2 that B.C. took the memory card from Boris Sanguiez'
3 bedroom from his camera without his permission. The
4 warrant to search, general warrant, and the
5 informations to obtain were all filed on the *voir dire*.
6 Photographs were also filed.

7 The first photographs were the photographs
8 located by B.C. on the memory card and shown to
9 Constables Fogerty and Candy. There are
10 approximately 68 photographs, and they are graphic.
11 They depict photographs of a woman who appears to
12 be unconscious, either sleeping or passed out. The
13 woman is laying on her back and is unclothed from the
14 waist down. She is wearing a blue shirt underneath a
15 grey, long-sleeved shirt. The vaginal area of the
16 woman is exposed, and the majority of the photographs
17 are of the vaginal area.

18 There are several pictures of a penis near or
19 penetrating the vagina of what appears to be the same
20 woman. There are photographs of the hand of a
21 person touching a vagina, and that person is wearing
22 what appears to be different clothing than the woman.
23 That person appears to be wearing a green, long-
24 sleeved shirt or sweater. There are also close-up
25 photographs of the hand spreading the labia of the
26 woman, and there appears to be a scar on the hand as
27 well as a freckle.

1 There is also a photograph of A.B. taken by
2 Constable Candy outside her residence when the
3 police officers first arrive there. The photograph depicts
4 a woman wearing a sweater that appears similar to the
5 sweater worn by the woman in the photographs located
6 on the memory card. There are also photographs
7 taken by Constable Currier when executing the general
8 warrant. There are photographs of the accused's hand
9 which appear to depict a scar and a freckle.

10 The issues in this case surround the police
11 seizure of the memory card and the subsequent
12 searches of the memory card by the police. In addition,
13 there are issues with respect to the information to
14 obtain the search warrant.

15 The accused claims the police breached his
16 rights under section 7 and 8 of the *Canadian Charter of*
17 *Rights and Freedoms* and that the evidence should be
18 excluded under section 24(2) of the *Charter*. The
19 Crown argues that there was no breach of the
20 accused's *Charter* right, that the memory card was
21 seized lawfully, and accessed lawfully. If there is a
22 *Charter* breach, the Crown argues that the evidence
23 should not be excluded under section 24(2) of the
24 *Charter*.

25 Section 7 of the *Charter* states that, "Everyone
26 has the right to life, liberty, and security of the person
27 and the right not to be deprived thereof except in

1 accordance with the principles of fundamental justice.”
2 The application filed by the accused alleges a breach of
3 section 7 and 8 of the *Charter*. The submissions of
4 counsel at the *voir dire* focussed on section 8 and did
5 not address section 7. As such, I do not intend to
6 specifically address section 7 in this decision. I would
7 note that section 8 addresses a specific right included
8 in the principles of fundamental justice, and if a search
9 is reasonable under section 8, it will invariably be
10 consistent with the principles of fundamental justice
11 under section 7 (*R. v. Mills*, [1999] 3 S.C.R. 668, at
12 paragraphs 87, 88).

13 Section 8 of the *Charter* states that everyone
14 has the right to be secure against unreasonable search
15 or seizure. In this case, the police seized the memory
16 card from B.C. at her residence. It is not in dispute that
17 B.C. took the memory card from a camera at Boris
18 Sanguiez’ residence and that she did not have his
19 permission to do so. Taking the memory card from the
20 camera was an action undertaken by B.C. prior to the
21 involvement of the police in this matter.

22 Section 8 of the *Charter* protects an individual’s
23 reasonable expectation of privacy against the actions of
24 the state and not of individuals. B.C.’s actions in taking
25 the memory card do not engage section 8. What we
26 are concerned about are the actions of the police once
27 they are shown the photographs on the memory card

1 by B.C..

2 The Crown argues that the memory card was
3 seized lawfully by Constable Fogerty pursuant to the
4 plain view doctrine or section 489(2) of the *Criminal*
5 *Code*.

6 The starting point is that a warrantless search
7 is *prima facie* unreasonable. When a search is
8 conducted without a warrant, the Crown must establish
9 on a balance of probabilities (1) that a search was
10 authorized by law, (2) the law itself is reasonable, and
11 (3) the manner in which the search was carried out was
12 reasonable (*R. v. Cole*, 2012 SCC 53, at paragraph
13 37).

14 The plain view doctrine operates to authorize
15 the seizure of an item in the plain view of officers when
16 the officers are lawfully present in the place where the
17 search is being conducted. The requirements of the
18 plain view doctrine were described in the *R. v. Jones*,
19 2011 ONCA 632, at paragraph 56:

20 The 'plain view' doctrine operates when a
21 police or peace officers in the process of
22 executing a warrant or an otherwise lawfully
23 authorized search with respect to one crime
24 and evidence of another crime falls into plain
25 view. Resort to this common law power is
26 subject to the following restraints, however:
27 (i) The officer must be lawfully in the place

1 where the search is being conducted ("lawfully
2 positioned", in the language of the authorities);
3 ii) the nature of the evidence must be
4 immediately apparent as constituting a criminal
5 offence;
6 (iii) the evidence must have been discovered
7 inadvertently;
8 (iv) the plain view doctrine confers a seizure
9 power not a search power; it is limited to those
10 items that are visible and does not permit an
11 exploratory search to find other evidence of
12 other crimes.

13 The decision in *Jones* emphasized that the
14 seizure power was limited to items that were visible, in
15 plain view, and that it did not grant authority to conduct
16 an exploratory search to find evidence of other crimes.
17 The police officers must also be lawfully in the place
18 and acting lawfully in the exercise of their powers when
19 discovering the evidence (*R. v. Gill*, 2019 BCCA 260, at
20 paragraphs 37, 38).

21 In *Gill*, the British Columbia Court of Appeal
22 held that the requirement that the evidence be
23 discovered inadvertently did not necessarily mean that
24 the discovery of the evidence be unexpected, and
25 stated at paragraph 52:

26 I accept that for the plain view doctrine to apply,
27 the discovery of the item by the officer must be

1 'inadvertent' in the sense that it is not
2 discovered by unauthorized search, but rather,
3 because it is in the open where the police are
4 lawfully in the place where it is visible, and
5 lawfully exercising police duties.

6 Section 489(2) of the *Criminal Code*
7 authorizes a peace officer to seize evidence
8 and states:

9 Every peace officer, and every public officer
10 who has been appointed or designated to
11 administer or enforce any federal or provincial
12 law and whose duties include the enforcement
13 of this or any other Act of Parliament, who is
14 lawfully present in a place pursuant to a
15 warrant or otherwise in the execution of duties
16 may, without without a warrant, seize anything
17 that the officer believes on reasonable grounds
18 (a) has been obtained by the commission of an
19 offence against this or any other Act of
20 Parliament;
21 (b) has been used in the commission of an
22 offence against this or any other Act of
23 Parliament; or
24 (c) will afford evidence in respect of an offence
25 against this or any other Act of Parliament.

26 In *Jones*, at paragraph 58, the Ontario
27 Court of Appeal noted that the plain view

1 doctrine in section 489 of the *Criminal Code* are
2 “exceptions to the general rule that a
3 warrantless search is unreasonable and
4 therefore a violation of section 8.”

5 I find that there is no section 8 breach in the
6 decision of Constable Fogerty to seize the memory
7 card from B.C.. Constable Fogerty and Constable
8 Candy went to Jean Marie River to investigate a
9 complaint of sexual assault. They were aware that
10 there were photographs which appear to depict a
11 sexual assault. When they arrived in Jean Marie River
12 and spoke with B.C., she showed the photographs to
13 the officers.

14 Both officers described B.C. as wanting to
15 show them the photographs and that she used her
16 laptop to show them and scroll through the
17 photographs. She also showed them a photograph of a
18 male she said was the accused. Neither officer could
19 remember if they scrolled through the photographs at
20 all but admitted that it was possible. In my view, I do
21 not think that matters in the circumstances of the case.

22 The officers were presented with a situation
23 where they were investigating a sexual assault and
24 viewed photographs on a computer that appeared to
25 depict a sexual assault. Constable Fogerty had a duty
26 to seize the evidence and not leave it in the possession
27 of B.C.. Constable Fogerty testified that B.C. appeared

1 upset by the photographs and told them to take the
2 memory card, that she did not want it.

3 It is not clear what B.C. would have done with
4 the memory card had Constable Fogerty not seized it.
5 Seizing the memory card allowed the officer to preserve
6 the evidence and prevent its loss or further
7 dissemination to other individuals. The officers had no
8 other realistic option but to seize the memory card at
9 that time, and Constable Fogerty was fulfilling his
10 responsibilities as a police officer in seizing the memory
11 card. Whether it was pursuant to section 489(2)(c) or
12 the plain view doctrine, I find that Constable Fogerty
13 lawfully seized the memory card from B.C..

14 The defence is not, as I understand it, alleging
15 that the actions of Constable Fogerty and Constable
16 Candy in initially viewing the photographs and seizing
17 the memory card from B.C. resulted in a violation of the
18 accused's section 8 rights. In submissions, counsel for
19 the accused took the position that having seized the
20 memory card and returned to Fort Simpson that the
21 police should have gotten a warrant for the card the
22 following day. Instead, the police did not obtain a
23 search warrant for approximately four months, and the
24 memory card was left in the police file.

25 In that time period, several officers viewed the
26 photographs. Constable Fogerty viewed the
27 photographs again the day after he and Constable

1 Candy returned from Jean Marie River. He viewed the
2 photographs while preparing his report.

3 Constable Smith and Constable Currier also
4 viewed the photographs. Constable Smith viewed at
5 least some of the photographs and printed off some to
6 use when he interviewed the accused following his
7 arrest. Constable Currier viewed the photographs
8 around four months later when he reviewed them as
9 part of the process of drafting an information to obtain a
10 search warrant.

11 The Crown argues that once the memory card
12 was lawfully seized, the accused had a diminished
13 expectation of privacy in it. Consequently, the police
14 did not need to obtain a search warrant for the memory
15 card and could access the card at will. The accused's
16 reasonable expectation of privacy was subordinate to
17 the police's duty to investigate crime.

18 The lawful seizure of a memory card without a
19 warrant does not necessarily mean that the police are
20 authorized to then search the memory card for
21 evidence. As observed in *Cole* at paragraph 65 and
22 73, the police may be authorized to take physical
23 control of a laptop temporarily in order to safeguard
24 potential evidence of a crime until a search warrant can
25 be obtained. The lawful receipt of the laptop does not,
26 however, allow the police warrantless access to the
27 personal information contained within it (See also *R. v.*

1 *Marakah*, 2017 SCC 59, at paragraph 50).

2 In *Cole*, the item was a work laptop which had
3 been turned over to the police by the school board after
4 child pornography had been located on the device
5 during maintenance. The Supreme Court of Canada
6 held that the personal information in the laptop
7 “remained subject at all relevant times to Mr. Cole’s
8 reasonable and subsisting expectation of privacy”
9 (*Cole*, paragraph 73).

10 The transfer of the accused’s memory card
11 from B.C. to the police did not change the accused’s
12 reasonable expectation of privacy in the memory card
13 (*R. v. Buhay*, 2003 SCC 30, at paragraphs 33, 34).

14 It has been established by the Supreme Court
15 of Canada that in the case of cell phones and
16 computers, important privacy interests are involved
17 when these devices are seized by the police. This was
18 stated in *R. v. Fearon*, 2014 SCC 77, at paragraph 51:

19 It is well settled that the search of cell phones,
20 like the search of computers, implicates
21 important privacy interests which are different
22 in both nature and extent from the search of
23 other ‘places’. It is unrealistic to equate a cell
24 phone with a briefcase or document found in
25 someone’s possession at the time of arrest. As
26 outlined in *Vu*, computers — and I would add
27 cell phones — may have immense storage

1 capacity, may generate information about
2 intimate details of the user's interests, habits,
3 and identity without the knowledge or intent of
4 the user, may retain information even after the
5 user thinks that it has been destroyed, and may
6 provide access to information that is in no
7 meaningful sense 'at' the location of the search
8 (citations omitted).

9 Computers and cell phones contain the sort of
10 private information which is at the biographical core of
11 personal information and closely protected by section 8
12 of the *Charter* (*Cole*, at paragraphs 46 to 48).

13 The Crown argues that a memory card from a
14 digital camera is different from a computer or laptop or
15 cell phone. A memory card, they say, is more like a
16 photo album than a computer, and the personal
17 information that it is capable of storing is not the
18 biographical core of information contained in cell
19 phones and computers.

20 The Supreme Court of Canada has considered
21 the seizure and search of electronic devices in a
22 number of decisions: *Morelli*, *Vu*, *Cole*, *Fearon*, et
23 cetera. The development of cell phones and laptops
24 and the amount of personal information that can be
25 gleaned from a search of these electronic devices has
26 been the focus of evolving section 8 jurisprudence.
27 However, I am not aware of a decision from the

1 Supreme Court of Canada that addresses specifically
2 digital cameras or memory cards.

3 In *R. v. Balla*, 2016 ABCA 212, the Alberta
4 Court of Appeal considered a case which involved a
5 camera memory card. In that case, the trial judge had
6 considered the execution of a search warrant and
7 whether the terms of the warrant permitted the seizure
8 of a digital camera and then for the police to search the
9 digital camera. The trial judge found there was no
10 section 8 breach and viewed the contents of the digital
11 camera as akin to documents which might contain
12 personal information but would not contain the
13 biographical core of personal information found in
14 computers or smart phones.

15 The trial judge went on to consider section
16 24(2) of the *Charter* and concluded that if there was a
17 breach, he would not exclude the evidence. On
18 appeal, the Alberta Court of Appeal appeared to come
19 to a different conclusion regarding section 8 but agreed
20 with the trial judge with respect to section 24(2) and did
21 not exclude the evidence.

22 The case of the *R. v. Caron*, 2011 BCCA 56
23 dealt with a search and seizure of a digital camera at a
24 vehicle traffic stop for speeding. In *Caron*, the issue on
25 appeal was not whether there had been a *Charter*
26 breach, but essentially the trial judge's section 24(2)
27 analysis. Factually, the actions of the officer in *Caron* in

1 searching the vehicle glove box, locating a digital
2 camera, turning it on, and scrolling through the
3 photographs to determine if there might be
4 photographs depicting the speedometer are very
5 different than in this case where the evidence was
6 essentially offered to Constable Fogerty and Constable
7 Candy by a third party. And the focus is on the actions
8 of the police officers, in this case, once they had
9 lawfully seized the memory card.

10 In *Caron*, the British Columbia Court of Appeal
11 viewed the digital cameras as containing biographical
12 core personal information that a person was entitled to
13 keep private (*Caron*, paragraph 60).

14 In this case, the photographs were located on a
15 memory card that Constable Carrier described as a SD
16 card. Constable Carrier described a SD as follows:

17
18 Question: And what is its function when it's
19 inserted into a camera? What does the SD
20 card do?

21 Answer: It provides memory storage.

22 Question: For what?

23 Answer: For any sort of data that you wish to
24 put on it. The camera generally would either be
25 images or video, but it is simply memory
26 medium. There's no reason why you couldn't
27 put other things on the card if you wished to do

1 so.

2

3 A SD card is a storage device which can store
4 a variety of electronic information. It is not the same as
5 a cell phone or a computer in that it requires that it be
6 inserted into or connected to an electronic device to
7 place information on the card whether it be
8 photographs, videos or documents. A memory card,
9 because it is a storage device, does not contain its own
10 computing or processing power, and the amount of
11 core biographical information that it contains about a
12 person is likely less than what would be on a smart
13 phone or computer. However, that is not to say that it
14 does not contain personal information. Photographs,
15 videos, documents can all contain personal information
16 and can reveal information about the user that may or
17 may not be intended.

18 Mr. Sanguiez retained a reasonable expectation
19 of privacy in the memory card which had been taken by
20 B.C. from his residence even after it was turned over to
21 the police. Once the police received this item from
22 B.C., they were required to obtain a search warrant to
23 convert their holding from a simple seizure to an
24 authorized power to seize the memory card and search
25 it for evidence as contemplated by Justice Paciocco in
26 *R. v. Barwell*, 2013 CarswellOnt 10608, at paragraph
27 16.

1 While the police were required to obtain a
2 search warrant, I would not stipulate that it had to be
3 done the next day, but, instead, within a reasonable
4 amount of time. Moreover, the police were required to
5 obtain a search warrant before further accessing the
6 photographs on the memory card. Simply because the
7 memory card was lawfully within the police's
8 possession does not mean that the police were free to
9 access the contents of the memory card at will.

10 Therefore, I find that the access of the memory
11 card by Constable Fogerty, Constable Smith, and
12 Constable Currier prior to obtaining a search warrant
13 was a violation of the accused's section 8 *Charter* rights
14 against unreasonable search or seizure.

15 Three other issues were raised during the *voir*
16 *dire* with respect to the information to obtain a search
17 warrant completed by Constable Currier that I also want
18 to address briefly. The first is that the information to
19 obtain that was presented in court shows Constable
20 Currier's signature affirming the information to obtain
21 but does not include the signature of the justice of the
22 peace indicating that the document was sworn before
23 him.

24 Constable Currier explained that he had
25 obtained the warrant by telephone and that he had
26 sworn the ITO and forwarded it to the justice of the
27 peace. He did not receive a signed copy back from the

1 justice of the peace. It would be expected that the
2 justice of the peace would forward his materials to the
3 Court Registry, and the signed originals would be on
4 the file. I do not have that information before me.

5 In any event, I do not think that this is a
6 significant oversight. Constable Currier's evidence was
7 that he affirmed the ITO. There is no evidence that he
8 presented to the justice of the peace an information to
9 obtain that was not sworn.

10 The second issue that was raised was the
11 appendix; although, it is not clear to me that defence
12 counsel actually took issue with how Constable Currier
13 drafted the information to obtain. The appendix that
14 was included in the informations to obtain for both the
15 search warrant and the general warrant were intended
16 to provide the justice of the peace with full, frank, and
17 fair disclosure, and to describe actions taken by the
18 police that Constable Currier viewed as being possibly
19 improper, but that were not being relied upon to obtain
20 the search warrant or the general warrant. In my view,
21 this was an appropriate method to deal with this
22 information. Even if it were necessary to excise this
23 information from the information to obtain, there were
24 still reasonable grounds to grant the warrants.

25 The third issue is that the information to obtain
26 a search warrant did not specifically say that Boris
27 Sanguiez did not give B.C. permission to take the

1 memory card. The information to obtain does not
2 specifically say this, but a review of the document
3 demonstrates that this information would have been
4 apparent to the justice of the peace.

5 Having found a breach of the accused's
6 *Charter* rights, the next question is whether the
7 evidence located on the memory card should be
8 excluded.

9 Section 24(2) of the *Canadian Charter of Rights*
10 *and Freedoms* states:

11 (2) Where, in proceedings under subsection
12 (1), a court concludes that evidence was
13 obtained in a manner that infringed or denied
14 any rights or freedoms guaranteed by this
15 *Charter*, the evidence shall be excluded if it is
16 established that, having regard to all
17 circumstances, the admission of it in the
18 proceedings would bring the administration of
19 justice into disrepute.

20 The Supreme Court in *R. v. Grant*, 2009 SCC 32 set
21 out what must be considered in determining whether
22 evidence obtained in breach of an accused *Charter*
23 rights should be excluded. A court must assess and
24 balance the effect of admitting the evidence on
25 society's confidence in the justice system, having
26 regard to:

27 (1) the seriousness of the Charter-infringing state

1 conduct;
2 (2) the impact of the breach on the Charter-protected
3 interests of the accused; and
4 (3) society's interest in the adjudication of the case on
5 its merits.

6 Looking first at the seriousness of the breach,
7 the court has to assess the seriousness of the police
8 conduct that led to the breach. There is a difference
9 between admission of evidence obtained through
10 inadvertent or minor violations of the *Charter* and
11 evidence obtained through a willful or reckless
12 disregard of *Charter* rights. The admission of evidence
13 obtained through a willful or reckless disregard of
14 *Charter* rights will have a negative effect on public
15 confidence in the justice system and risk bringing the
16 administration of justice into disrepute (*Grant*, at
17 paragraph 74).

18 Whether the police were operating in good faith
19 is another consideration in assessing the seriousness
20 of the police conduct. However, the court in *Grant* also
21 noted the that ignorance of *Charter* standards must not
22 be encouraged, and negligence or willful blindness
23 does not constitute good faith. As stated in *Grant* at
24 paragraph 75:

25 Willful or flagrant disregard of the *Charter* by
26 those very persons who are charged with
27 upholding the right in question may require that

1 the court dissociate itself from such conduct.

2 The court in *Grant* refers to the spectrum of
3 seriousness of *Charter* violations, with inadvertent or
4 minor violations at one end and willful or reckless
5 disregard for *Charter* rights at the other end. While the
6 officers did not initially give any consideration to
7 whether the accused had a reasonable expectation of
8 privacy in the memory card and did not initially consider
9 whether they should obtain a search warrant, erring on
10 the side of caution, they did not knowingly disregard the
11 requirement to obtain a search warrant. While the
12 situation with computers and cell phones is settled, the
13 issue of memory cards has not been specifically
14 addressed by the Northwest Territories Court of Appeal
15 or the Supreme Court of Canada.

16 The officers did have reasonable and probable
17 grounds to obtain a warrant; although, in some
18 circumstances that may aggravate the seriousness of
19 the breach (*Cole*, at paragraph 89). I do not think that it
20 does aggravate the seriousness of the breach in this
21 case. Constable Currier sought advice from other
22 offices and from counsel. He did turn his mind then to
23 the accused's reasonable expectation of privacy. He
24 obtained a search warrant and a general warrant, and
25 in the information to obtain, he did disclose the police
26 actions with respect to the memory card.

27 There was nothing excessive or abusive in

1 how the police officers dealt with the memory card
2 following its seizure from B.C.. Somewhere between
3 the extremes of bad faith and good faith is a grey zone
4 with varying shades of grey (*Fearon*, at paragraph 94,
5 95).

6 This spectrum was described in the *R. v.*
7 *Flintroy*, 2019 BCSC 213, at paragraph 45:
8 As I see the matter, knowingly or intentionally
9 violating *Charter* standards represents bad
10 faith. Moving down the spectrum is willful
11 blindness and negligence, then carelessness
12 and ignorance somewhere nearer to the
13 middle. Moving closer to the good faith end is
14 where the state of the law is ambiguous,
15 unclear, or evolving, but the police proceeded
16 nonetheless, i.e. not careless *per se* but also
17 not erring on the side of caution. Finally, at the
18 good faith end of the spectrum, is an honestly
19 and reasonably held belief as to the legality of
20 the action at the time the action was taken,
21 which incorporates the consideration that the
22 law, at the time, was either fairly settled,
23 sufficiently ambiguous or not yet decided upon.
24 The non-exigency of the situation may
25 aggravate the degree of culpability; conversely,
26 exigent circumstances may mitigate it.
27 I do not think that the actions of the police

1 officers were egregious or demonstrated bad faith.
2 This does not mean that they acted in good faith. I find
3 that the officers' actions fall somewhere in the middle of
4 the spectrum.

5 Turning to the second factor, the court must
6 also evaluate the extent to which the breach
7 undermined the *Charter* protected interests of the
8 accused. The impact of a *Charter* breach may range
9 from fleeting and technical to profoundly intrusive. The
10 more serious the impact on the accused's interest, the
11 greater the risk that omission of the evidence will bring
12 the administration of justice into disrepute (*Grant*, at
13 paragraph 76).

14 The focus on a section 8 breach is "on the
15 magnitude or intensity of the individual's reasonable
16 expectation of privacy and on whether the search
17 demeaned his or her dignity" (*Cole*, at paragraph 91).

18 In *Fearon*, which dealt with a search of a cell
19 phone incidental to arrest, the Supreme Court of
20 Canada considered the second factor. While noting
21 that a search of a cell phone has the potential to be a
22 significant invasion of a person's privacy, the court
23 viewed that Mr. Fearon's privacy interests were going
24 to be impacted in any event. Even after excising the
25 details of the section 8 breach, there were still
26 reasonable and probable grounds to obtain a search
27 warrant. As such, the breach of Mr. Fearon's section 8

1 rights did not significantly change the nature of that
2 impact (*Fearon*, at paragraph 96).

3 This was the situation in *Cole* as well where the
4 Supreme Court stated at paragraph 93:

5 [T]he courts below failed to consider the impact
6 of the 'discoverability' of the computer evidence
7 on the second *Grant* inquiry. As earlier noted,
8 the officer had reasonable and probable
9 grounds to obtain a warrant. Had he complied
10 with the applicable constitutional requirements,
11 the evidence would necessarily have been
12 discovered. This further attenuated the impact
13 of the breach on Mr. *Cole's Charter*-protected
14 interests.

15 As with cell phones, cameras can contain
16 biographical core information of an individual, and the
17 search of a memory card from a camera has the
18 potential for a significant invasion of a person's privacy
19 interests. In this case, the police officers were aware of
20 the evidence prior to the breach. They were shown the
21 photographs by B.C. and lawfully seized the memory
22 card.

23 While the accused retained a reasonable
24 expectation of privacy in the memory card, and there is
25 the potential for a significant invasion of his privacy, in
26 the circumstances, the accused's privacy interests were
27 going to be impacted in any event. The police had

1 reasonable and probable grounds to obtain a warrant
2 prior to the section 8 breach, and the breach did not
3 significantly change the nature of the impact on the
4 accused's privacy interests. As in *Fearon*, I conclude
5 that the impact of the breach on the accused's *Charter*-
6 protected interest weakly favours exclusion.

7 Looking at society's interests in adjudication on
8 the merits, society generally expects that criminal
9 charges will be determined on their merits, and there is
10 a collective interest in ensuring that those who violate
11 the law are brought to trial and dealt with according to
12 the law. In considering this factor, the court must be
13 careful not to allow it to overwhelm the section 24(2)
14 analysis (*Cole*, at paragraph 95).

15 The reliability of the evidence is an important
16 factor to consider. As stated in *Grant* at paragraph 81:
17 If a breach...undermines the reliability of the
18 evidence, this points in the direction of
19 exclusion of the evidence. The admission of
20 unreliable evidence serves neither the
21 accused's interest in a fair trial nor the public
22 interest in uncovering the truth. Conversely,
23 exclusion of relevant and reliable evidence may
24 undermine the truth-seeking function of the
25 justice system and render the trial unfair from
26 the public perspective, thus bringing the
27 administration of justice into disrepute.

1 Reliability issues with physical evidence will
2 generally not be related to the *Charter* breach (*Grant*, at
3 paragraph 115). Other factors to consider include the
4 importance of the evidence to the prosecution's case
5 and the seriousness of the offence in issue.

6 The evidence obtained in this case is critical
7 evidence to the Crown's case. The evidence is highly
8 reliable and probative physical evidence. The charges
9 the accused face are serious. Sexual assault is a
10 significant issue in this jurisdiction, and there is a
11 significant interest in having these types of charges
12 determined on their merits in the Northwest Territories.

13 In conclusion, the administration of the contents
14 of the memory card into evidence would not bring the
15 administration of justice into disrepute. The breach was
16 in the middle of the spectrum of seriousness, and the
17 impact of the breach was attenuated by the
18 discoverability of the evidence. The evidence is highly
19 probative and reliable.

20 Society has a significant interest in having
21 serious matters like this determined on its merits. In my
22 view, balancing these factors weighs in favour of
23 admission, and the admission of the evidence would
24 not bring the administration of justice into disrepute.
25 Exclusion of this evidence would, however, risk bringing
26 the administration of justice into disrepute.

27 For these reasons, I find that the memory card

1 and its contents are admissible in evidence.

2 **(END OF EXCERPT)**

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17 **CERTIFICATE OF TRANSCRIPT**

18

19 Neesons, the undersigned, hereby certify that the foregoing
20 pages are a complete and accurate transcript of the
21 proceedings transcribed from the audio recording to the best
22 of our skill and ability. Judicial amendments have been
23 applied to this transcript.

24

25

26 Dated at the City of Toronto, in the Province of Ontario, this
27 24th day of March, 2020.

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Kim Neeson

Kim Neeson
Principal