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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

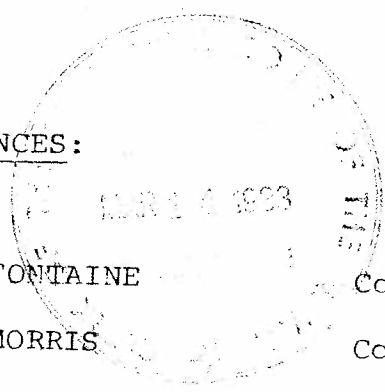
v.

FRASER SCOBEL

Transcript of the Decision given by His Honour Judge
R. M. Bourassa sitting at Yellowknife, Northwest
Territories, on Monday, December 20, A.D. 1982.

APPEARANCES:

MR. B. FONTAINE Counsel for the Crown
MS. J. MORRIS Counsel for the Defence





1 THE COURT: This is an issue that arises with respect to a
2 search. A peace officer, armed with a warrant, entered into
3 or at least presented himself at certain premises for the
4 purposes of searching for narcotics. The warrant here was
5 apparently pursuant to Section 443 of the Criminal Code on
6 Form 5 directing "any peace officer" or authorizing "any
7 peace officer" to conduct a search, whereas in fact, the
8 warrant should have properly been issued under Section 10 of
9 the Narcotic Control Act, 10(2), authorizing a named peace
10 officer. There can be no questions in my view but that the
11 warrant was defective; and initially, in any event, any
12 search made pursuant to it was "illegal".

13 The police officers presented themselves at the
14 premises owned by a person other than the accused; and from
15 the evidence before me, I am satisfied they were invited
16 into those premises. The search of the premises was in no
17 way objected to whatsoever.

18 I accept that the peace officers were invited
19 in. Perhaps in the mind of the owner there was some element
20 of compulsion involved because the peace officer showed the
21 defective warrant, but in any event, I am satisfied that they
22 were invited in.

23 Under the Narcotic Control Act, again Section
24 10, Mr. Scobel was found sitting by a table under circum-
25 stances that led the investigating constable to believe
26 that there were reasonable and probable grounds to search
27 Mr. Scobel over and above his right to search him under



1 Section 10 of the Narcotic Control Act.

2 I also take it that the constable has the authori-
3 ty in law to freeze the site, and pursuant to his right
4 to freeze the site, that is to say to prevent the destruction
5 or removal or alter~~ation~~ of any probable exhibits, has the
6 right to search any individuals~~.~~

7 Additionally, the search of Mr. Scobel was done
8 without the objection of Mr. Scobel which I think again is
9 significant.

10 As a result of that search, drugs were found.
11 The issue was raised as to whether or not there was a
12 Section 8 of the Charter of Rights violation insofar as it
13 was unreasonable.

14 Unreasonable, in my view, is not equated to
15 legal or illegal. The words are different. They import
16 totally different concepts, while there may be some overlap,
17 they are different concepts and different meanings.

18 Reasonable, in my view, means a balancing of
19 different interests in each factual situation. A person's
20 need for privacy and his right to privacy versus the need for
21 valid and effective law enforcement.

22 The searches, in my view, must be legal as
23 required by law, and reasonable. In my view, there must be
24 a presumption that the police, by complying with the law,
25 are acting reasonably.

26 I do not think that there can be any question but
27 that legislative enactments providing for searching of



1 narcotics as we have in Section 10 of the Narcotic Control
2 Act are reasonable in that the executive act in searching
3 for narcotics is reasonable.

4 Here the warrant was technically speaking illegal,
5 but does that automatically make the search unreasonable
6 according to the Charter of Rights? I do not believe so.
7 Additionally there is the question of standing that has
8 been raised by the Crown, and I believe that that issue
9 must be resolved in favour of the Crown. That is to say
10 that Mr. Scobel has no standing in this court to raise
11 the issue of unreasonable search. It was not his premises
12 that were being searched, and in my view the only one who
13 can raise that issue is the individual who owns the premises;
14 and as I have already indicated, he virtually consented to
15 the search.

16 Now I also, of course, should note in fairness
17 to the police and to the accused that there was no suggestion
18 here whatsoever that the police were acting in a sneaky
19 fashion, in a surreptitious fashion using trickery or some
20 sort of malevolent design to obtain this evidence. The
21 police acted on a search warrant which, for technical reasons,
22 was invalid or illegal but which they believed to be per-
23 fectly legitimate, perfectly legal, and authorizing them to
24 do certain acts.

25 I accept under our law that materials or evidence
26 seized as a result of an illegal search warrant may be
27 excluded under certain circumstances, but it is not



1 automatically excluded, and even if the police had not been
2 invited into the premises, I am not prepared to reject the
3 evidence on the basis that the search warrant was technically
4 illegal.

5 As I have indicated, Mr. Scobel, in any event,
6 does not have the standing under the Charter of Rights with
7 respect to this offence or this search, to raise that defence.

8 With respect to the procedure, and again I am
9 only dealing with the procedure in this court, I am not
10 dealing with the procedure with a jury, defence has argued
11 that the Charter of Rights argument should be raised by way
12 of voir dire as soon as the point is reached where question-
13 able evidence or the evidence that it sought to exclude is
14 being brought in. I indicated at the trial that that was
15 not my view but that the issue of a Charter of Rights viola-
16 tion should be brought at the termination of the trial, and
17 that if it is successful, the evidence that has been adduced
18 that should be properly excluded if that is the proper
19 remedy, can be excluded; and if that is fatal to the Crown's
20 case, so be it.

21 The defence has raised the point that the
22 defendant is unable to give evidence on the alleged violation
23 of his rights, without being cross-examined on the whole of
24 the offence. With respect, I disagree. Section 13 of the
25 Charter of Rights entitles an accused in any proceedings to
26 give evidence free from the threat of incrimination. In my
27 view, at the termination of a trial, if there is allegedly



1 a breach of the Charter of Rights that would justify an
2 exclusion of certain evidence, the proper procedure would
3 be for the defence to make a motion to quash and call evi-
4 dence on that motion. The accused could be called on the
5 motion, and in my view, Section 13 would protect him from
6 being cross-examined on the offence and leave the accused
7 free to testify as to why there has been a breach of his
8 fundamental rights.

9 In any event, as I have indicated, I am not
10 satisfied there was a breach of his rights here in fact or
11 in law, and that there should be a conviction.

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14 Certified a correct transcript

15
16 Catherine Metz

17 Catherine Metz
18 Court Reporter