Case Name:

R. v. Blizzard

Between
Her Majesty the Queen, and
Angus Jason Blizzard, John Adam Young, Shane Timothy Voeller and Dwayne Noel Ireland

[2006] N.B.J. No. 217

[2006] A.N.-B. no 217

2006 NBQB 155

2006 NBBR 155

304 N.B.R. (2d) 299

69 W.C.B. (2d) 812

No. S/CR/20/03

New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Saint John

P.S. Glennie J.

Heard: April 6, 2006.
Oral judgment: April 7, 2006.

(37 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights --Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Where administration of justice brought into disrepute -- Application by the accused to exclude evidence of observations of a hotel room obtained pursuant to a general warrant allowed -- Warrant was invalid because no notice of entry and search was given by the police before the accused were charged -- Admission of such evidence would bring the administration of justice into disrepute -- Criminal Code, s. 487.01(5.1).

Application by the accused to exclude from evidence all observations made pursuant to a

general warrant -- Police entered a hotel room and made certain observations -- Nothing was physically seized -- Warrant was issued pursuant to s. 487.01 of the Criminal Code -- It was previously determined to be invalid because no notice of the entry and search was given by the police, as required by s. 487.01(5.1), before the accused were charged -- HELD: Application allowed -- Search warrant evidence was non-conscriptive evidence -- Non-conscriptive evidence would not render the trial unfair -- Evidence would therefore not affect the fairness of the trial -- Court previously found that there was no bad faith in this case but there was a pattern of negligence -- Failure to give notice was part of that pattern and was serious because an unreasonable search was conducted and s. 8 of the Canadian Charter of Rights and Freedoms was violated -- Magnitude of the violation was not mitigated by good faith on the part of the police -- Failure to give notice was so glaring that the admission of evidence obtained under such circumstances would bring the administration of justice into disrepute.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 8, s. 24(2)

Criminal Code, s. 487.01, s. 487.01(1), s. 487.01(3), s. 487.01(5.1)

Counsel:

Gerald H. McCracken, Q.C. and Roland V. Levesque on behalf of the Crown

Hazen L. Brien on behalf of Angus Jason Blizzard

William H. Watts on behalf of John Adam Young

Patrick C. Fagan on behalf of Shane Timothy Voeller

John M. Henderson on behalf of Dwayne Noel Ireland

Section 24(2) Ruling

1 P.S. GLENNIE J. (orally):-- This is an application for an order pursuant to Section 24(2) of the ***Charter of Rights and Freedoms*** excluding from evidence at the trial in this matter all observations made as the result of a General Warrant dated June 27, 2003, being issued pursuant to Section 487.01 of the ***Criminal Code of Canada***.

2 The June 27, 2003 General Warrant authorized the entry, conducting a 'sneak and peak' and the seizure of evidence in a hotel room at the Comfort Inn in Dieppe, New Brunswick.

3 In a previous ruling, I determined that the June 27, 2003 General Warrant was invalid

because it did not contain the mandatory provisions of Section 487.01(5.1) of the ***Criminal Code***.

General Legal Principles

4 The authority for the issuance of a General Warrant is contained in Section 487.01 of the ***Criminal Code***, the relevant provisions of which read as follows:

> *487.01(1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property.*
>
> ...
>
> *(3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.*
>
> ...
>
> *(5.1) A warrant issued under subsection (1) that authorizes a peace officer to enter and search a place covertly shall require, as part of the terms and conditions referred to in subsection (3), that notice of the entry and search be given within any time after the execution of the warrant that the judge considers reasonable in the circumstances.*

5 It should be noted that in this case no notice of the entry and search was ever given by the police prior to charges being laid.

6 The Applicant, on an application to exclude evidence under Section 24(2) of the ***Charter***, has the burden of proving that, on a balance of probabilities:

> *(1) There was an infringement, or denial, of a right or freedom guaranteed by the Charter;*
>
> *(2) Evidence was obtained in a manner that infringed or denied the right of freedoms; and*

> *(3) The admission of the evidence would bring the administration of justice into disrepute. See* ***R. v. Collins****, [1987] 1 S.C.R. 265 (S.C.C.);* ***R. v. Ha****, [2005] O.J. No. 11, 2005 CarswellOnt 12 per Power J.*

7 The Applicant must demonstrate the causal connection between the evidence obtained and the infringement or denial. The connection does not have to be a direct one or one where there exists a strict causal link; however, there must be some connection or relationship. See *Criminal Practice Manual*, 5-31; ***R. v. Bartle***, [1994] 3 S.C.R. 173 (S.C.C.); and ***R. v. Strachan*** (1988), [1989] 1 W.W.R. 385 (S.C.C.).

8 If the conditions are met by the Applicant, the court "*shall* " exclude the evidence. See ***R. v. Therens***, [1985] 1 S.C.R. 613 (S.C.C.).

9 The Supreme Court of Canada has determined that when considering whether the admission of the evidence "*would*" bring the administration of justice into disrepute, "*would*" means "*could*". The test is whether a reasonable person, dispassionate and fully apprised of the circumstances, would consider that the admission of the evidence could bring the administration of justice into disrepute. See ***R. v. Collins****, supra*.

10 In ***R. v. Collins****, supra* at pp. 18-19, Lamer, C.J. set out certain criteria which should be examined in order to determine whether the admission of evidence obtained as a result of a ***Charter*** breach should be rejected as tending to bring the administration of justice into disrepute. He summarized these factors as follows:

1. *those factors affecting the fairness of the trial;*
2. *those relating to the seriousness of the violation; and*
3. *those relating to the effect on the reputation of the administration of justice.*

11 The three sets of factors stated in ***Collins*** were expanded upon by Dickson, C.J. in ***R. v. Jacoy*** (1988), 45 C.C.C. (3d) 46 (S.C.C.) at p. 54:

> *First, the court must consider whether the admission of evidence will effect the fairness of the trial. If this inquiry is answered affirmatively, "the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of other factors, the evidence generally should be excluded" [Collins, supra, at p. 19]. One of the factors relevant to this determination is the nature of the evidence; if the evidence is real evidence that existed irrespective of the Charter violation, its admission will rarely render the trial unfair.*
>
> *The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it*

> *was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a Charter violation.*
>
> *Finally, the court must look at factors relating to the effect of excluding the evidence. The administration of justice may be brought into disrepute by excluding evidence essential to substantiate the charge where the breach of the Charter was trivial. While this consideration is particularly important where the offence is serious, if the admission of the evidence would result in an unfair trial, the seriousness of the offence would not render the evidence admissible.*

First Branch of the Test: Trial Fairness

12 The majority in ***R. v. Stillman*** (1997), 113 C.C.C. (3d) 321 (S.C.C.), building on ***Collins***, provided a summary of the steps to be taken when dealing with the issue of trial fairness. In discussing the treatment of conscriptive and non-conscriptive evidence under this branch of the Section 24(2) analysis, Justice Cory stated at para. 119 that it is necessary to first classify the evidence as conscriptive or non-conscriptive based on the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.

13 In ***Stillman***, Justice Cory, for the majority, pointed out that the consideration of trial fairness is of fundamental importance in determining the exclusion of evidence under s. 24(2). He states at para. 73:

> *.... The primary aim and purpose of considering the trial fairness factor in the s. 24(2) analysis is to prevent an accused person whose Charter rights have been infringed from being forced or conscripted to provide evidence in the form of statements or bodily samples for the benefit of the state. It is because the accused is compelled as a result of a Charter breach to participate in the creation or discovery of self-incriminating evidence in the form of confessions, statements or the provision of bodily samples, that the admission of that evidence would generally tend to render the trial unfair. That rule, like all rules, may be subject to rare exceptions.*

14 Search warrant evidence is non-conscripted evidence. Non-conscriptive evidence, by its nature, will not render the trial unfair and accordingly any evidence obtained as a result of the execution of the June 27, 2003 General Warrant would not affect the fairness of the trial in this matter.

15 I therefore now turn to the seriousness of the breach and the effect of exclusion on the administration of justice.

16 In an earlier decision in this matter dealing with an application for a stay of proceedings on the basis of an alleged abuse of process under Section 7 of the ***Canadian Charter of Rights and Freedoms***, the issue of a failure to incorporate the mandatory notice of entry provisions as mandated by Section 487.01(5.1) of the ***Criminal Code*** was addressed as follows at paras. 32-34 of the decision which is reported at [2005] N.B.J. No. 566, 2005 CarswellNB 778:

> *32 When asked why the mandatory Notice of Entry provision as mandated by Section 487.01(5.1) of the Criminal Code was left out of each of the search warrants, Constable Kerr replied, "an oversight on my part."*
>
> *33 He conceded that Crown counsel was available to him for assistance but he chose not to seek advice. Time was a factor along with "resources", he added.*
>
> *34 Constable Kerr described the drafting of the Information, Warrants and other documentation as a "cut and paste process." He says he did not think he needed the advice of Crown counsel.*

17 Although I found an absence of fraud, bad faith, improper motive or intention to deceive, I did conclude that there was a pattern of negligence in this case and the failure to comply with Section 487.01(5.1) is part of that pattern of negligence.

18 The failure to include the mandatory provisions of Section 487.01(5.1) of the ***Criminal Code*** also occured in ***R. v. Mero***, [2003] B.C.J. No. 1499, 2003 CarswellBC 1563 where Justice Parrett excluded evidence and observations garnered pursuant to the defective warrant.

19 He writes at para. 31:

> *31 Subsection 5.1 is cast in mandatory terms and requires the issuing judge to fix a time for notice to be given that is "... reasonable in the circumstances". If I was in any doubt concerning that interpretation it is laid to rest by the terms of ss. 5.2 which authorizes the extension of time for giving the requisite notice but prohibits any extension for a period exceeding three years.*

20 And at para. 44:

> *44 The officers' observations and the evidence gleaned from their entry onto the property on September 7, 2000 was obviously non-conscriptive. The evidence was real evidence which existed irrespective of the breach. In my view, the breach and the defects in this case are serious. The police officers were extremely careless in not fully informing themselves*

24 Section 8 of the ***Charter*** was infringed in this case. The violation is serious although it is of a procedural nature, namely the failure to include the mandatory requirements of Section 487.01(5.1) of the ***Criminal Code***.

25 Although there is no evidence the officer who drafted the June 27, 2003 General Warrant was acting in bad faith, upon considering all the evidence in this matter, I conclude that the seriousness of the violation is such that it is not mitigated by good faith on the part of the police.

26 The ignorance of the requirements for the granting of a General Warrant pursuant to Section 487.01 of the ***Criminal Code*** is so glaring that any search or seizure under the invalid June 27, 2003 General Warrant would result in the obtaining of evidence in contravention of the ***Charter*** in such circumstances that its admission would bring the administration of Justice into disrepute. As our Court of Appeal stated in ***R. v. Blizzard***, [2002] N.B.J. No. 34, 2002 CarswellNB 52 at para. 101:

> *101 The May order was found partially invalid for reasons already enunciated and, under the circumstances of this case, good faith alone could not rehabilitate or resuscitate an otherwise invalid order. See* R. v. Harris *(1987), 35 C.C.C (3d) 1 (Ont. C.A.).*

27 On the urgency question, I conclude that the obtaining of the General Warrant on June 27, 2003 was pressing because the police had just learned of the presence of the occupants of the hotel room in question. The Crown asserts that no other investigative techniques were available. Corporal Ferguson did not testify that it was the only tool available.

28 The Crown asserts that the only was to proceed was surreptitiously and that the evidence could not have been obtained otherwise.

29 The offence is a serious one.

30 On the issue of whether the evidence is essential to substantiate the charge in this case, the Crown says no it is not essential, but it is important because this is a conspiracy charge and it would be of "*assistance*" in the presentation of the Crown's case.

31 Finally on the last question, other remedies available, there are none.

32 In ***R. v. Grant*** (1993), 84 C.C.C (3d) 173 (S.C.C.), Spoinka J. dealt with the respect for freedom from trespass by the state on private property. He stated at p. 188:

> *The common law has long demonstrated a respect for freedom from trespass on private property by state authorities, especially where the homes of individuals are involved. That respect for privacy in the home has been expanded by this court to include other areas in which individuals expect a high degree of privacy, including the office (Hunter, supra) and to a lesser degree even a motor vehicle in some cases: see R.*

v. Wise, [1992] 1 S.C.R. 527, (1992), 70 C.C.C. (3d) 193, 11 C.R. (4th) 253 and R. v. Mellenthin, [1992] 3 S.C.R. 615, (1992), 76 C.C.C. (3d) 481, 16 C.R. (4th) 273.

33 In my opinion, this would obviously include a hotel room.

34 As stated by Justice Parrett in ***R. v. Mero,*** *supra*, in granting the expanded powers to police contained in Section 487.01 of the ***Code***, Parliament recognized the existence of privacy and property rights and enacted a procedure designed to provide some level of protection for them. This is obviously the reason for the provisions of Section 487.01(5.1).

35 On the evidence, I find that the ignorance by the Police of the requirements for the granting of a General Warrant pursuant to Section 487.01 of the ***Criminal Code***, when considered as part of the overall pattern of negligence in this case, is so glaring that the admission into evidence of the observations of the Police with respect to the subject hotel room pursuant to the invalid June 27, 2003 General Warrant is capable of bringing the administration of justice into disrepute.

Conclusion

36 In the result, I find that it has been established, on a balance of probabilities, that the admission into evidence of any observations made pursuant to the entry by Police into the subject hotel room could and would bring the administration of justice into more disrepute than if such observations were not received into evidence.

37 For these reasons, any evidence garnered pursuant to the invalid June 23, 2003 General Warrant will not be received into evidence at the trial of this matter.

P.S. GLENNIE J.

cp/e/qw/qlbxm/qlcem/qltxp/qlsxs