In the Provincial Court of Alberta

Citation: R. v. Nafke, 2018 ABPC 139

Date: 20180626
Docket: 160847141P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Suzvan Nafke

Reasons for Ruling on Section 8 *Charter Voir Dire*
by the Honourable Judge A.A. Fradsham

Introduction

[1] Mr. Nafke is charged with several offences alleged to have occurred on or about July 21, 2016: possession of both cocaine and marihuana for the purpose of trafficking; production of cocaine; possession of the proceeds of crime; possession of cannabis resin. He is currently being tried before me on these charges.

[2] This Ruling relates to his application for a declaration that his right to be secure against unreasonable search and seizure (section 8 of the *Canadian Charter of Rights and Freedoms*) was violated when the police, without a search warrant, covertly placed and operated a video camera to record activity in a hallway in a condominium complex frequented by Mr. Nafke. The monitored activity formed, in part, the basis for an application for a search warrant permitting the search of a particular condominium. That warrant was granted, and executed. Items seized in the condominium form the basis of the charges being tried before me.

[3] Earlier in this *voir dire*, I gave an oral ruling declaring that Mr. Nafke had standing to bring the section 8 *Charter* application. In that ruling, I relied upon, and applied, Madam Justice Antonio's reasoning as set forth in ***R. v. Sandhu*** 2018 ABQB 112 (particularly in paragraph 36).

Issues

[4] The ultimate issue is whether Mr. Nafke's section 8 *Charter* right was violated. The subsidiary issue is whether the police obtained valid consent to install the camera in the hallway.

Facts

[5] In the *voir dire*, I heard two from two witnesses: Bradley Scott and Constable Brad MacLean of the Calgary Police Service. The defence called no evidence in the *voir dire*. I will only refer to the evidence necessary to decide the issues before me.

Bradley Scott

Examination-in-Chief

[6] Between May, 2016, and October 31, 2017, Mr. Scott was the manager of the condominium complex in Airdrie, Alberta called "Creekside Village". Creekside Village is a complex made up of nine buildings, one of which was called Building 2000. Building 2000 was a building with four floors and contained, in total, 64 units.

[7] All nine buildings shared a common underground parkade. Once a person gained entry into the underground parkade, he or she could proceed throughout the common areas of the nine buildings. The only other key required would be one to allow one to enter one of the condominium units. Those who had keys to access to the buildings, including Building 2000, were condominium unit owners, tenants, contractors engaged to work in the complex (there were five permanent contractors), the building manager, and members of a mobile security force. Those members of the public who were granted access to a building in the complex by someone with a key also had access to the entire complex.

[8] Mr. Scott testified that his duties were to manage the property and the common areas, and deal with maintenance requests from tenants and owners (residential and commercial). He usually worked week days, and had one staff member for maintenance matters. The Board of Directors of the condominium association was in overall charge, but he (Mr. Scott) gave the daily direction to the maintenance staff member.

[9] The Board of Directors was made up of seven members, and Mr. Scott said that one particular member was his primary contact. Mr. Scott testified that he was "left on [his] own for the most part."

[10] Mr. Scott testified that it was to him that issues such as garage door and elevator operation, and the like, were brought, as were tenant concerns about "things not working".

[11] Mr. Scott described the common areas as being the hallways, the parkade, and the open areas of the complex (the two garbage enclosures and outside parking lot).

[12] Mr. Scott testified that for the two years before he became the building manager of Creekside Village, he was a property manager elsewhere doing the same sort of work.

[13] There were no security personnel located at the main doors of the respective buildings, and there were no cameras either outside or inside the buildings.

[14] Mr. Scott testified that there was no direction from the condominium board about how he should handle requests from police agencies. He did not ask for a specific direction.

[15] Mr. Scott said that he was contacted by Constable MacLean about the police having access to Building 2000 for a "police investigation". Mr. Scott said he and the Constable had a conversation, and that "I complied and provided any access I could." In that conversation, Mr. Scott said Constable MacLean spoke of placing a camera in the parkade as well.

[16] Mr. Scott said that he provided Constable MacLean with a key for the front entrance to the building and with "a fob" (garage door opener) for the parkade. Mr. Scott placed no restrictions on Constable MacLean's use of these items. No time frame was discussed regarding the length of time during which Constable MacLean could use those items.

[17] Mr. Scott testified that he "mentioned" to the Board of Directors that the police were "doing an investigation", but he could not recall whom he specifically told. He told the Board that he had had a conversation with Constable MacLean, and that the Constable had been provided access. He said that "there was no major discussion" as he was only "providing awareness of what was going on." He said that Board meetings were "every month or every second month". He said that he had two or three conversations with the Board about "the investigation", that those conversations could have been before or during formal Board meetings, and that he "passed on all information to the Board" and "did not hold back." He was clear that he told the Board of the investigation and the police access to the property.

[18] Mr. Scott testified that he also had a conversation with Constable MacLean when the latter returned the key and "fob", but Mr. Scott could not recall how much time elapsed between Constable MacLean receiving the key and "fob" and returning them.

[19] Mr. Scott could not recall being told that there was more than a "potential" that the police would install a camera. He said that he recalled giving permission to place cameras but could not remember "when that occurred or any details."

[20] Mr. Scott testified that his authority to grant the police permission to conduct their investigation on the property stemmed from his position as property manager. Safety issues and concerns were within his mandate, and that included police investigations.

Cross-Examination

[21] In cross-examination, Mr. Scott was asked when he had his conversations with Constable MacLean. Mr. Scott said he could not recall but thought it was in 2017.[1] He could not recall the month.

[22] Mr. Scott said that his meeting with Constable MacLean occurred at Mr. Scott's office which was located within the condominium complex. He said that there was another similar police investigation occurring at the same time. He could not recall with whom he dealt on that matter.

[23] Mr. Scott testified that the meeting with Constable MacLean lasted 5 to 10 minutes. He said that he was shown identification by the Constable, and he thought it was the officer's badge

[1] That statement was clearly in error.

(though he could not recall if saw the badge). Mr. Scott said that the person at least said that he was a peace officer with the Calgary Police Service.

[24] Mr. Scott testified that he was told that there was "an investigation", but did not believe that he was told "what was being investigated". He was told that the officer wanted access to Building 2000. Mr. Scott said that he gave the officer access immediately after the meeting. In particular, the officer was given both a "fob" (overhead door opener) and a key. The "fob" gave the officer access to the parkade (and from there one can, without more, access the buildings), and the key gave access to the main entrance of Building 2000.

[25] Mr. Scott confirmed that Building 2000 has 64 units in it (16 units on each of its four floors).

[26] Mr. Scott could not recall if Constable MacLean told him in which unit the Constable was interested. He testified that the officer did say that he was interested in Building 2000, but Mr. Scott did not think the officer indicated a specific floor. However, eventually Mr. Scott did come to learn that the condominium unit in which the police had interest was unit 2416. He further explained that the first digit ("2") represented Building 2000, and the second digit ("4") represented the floor.

[27] Mr. Scott testified that he later noted a broken door on that particular unit; he assumed that he saw that on the day of search of the condominium.

[28] Mr. Scott testified that he understood that he was providing police access to Building 2000 in furtherance of their investigation. He said that he remembered it being mentioned that "a camera might be going up", but he also said that he had no recollection of any statement that a camera would be installed. He then testified that he did recall that there was a conversation during the "five minute meeting or by telephone" about the installation of a camera.

[29] Mr. Scott said that he could not recall if he was ever told that a camera had actually been installed. He said that he told the Board of Directors of the possibility of a camera "being used in the investigation". He said he could not recall the Board's response.

[30] Mr. Scott said that at some point after seeing the broken door on the condominium unit, he received back the key and "fob" he had provided to Constable MacLean.

[31] Mr. Scott said that it was common to see the police (RCMP and Calgary Police Service) at the complex.

Constable Brad MacLean

Examination-in-Chief

[32] Constable MacLean testified that he is a member of the Calgary Police Service. As a result of a drug investigation in relation to another individual, the officer became interested in the activities of a person whom they subsequently identified as Mr. Nafke. The officer identified the Creekside Village condominium complex in Airdrie as a place visited by this person. Further investigation disclosed that the person used parking stall 191 in the complex's underground parkade.

[33] Constable MacLean testified that he contacted a Mr. Jason Warbeleski whom he understood to be the building manager, and learned that stall 191 was related to unit 2416 in the complex. The person listed as the owner of that unit was Rojean Nafke. Constable MacLean said that he was told that his future contacts should be with Brad Scott.

[34] The officer said that on May 20 he met Mr. Scott at Mr. Scott's office, that he told Mr. Scott that he (MacLean) needed access to the building, and that Mr. Scott agreed.

[35] Constable MacLean said that Mr. Scott walked the officer to Building 2000 and showed him the "Telus room" access to which the officer needed for the installation of a camera. The Constable testified that Mr. Scott gave him a garage door opener and a key. However, the key did not work, so the police had to use the garage door opener to access the building through the underground parkade.

[36] Constable MacLean testified that he told Mr. Scott that "we would be using a covert camera to capture activity to and from" the unit, and that the camera would be placed in the hallway. The officer said that he could not remember if he told Mr. Scott "more than they were watching unit 2416 associated with Rojean Nafke".

[37] Constable MacLean said that he could not recall the specific day upon which he was provided the garage door opener and the key (i.e., the next day or the following week). He did recall that on July 11, 2016, he again had contact with Mr. Scott, and at that time the officer was provided the key code for the building's front door (because the key provided did not work). He was also provided the separate key code for the "garbage room".

[38] According to Constable MacLean, the May 20 meeting with Mr. Scott lasted approximately 45-60 minutes. During that time, there was the conversation between Mr. Scott and Constable MacLean, and the two walked from Scott's office to and through Building 2000. Constable MacLean did not recall any other contact between May 20 and July 11.

[39] Constable MacLean again explained that when he met with Mr. Scott on May 20, the individual associated with parking stall 191 had not yet been identified by name. Constable MacLean again said that he told Mr. Scott that the police would be using a covert camera to see the common rea and the people coming to and going from the unit. He said that he told Mr. Scott that the police needed access to the internet in the "Telus room" because the camera used internet to transmit the images.

[40] Constable MacLean said that there was no discussion as to when the camera would be installed because it had not yet been definitely decided that a camera would be installed. Constable MacLean had to deal with the electronic surveillance officers and obtain their permission. He said that he thought that the requisite permission was received in about three days.

[41] Constable MacLean said that the condominium complex was large with multiple floors and units. In order to associate a person with a specific unit, a camera was required to observe the activity in relation to that unit. Without the camera, the police would have to follow the person into the building each time with the attendant risk of the target seeing those conducting the surveillance.

[42] Constable MacLean explained that the information sought to be obtained by use of the camera was important as it would inform the investigators as to the frequency of visits by the person being investigated, the duration of those visits, and some understanding of items being taken into and from the unit. Since Mr. Nafke seemed to live at another address, Constable MacLean said that he had suspicions that the condominium unit was being used as a drug "stash".

[43] Constable MacLean testified that when a suspect enters an apartment building or condominium complex, more work is involved in trying to determine with which unit the suspect is associated. Further, Constable MacLean explained that the presence of multiple families in an apartment or condominium complex added to his concerns.

[44] Constable MacLean testified that the camera was set up on June 1, 2016. It was installed just east of the elevator and was facing west looking down a hallway so that it captured images of people coming and going to unit 2416. The camera did not look into any unit. It recorded the images it captured, and those images, including past images recorded, could be viewed from a remote location and could be viewed on an iPhone or a computer.

[45] The camera recording feature was activated when the camera detected motion, and recorded images of any motion plus images for the 30 second period of time before the motion was detected and the 30 second period of time after any motion ceased.

[46] Constable MacLean testified that a malfunction led, at one point, to the camera recording continuously even though there was no motion, and, at one point, to the camera failing to capture any activity involving unit 2416.

[47] Constable MacLean said that the recorded images were saved until purged. The camera did not capture audio, and the camera was installed on June 1, 2016. On July 14, difficulties were encountered with the camera, "a couple of days later it was repaired." The camera was used until approximately July 23.

[48] Constable MacLean testified that he told the "electronic surveillance team" that he needed to see the people coming and going from unit 2416; it was then up to that team to decide if the area was suitable for a camera installation, and, if so, to effect the installation.

[49] Constable MacLean said that he and his colleagues knew that they were not to record activity within someone's living space, and the camera was placed so that it would not do so. Constable MacLean said that "we take privacy seriously" and that "privacy protection is important."

[50] The Constable said that he had done about five other hallway camera investigations, and was the primary officer in two or three of those.

[51] Constable MacLean said that he met with Mr. Scott after the subsequent search warrant was executed, and "a couple of times later." Constable MacLean said that he had telephone conversations with Mr. Scott, but he could not recall the dates of the conversations or what was said.

[52] The officer did testify that during the initial May 20 conversation between himself and Mr. Scott, the Constable asked Mr. Scott if there was a condominium board. Constable

MacLean testified that he was told that there was such a board but that it was new and no meetings of the board were scheduled "in the near future". Constable MacLean said that Mr. Scott told him that he had the authority to cooperate with the police.

[53] Constable MacLean again said that he (the Constable) told Mr. Scott that the police needed access to the building. The Constable said that Mr. Scott agreed, provided the requested access, and showed the Constable the "internet room".

[54] Constable MacLean testified that at the time it was his understanding that he had to discuss the placement of covert cameras with the condominium board or the building manager. He said that he believed that cooperation with the condominium management was "the best practice". He said he was familiar with the Part 6 provisions of the *Criminal Code* (regarding the capturing of private communications). He did not speak to any Crown prosecutor about this investigation.

[55] Constable MacLean testified that the camera stopped working on June 17 and was again operational on June 23. His colleague Detective Wood had access to the video footage which was password protected. The password was generated by the electronic surveillance team, and it was provided to Constable MacLean who, in turn, provided it to Detective Wood.

Cross-Examination

[56] Constable MacLean agreed that he did not make many notes of his May 20 meeting with Mr. Scott (the meeting he said had lasted between 45-60 minutes). The note he did make referred to "access to the building" and that "Mr. Scott was cooperative". The note did not refer to any camera. The note referred to an "active investigation" but did not specify a "drug investigation".

[57] The Constable agreed that the note made no reference to being shown the "Telus room" or that unit 2416 was the focus of the police interest.

[58] Constable MacLean confirmed that the video was saved onto a hard drive and was maintained there until it was purged because the space it occupied was required. He confirmed that the camera recorded the period June 1 to July 23.

[59] Constable MacLean testified that the electronic surveillance team downloaded the video footage from the team's hard drive onto Constable MacLean's hard drive. It was only purged from the team's hard drive when space requirements made that necessary. None of the footage was "lost".

[60] Constable MacLean said that prior to installing the camera, he did not think about obtaining judicial authorization. The building manager (Mr. Scott) was cooperative.

[61] Constable MacLean said that on May 18 the police entered the building by driving into the parkade behind someone who had just entered. They did not have authority to do so (it was on that date that the police determined the parking stall number which led to identifying unit 2416).

Findings of Fact

[62] I found both Mr. Scott and Constable MacLean to be forthright and candid witnesses. There were some discrepancies in parts of their evidence (e.g., Mr. Scott's erroneous reference to 2017, and the time length of the initial meeting), but, in my view, those were minor in nature, and certainly not the product of deceit. Those discrepancies did not make the main points of their respective testimonies less reliable.

[63] I find that Mr. Bradley Scott, the building manager for the Creekside Village condominium complex, was contacted by Constable MacLean who told Mr. Scott that the police were conducting an investigation and that they (the police) wanted access to Building 2000 in the complex.

[64] I find that Mr. Scott represented to the Constable that he (Scott) had the authority to give the police access to the building. In the "Law and Analysis" portion of these Reasons I will discuss whether it was proven on a balance of probabilities that Mr. Scott actually had that authority.

[65] I find that at the initial meeting, Constable MacLean mentioned that the police might install a camera but no more than that was said because at that point the Constable did not yet know if the electronic surveillance team would authorize the installation. I accept that Constable MacLean was shown the "Telus room".

[66] Mr. Scott was only told that this was a police investigation; he was given no details about the type of investigation or the specific unit in which the police had interest.

[67] Mr. Scott was cooperative and granted whatever access was requested.

Law and Analysis

[68] A search violates section 8 of the Charter if it is unreasonable. In ***R. v. Caslake*** (1998), 121 C.C.C. (3d) 97 (S.C.C.), Chief Justice Lamer said:

> **12** In order to be reasonable, searches and seizures must be authorized by law. The reason for this requirement is clear: under both the Charter and the common law, agents of the state can only enter onto or confiscate someone's property when the law specifically permits them to do so. Otherwise, they are constrained by the same rules regarding trespass and theft as everyone else. There are three ways in which a search can fail to meet this requirement. First, the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search. If they cannot do so, the search cannot be said to be authorized by law. Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides. For example, s. 487 of the Criminal Code, R.S.C., 1985, c. C-46, authorizes searches, but only with a warrant issued by a justice on the basis of a sworn information setting out reasonable and probable grounds. A failure to meet one of these requirements will result in a search which has not been authorized by law. Third, and in the same vein, the scope of the search is limited to the area and to those items for which the

law has granted the authority to search. To the extent that a search exceeds these limits, it is not authorized by law.

[69] In ***R. v. Borden*** [1994] 3 S.C.R. 145, Iacobucci, J., speaking for the majority, discussed the concept of "consent seizures" of bodily substances. His Lordship said:

> **34** I agree with Doherty J.A., for the Ontario Court of Appeal in R. v. Wills (1992), 12 C.R. (4th) 58, at p. 72, that:
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> > When one consents to the police taking something that they otherwise have no right to take, one relinquishes one's right to be left alone by the state and removes the reasonableness barrier imposed by s. 8 of the Charter. The force of the consent given must be commensurate with the significant effect which it produces.
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> In order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. This is equally true whether the individual is choosing to forego consultation with counsel or choosing to relinquish to the police something which they otherwise have no right to take.
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> ....
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> **41** The question of whether the seizure was unreasonable can be disposed of simply. In the absence of prior judicial authorization, a search or seizure will be unreasonable unless it is authorized by law, the law itself is reasonable and the manner in which the search was carried out is reasonable: R. v. Collins, [1987] 1 S.C.R. 265, at p. 278; and R. v. Wiley, [1993] 3 S.C.R. 263. The seizure in this case was not lawful. There is no statutory authorization available for the seizure of a blood sample in relation to the offence of sexual assault. A lawful seizure in this case required the respondent's consent. For the foregoing reasons, I find that consent to be absent.

[70] In the case at bar, the Crown quite properly conceded that the taking of images in the hallway constituted a warrantless search. Further, there was no statutory authority permitting the police to install the camera and take images of the hallway space. As such, it fell to the Crown to prove on a balance of probabilities that the search was lawful because it was conducted in accordance with effective consent given to the police.

[71] The law regarding the granting of effective consent was set out by the Ontario Court of Appeal in ***R. v. Wills*** (1992), 70 C.C.C. (3d) 529:

> **69** In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:
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> (i) there was a consent, express or implied;

(ii) the giver of the consent had the authority to give the consent in question;

(iii) the consent was voluntary in the sense that that word is used in Goldman, supra, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;

(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

(vi) the giver of the consent was aware of the potential consequences of giving the consent.

70 The awareness of the consequences requirement needs further elaboration. In Smith, supra, at pp. 726-28 S.C.R., pp. 322-23 C.C.C., McLachlin J. considered the meaning of the awareness of the consequences requirement in the context of an alleged waiver of an accused's s. 10(b) rights. She held that the phrase required that the accused have a general understanding of the jeopardy in which he found himself, and an appreciation of the consequence of deciding for or against exercising his s. 10(b) rights.

71 A similar approach should be applied where s. 8 rights are at stake. The person asked for his or her consent must appreciate in a general way what his or her position is vis-a-vis the ongoing police investigation. Is that person an accused, a suspect, or a target of the investigation, or is he or she regarded merely as an "innocent bystander" whose help is requested by the police? If the person whose consent is requested is an accused, suspect or target, does that person understand in a general way the nature of the charge or potential charge which he or she may face?

[72] Applying the criteria set out in ***R. v. Wills***, *supra*, to the case at bar, I reach the following conclusions:

1. Consent was given by Mr. Scott to the police to both access the building (and the hallway) and if desired, to install a covert camera.
2. Mr. Scott had authority to provide the consent. It was submitted on behalf of Mr. Nafke that authority to provide consent could not be established by Mr. Scott's uncorroborated evidence. With respect, I disagree. There is no statutory or common law requirement for corroboration of Mr. Scott's statement that he had the lawful authority to grant the consent he purported to grant. In ***R. v. Khela*** (2009), 238 C.C.C. (3d) 489 (S.C.C.), Justice Fish said, at paragraph 2: "The evidence of a single witness is nonetheless sufficient in Canada to support a conviction for any offence other than treason, perjury or procuring a feigned marriage. Many serious crimes might otherwise go unpunished. But where the guilt of the accused

is made to rest exclusively or substantially on the testimony of a single witness of doubtful credit or veracity, the danger of a wrongful conviction is particularly acute." In the case at bar, Mr. Scott was a credible and reliable witness. That which he said about his authority was reasonable in the circumstances of his employment and position. I accept his evidence, and find that he had the authority in law to provide the consent.

3. The consent was voluntary.
4. Mr. Scott was aware that the police wanted access to Building 2000 to aid in an investigation they were conducting. I am satisfied that Mr. Scott knew that the police might install a camera in a hallway.
5. I am not at all satisfied that Mr. Scott was aware of his right to refuse to permit the police to have access to the building or to install a covert camera. The evidence before me does allow me to conclude that the police made it clear to Mr. Scott that he had the power to refuse the police request. From Mr. Scott's evidence, I suspect that Mr. Scott would have granted his consent regardless, but one must not confuse "eager consent" with "informed consent". The person being asked to consent must be made to understand that he or she has the right to choose to withhold consent. The evidence before me does not satisfy me on a balance of probabilities that Mr. Scott understood that.
6. I am satisfied that Mr. Scott was aware that a camera might be installed in the hallway. He did not know of its recording capabilities.

[73] Consequently, I find that the consent provided by Mr. Scott to the police access Building 2000 and install a covert camera was not informed consent, and therefore was not valid in law.

[74] The search and the seizure (by virtue of the recorded images) were therefore unreasonable, and there was a violation of Mr. Nafke's section 8 *Charter* right to be secure against unreasonable search and seizure.

Consequences of the Section 8 *Charter* breach

[75] Crown and defence made submissions, based on section 24(2) of the Charter, as to what should occur if I were to find a section 8 *Charter* breach. Specifically, the submissions were directed at whether any evidence obtained in violation of section 8 of the *Charter* should be excised from the Information to Obtain used in a subsequent and successful application for a search warrant to search the Unit 2416 in Building 2000.

[76] However, I am of the view that reference to section 24(2) was premature. Section 24(2) relates to the question of whether evidence obtained in a manner which infringed a right guaranteed by the *Charter* should be excluded from the proceedings, i.e., the trial. Section 24(2) does not govern whether such evidence is to be excised from an Information to Obtain.

[77] Rather, evidence obtained in violation of section 8 of the *Charter* cannot be used to support an application for a search warrant. The matter was succinctly stated by Justice Sopinka in ***R. v. Plant*** (1993), 84 C.C.C. (3d) 203 (S.C.C.) at p. 215:

> The appellant alleged that the warrant issued in this case was invalid in that it was issued on the basis of an Information containing improperly obtained and misstated facts. This Court has determined that peace officers cannot benefit from their own illegal acts by including in informations sworn to obtain warrants facts which were retrieved through searches without lawful authority. See *Grant* and *Kokesch*, supra....

[78] In short, the evidence obtained by the warrantless search and seizure effected by the use of the covert hallway camera must be excised from the Information to Obtain which was used to secure the search warrant in relation to Unit 2416. In ***R. v. Wiley*** (1993), 84 C.C.C. (3d) 161 (S.C.C.), Justice Sopinka concluded that a warrantless perimeter search violated section 8 of the *Charter*. Information obtained by that perimeter search was included in the Information to Obtain which was subsequently and successfully used to obtain a search warrant. His Lordship said at pp. 169 and 172:

> Having concluded that the warrantless perimeter search violated s. 8 of the Charter, it is necessary to determine the effect which inclusion of facts obtained during the unconstitutional search in the information in support of the warrant has on its validity. In *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, [1990] 2 S.C.R. 1421, 80 C.R. (3d) 317, this Court concluded that a search warrant issued in reliance, in part, on facts which are found to be inadmissible on review will continue to be valid if it can be shown that the warrant would have issued even if the inadmissible facts had been excised from the information sworn to obtain the warrant.
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> With regard to the standard of review, the decision in Garofoli indicated (at p. 188) that if,
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> > ...based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere.
>
> Accordingly, if in the case at bar it can be concluded that the search warrant would have issued absent inclusion of the evidence obtained during the warrantless perimeter search, then the warrant and the search and seizures conducted pursuant to it remain legally valid.
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> . . .
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> Although the evidence sought to be excluded was obtained as a result of a search pursuant to a valid search warrant, this does not end the matter. As I explained in *Grant*, it is necessary to determine whether the evidence was "obtained in a manner" that infringed the Charter by reason of the perimeter search which I have held violated s. 8 of the Charter. The connection between the evidence ultimately unearthed and the warrantless perimeter search, in my view, constitutes a sufficient temporal connection to trigger operation of s. 24(2) of the Charter. As I indicated in *Grant,* although the warrantless perimeter search was not essential to the search and seizure validly conducted pursuant to a warrant, all of these actions

formed component parts of an ongoing investigation and thus are not sufficiently remote from on another to diminish their temporal connection.

[79] In the case at bar, for the reasons I have set out above, the use of the covert hallway camera was an infringement of Mr. Nafke's section 8 *Charter* right to be secure against unreasonable search and seizure. The evidence so obtained must be excised from the Information to Obtain. There is no discretion at this stage to allow the evidence to remain in the ITO.

[80] Whether, after the required excision from the Information to Obtain, there remains enough information to support the warrant which was issued, is a matter to be determined after a ***Garofoli*** application. After that is determined, the matter of whether the search of Unit 2416 violated Mr. Nafke's section 8 *Charter* rights can be addressed. If a violation is found, then resort to section 24(2) can be made to determine whether that which was seized through the use of the covert hallway camera, and that seized in the search of Unit 2416, should be excluded from the evidence at trial.

Ruling

[81] The use of the covert hallway camera violated Mr. Nafke's section 8 *Charter* right to be secure against unreasonable search and seizure. The evidence so obtained must be excised from the Information to Obtain.

Dated at the City of Calgary, Alberta this 26th day of June, 2018.

A.A. Fradsham
A Judge of the Provincial Court of Alberta

Appearances:

K. McDonald
S. Tkatch
for the Crown

P. Fagan, Q.C.
for the Accused