NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. DeWolfe***, 2007 NSCA 79

Date: 20070628
Docket: CAC 274229
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Christopher Lee DeWolfe

Respondent

Judges:	Bateman, Saunders and Fichaud, JJ.A.
Appeal Heard:	June 11, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed and a new trial ordered per reasons for judgment of Bateman, J.A.; Saunders and Fichaud, JJ.A. concurring.
Counsel:	Mark Covan, for the appellant Roger Burrill, for the respondent

Reasons for judgment:

[1] This appeal arises from a police raid on a residential crack shop. Although the search of the premises was authorized by warrant, Barbara Beach, J.P.C. found that the respondent's s. 8 **Charter** rights had been violated by the manner of the search. Pursuant to s. 24(2) of the **Charter** she excluded the drug evidence. The Crown appeals. The decision on appeal is reported as **R. v. DeWolfe**, 2006 NSPC 51; [2006] N.S.J. No. 468 (Q.L.). A prior, companion decision is reported as **R. v. DeWolfe**, 2006 NSPC 9; [2006] N.S.J. No. 109 (Q.L.).

BACKGROUND

[2] On January 26, 2004, at 8:00 p.m., D./Cst. Carlisle of the Halifax Regional Police Drug Unit obtained a warrant to search the residence of Christopher DeWolfe located at 2408 Adams Avenue, Halifax, Province of Nova Scotia. This is in an area of Halifax known as Uniacke Square.

[3] In his Information to Obtain, D./Cst. Carlisle relied on information provided to him by three separate sources identified as Source "A" through "C" regarding the alleged trafficking activities of Mr. DeWolfe at his residence. The following details were supplied by the confidential sources:

- Crack cocaine was being trafficked from 2408 Adams Avenue
- The crack was packaged for resale in tinfoil;
- About one ounce of crack was observed in the residence in the last 24 hours;
- Christopher Lee DeWolfe resides at 2408 Adams Avenue with his wife and a couple of kids;
- The residence is used as a "crack shop" where cocaine can be purchased on a twenty-four hour basis;
- Christopher DeWolfe keeps a young pit bull at his residence to act as a deterrent to police and rival drug dealers;
- Christopher DeWolfe has a quantity of crack cocaine in either a seven bag or an eight ball at any given time.

[4] In addition to the information from the confidential sources, D./Cst. Carlisle, a police officer assigned to the Drug Unit, supplied the following:

- A check of police records shows Christopher Lee DeWolfe d.o.b. 1969/12/25 as being charged with several weapons offences;
- Christopher Lee DeWolfe d.o.b. 1969/12/25 resides at 2408 Adams Avenue;
- Christopher Lee DeWolfe d.o.b. 1969/12/25 has two convictions in 1988 and 1992, the most recent being for uttering threats;
- D./Cst. Carlisle has worked frequently in the Uniacke Square area over the last ten years, attempting numerous times to conduct surveillance;
- He has learned that residents in the area attempt to do counter-surveillance on the police;
- He has learned that a number of street level drug dealers hire young persons to tell them if police are coming into the area by using signals or yelling “5 0", which is slang for police;
- The door to 2408 Adams Avenue is located on a path way not a road way and cannot be viewed from the street;
- It is very difficult to conduct physical surveillance on 2408 Adams Avenue.

[5] The judge was satisfied that the Information provided sufficient grounds for the issuance of a warrant executable “at any time”, which included a night time search.

[6] Having obtained the warrant at 8 p.m. on January 26, 2004, the police executed it at 2:20 a.m. the following morning. They made a “hard entry” into Mr. DeWolfe’s residence. By this method the police take down the door with a battering ram, yelling, contemporaneously, “Police - search warrant”.

[7] The police seized .2 grams of crack cocaine wrapped in foil in Mr. DeWolfe’s pants pocket; 26.26 grams of crack cocaine located above a dryer vent in the laundry room; digital scales with cocaine residue on the night table in the master bedroom; and $680 cash in various denominations. Mr. Dewolfe was charged with possession of cocaine for the purposes of trafficking.

[8] A number of preliminary motions were raised in the Provincial Court. Mr. DeWolfe challenged the constitutional validity of ss. 11 and 12(b) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, as am. (“**CDSA**”) asserting that they were inconsistent with s. 8 of the **Charter**. In addition he sought to have the warrant declared invalid.

[9] The hearing commenced on November 10, 2004. Witnesses were called by the defence and Crown on that day, in July, October and December of 2005 and in February of 2006. It was agreed that the judge's reasons on the various motions would follow in two parts, dealing first with the constitutional issues. In that regard Mr. DeWolfe advanced two positions, as summarized by the judge in the first decision:

> [3] Section 11(1) of the *CDSA* allows a justice to issue a warrant authorizing police to search a specified place "at any time", based on reasonable grounds to believe evidence of a drug offence will be found there, and to seize any such evidence. The Applicant says that s. 8 of the *Charter* requires that if the warrant is to be executed at night and the place to be searched is a dwelling house, then the justice must specifically authorize a night-time search, based on reasonable grounds, and if a night search is not specifically authorized, then the warrant may only be executed during the daytime. Essentially, the Applicant wants a rule like that in s. 488 of the *Criminal Code* to be recognized as a constitutional minimum standard under s. 8 of the *Charter*.
>
> [4] Section 12(b) of the *CDSA* permits the police officer authorized by a s. 11 warrant to use as much force as necessary in the circumstances in order to execute the warrant. The Applicant says that s. 8 of the *Charter* requires police, when they know in advance that force will be used to effect entry into a home, to obtain specific authorization in the warrant to make a forced entry. Essentially, the Applicant wants s. 8 of the *Charter* to be understood as requiring police to obtain prior authorization to violate the common law knock/notice rule.
> (Emphasis added)

[10] Finding neither argument persuasive, the judge concluded that the impugned sections of the **CDSA** did not infringe s. 8 of the **Charter**. That decision has not been appealed.

[11] The hearing resumed on March 28, 2006, for submissions on the validity of the warrant. No additional evidence was called. It was Mr. DeWolfe's position that the grounds contained within the Information to Obtain were insufficient, therefore the warrant should not have issued and the search was unauthorized. He further submitted that in making a "hard entry" into the premises, the police acted unreasonably thereby violating his s. 8 **Charter** rights.

[12] The judge was satisfied that the information was sufficient for the issuance of a warrant executable "at any time". However, as stated above, she concluded

that the search violated s. 8. of the **Charter**. Pursuant to s. 24(2) of the **Charter** she excluded the evidence. The appellant says the judge erred in both respects.

ISSUES

[13] The Crown says the trial judge erred in her interpretation and application of both s. 8 and s. 24(2) of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

STANDARD OF REVIEW

[14] The Crown's right to appeal an acquittal, pursuant to s. 676(1)(a) is restricted to questions of law which are reviewed on a correctness standard.

[15] The incorrect application of a legal standard, as is asserted here, is a question of law (**R. v. Araujo**, [2000] 2 S.C.R. 992, 2000 SCC 65). Identifying a legal error where the matter involves the application of a legal standard to a set of facts was explained in **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, 2002 SCC 33, Iacobucci and Major, JJ. wrote for the majority, at pp. 256-58:

> At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are sometimes confounded. ...
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> . . .
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> Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam, supra*, at para. 39, this Court illustrated how an error on a question of

mixed fact and law can amount to a pure error of law subject to the correctness standard:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

ANALYSIS

(i) Forced Entry and the "Knock/Notice Rule"

[16] At common law, in the ordinary case, before forcing entry into a private dwelling, police officers, should give: (1) notice of presence by knocking or ringing a doorbell; (2) notice of authority by identifying themselves as law enforcement officers; and (3) notice of purpose by stating a lawful reason for entry. This rule is subject to an exception for "exigent circumstances". In **Eccles v. Bourque**, [1975] 2 S.C.R. 739, Dickson, J., as he then was, writing for a unanimous court, said at p. 746:

> Except in exigent circumstances, the police officers must make an announcement prior to entry. There are compelling considerations for this. An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance. No precise form of words is necessary. ...
> (Emphasis added)

[17] In **Eccles v. Bourque** the police had a warrant to arrest a subject who was believed to be in the premises entered. They did not have a warrant to search the premises. As Dickson, J. wrote, there is no right of entry to search for a fugitive - a common arrest warrant does not authorize a trespass onto private property. The case is commonly cited, as well, for the proposition that execution of a warrant to

search private premises must be preceded by notice, although that issue is not directly addressed.

[18] In **R. v. Gimson** (1990), 54 C.C.C. (3d) 232 (Ont C.A.), aff'd [1991] 3 S.C.R. 692, the defence argued that the execution of a search warrant issued under the former **Narcotic Control Act**, R.S.C. 1985, c. N-1, (the "**NCA**") was not valid because the police had failed to announce themselves prior to using a battering ram and sledgehammer to enter the residence. After conducting a detailed review of the history of the "knock/notice rule", Finlayson, J.A., writing for the Court, concluded that announcement was not a condition of executing the warrant under the **NCA**. Section 14 of the **NCA** provided:

> 14. For the purpose of exercising authority pursuant to any of sections 10 to 13, a peace officer may, with such assistance as that officer deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing.

[19] He referred extensively to the reasons of the Supreme Court of Canada in **R. v. Genest**, [1989] 1 S.C.R. 59. He did not interpret **Genest** as requiring the police to comply with a knock/notice rule in executing a warrant to search a named private dwelling. Finlayson, J.A. wrote at pp. 237-239:

> *Genest* is frequently cited as authority for a variety of propositions involving the validity of and execution of a search warrant under the *Narcotic Control Act*, but it must be remembered that in that case the Crown admitted that there was an illegal search of the dwelling-house in question which violated s. 8 of the Charter, and the only issue was as to the exclusion of the evidence under s. 24(2) of the Charter.
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> . . . Counsel, in citing *Genest* in the case on appeal, where the validity of the warrant was not in question, were perhaps not mindful that *Genest* involved what was, in law, a warrantless search that was illegally executed pursuant to what would appear to have been an ongoing programme of harassment of the accused.
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> . . .
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> . . . Much was made by counsel for the respondent of the criticisms in *Genest* of the fact that there was no announcement of the arrival of the police officers, no request for admission, and no justification was offered for the extreme force which was used to effect entry. However, as I read the case, the discussion of the

> lack of prior announcement was only part of the narrative of what was very clearly an abuse of police power. . . .
>
> The cases discussed in *Genest* in support of the seriousness of the Charter violation involved arrests on private property without warrant or the execution of searches of dwelling-houses pursuant to invalid warrants. . . .

[20] He noted that he could find only two cases supporting a knock/notice requirement: **Wah Kie v. Cuddy** (1914), 23 C.C.C. 383 (Alta. S.C.) and **Launock v. Brown** (1819), 106 E.R. 482.

[21] It was his conclusion that if there were a common law rule requiring knock/notice, the search provisions in the **NCA** constituted a special scheme displacing the common law rule. This was because the easy destruction of evidence, unique to drug crimes, often necessitated unannounced entry in order to allow police to surprise the occupants of the dwelling house where drug trafficking was suspected. In the result, the court held that an unannounced forceful entry under a **NCA** warrant would be reasonable where the information available to the police supported a need for surprise.

[22] A number of courts have distinguished **Gimson**, **supra**, on the basis that the **NCA** has now been replaced with the **CDSA**, with wording different from s. 14 of the **NCA**. (see, for example, **R. v. Lau**, (2002), 175 C.C.C. (3d) 273 (B.C.C.A.) at paras. 28 to 35). The governing sections of the **CDSA** are:

> 11. (1) A justice who, on *ex parte* application, is satisfied by information on oath that there are reasonable grounds to believe that
>
> > (a) a controlled substance or precursor in respect of which this Act has been contravened,
> >
> > (b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,
> >
> > (c) offence-related property, or
> >
> > (d) any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the Criminal Code

> is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.
>
> . . .
>
> 12. For the purpose of exercising any of the powers described in section 11, a peace officer may
>
> (a) enlist such assistance as the officer deems necessary; and
>
> (b) use as much force as is necessary in the circumstances.

[23] I would express reservation at the ready dismissal of the court's reasoning in **Gimson**, **supra**, as restricted to the unique provisions of the **NCA**. It is, however, unnecessary to consider this issue further as it is my view there were exigent circumstances here, justifying a hard entry and, the requirement in **Gimson** that an unannounced entry is warranted if the police have information supporting a need for surprise equates to a requirement of exigent circumstances.

(ii) Exigent Circumstances

[24] There is no express reference in the **CDSA** to "exigent circumstances". As developed in the case law, exigent circumstances are generally found to exist where the police have reasonable grounds to be concerned that prior announcement would: (i) expose those executing the warrant to harm and/or (ii) result in loss or destruction of evidence and/or (iii) expose the occupants to harm.

[25] These same factors - officer or occupant safety or destruction of evidence - are the elements of exigent circumstances where that term is defined in the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 (see, for example, s. 529.3 authorizing a warrantless entry into a dwelling house).

(iii) The Police Decision to Make an Unannounced Forced Entry

[26] As stated above, the judge having found ss.11 and 12(b) of the **CDSA** constitutional, the first of the next two issues confronting the judge was whether

the Information to Obtain contained sufficient particulars for the issuance of a warrant executable “at any time”. She found that it did:

> [10] I am satisfied, having examined the Information to Obtain and having heard from the officers who have given evidence in this matter, that the Information to Obtain met the threshold of some evidence, albeit at a minimal level, for the issuance of a warrant to search "at any time." There existed, in the sworn Information, a reasonable basis to justify the Justice of the Peace, acting judicially, to permit a search at night.
> (Emphasis added)

[27] In support of this conclusion the judge referred in some detail to the evidence provided in the Information to Obtain which I have set out at paras. 3 and 4, above. She referred to the loss of evidence from a delay:

> [12] It would have been reasonable for the Justice of the Peace to conclude that a delay in the search until daylight hours would result in there being no cocaine left remaining in the residence and render the whole process futile.

[28] She agreed that there was a requirement for urgency in searching Mr. DeWolfe’s residence, the three sources having indicated that the amount of cocaine was relatively small and being sold around the clock. She further noted that the existence of counter-surveillance in the area supported the need to conduct the search under cover of darkness so that the police would not be detected approaching the residence - ensuring surprise and contributing ‘both to the effectiveness of the search as well as to the issue of officer safety’ (trial decision para. 13). She agreed that the inability to view the premises from the street made physical surveillance difficult and that the presence of the dog presented an officer safety issue.

[29] Next to be decided was whether, in forcing entry without an announcement, the police had violated s. 8 of the **Charter**. Broadly stated, the question was whether the manner of search was reasonable.

[30] There was a substantial amount of evidence from the police officers about why they had decided to effect a hard entry. That decision, they testified, is informed by source information, surveillance, and general knowledge of the type of drug operation. This includes information about the targeted individual such as his/her known criminal history and associates; the number of people the police

expect to find inside; whether children may be present; the physical layout and location of the general area and of the specific residence to be searched; and whether the police anticipate encountering deterrent factors, such as counter-surveillance, barricades, dogs and/or weapons.

[31] In addition to the particulars contained in the Information to Obtain (above at paras. 3 and 4), the police officers testified that they knew the following from their experience in dealing with the "crack shop" method of distributing drugs:

> a) Crack shops are sporadic, being established from time to time until taken down by the police or rival drug traffickers. In the chain of distribution, crack shops are a step above street level sales;
>
> b) The crack shop operates on a 24-hour, 7 day per week basis;
>
> c) The crack shop is a location where one can obtain a supply of crack cocaine, typically from a residence utilized for the sale of the drug;
>
> d) People are employed to work in shifts, given the fact that the sales take place 24-hours per day;
>
> e) It is not uncommon for the operators to erect barricades to deter the police or to protect the supply of drugs from theft or robbery from rival dealers;
>
> f) Operators of crack shops try to limit the quantity of drugs kept on location to limit losses in the of event police search activity or theft;
>
> g) Actions by rival traffickers present a real and significant threat to operators of crack shops. In some cases, they impersonate the police to attempt to obtain compliance of the crack shop operator. In other cases, the actions taken by rival traffickers may involve threats, intimidation, assaults, fire bombings, killings, etc.

> h) Crack shop operators will attempt to deter rival traffickers by several methods, including hiring look-outs to warn of approaching police or rivals, obtaining aggressive dogs, such as pit-bulls or Rottweillers, or arm themselves with firearms or other weapons.

[32] Addressing specifically crack shops operated in HRM, they knew the following:

> a) Crack shops are known to exist throughout the Halifax Regional Municipality, but Spryfield and the Gottingen/Uniacke street areas are predominant areas for sales of crack cocaine;
>
> b) The method of distributing crack in these areas varies for a number of reasons, including whether operators are incarcerated and the extent to which a crack shop may impinge on street level distribution;
>
> c) Drug trade violence is well known to the Uniacke Square area, and has resulted in numerous baseball bat assaults, countless shootings, including those involving police officers, and at least six murders in that immediate area;
>
> d) Counter-surveillance is known to exist in the area to alert drug dealers to police presence;
>
> e) When occupants of crack shops are alerted to police presence in advance of search activity, officer safety is compromised and the possibility of destruction of evidence increases;
>
> f) Experience has established that so-called "hard entries" enhance officer safety and decrease the opportunity for crack shop operators to destroy evidence.

[33] In **R. v. Lau**, **supra**, evidence of the police's general knowledge of the type of operation was accepted as relevant to the assessment of the danger involved in a particular situation (at para. 32). It is, however, incumbent upon the police to lay

an evidentiary foundation supporting the decision to force entry, as was done here. In **R. v. Genest**, **supra**, Dickson, C.J.C. wrote for the Court at pp. 90-91:

> . . . On the issue of the amount of force used in the search, the police witnesses at no point gave any explanation for the reason they thought it necessary to use force, or why they broke into the house without giving the normal warnings the common law requires. No mention was made to why the TACTIC squadron of the Surete de Quebec was called to assist in breaking open the door. There is an onus on the police, in these circumstances, to explain why they have thought it necessary to depart from the common law restrictions on searches.
>
> I agree with LeBel J.A. that fears for the safety of the searchers and the possibility of violence are reasons for the use of force in the execution of a search warrant, but no attempt was made by the police at trial to lay the factual foundation to support this approach.
>
> I would not wish to be taken to say that the Crown must prove a tendency to violence beyond a reasonable doubt, nor that the Crown cannot refer to past conduct as influencing their decision as to the amount of force thought necessary to carry out a search. The assessment of the amount of force, like the motives for the search in the first place, need not be proven on the same standard of guilt as when proving the elements of an offence. The Crown must, however, lay the evidentiary framework to support the conclusion that there were grounds to be concerned about the possibility of violence. The important point is that the justification for the amount of force used must be made clear at the beginning, at trial. The Crown cannot try to rehabilitate its case later on appeal.
> (Emphasis added)

[34] The police here were particularly worried about counter surveillance which was a known factor in Uniacke Square drug operations. To highlight the problems that can arise, D./Cst. Astephen testified about a prior drug search carried out within a stone's throw of Mr. DeWolfe's residence.

> . . . We actually were…drive up in a car, park down the street, try to covertly go up the sidewalk, ten officers with a ram and a shield and a fire extinguisher – it's hard to be covert – most of the guys are over 200 pounds and we stick out. There's people, like I said, street-level drug traffickers all over the street any time of the day- - it doesn't matter if it's the morning, 2:00 in the morning, six o'clock in the morning - - and we actually went up towards the residence to go to do the entry, and one of the people in the street was yelling, "Five Oh," at the top of their lungs indicating that the police were in the area, and then we had to pick up the pace and we actually ran to the door and hit the door, but, I mean it puts us in a

> compromising position when we can be detected before we get there. That's why we hit the door – for surprise, the element of surprise. Then people don't have an opportunity to arm themselves. They don't have an opportunity to destroy the narcotics. They don't have an opportunity to think.
>
> I…I've interviewed hundreds of people after the fact that we did a search, whether it's an accused, or sources after the fact, and I'll tell you that because of the bang on the door, they don't know what to do. They freeze. They stand up, they sit down. They…they don't do what they wanted to do: get rid of the drugs or arm themselves. And that's why we do it – safety and to preserve evidence.

[35] The Crown entered into evidence an aerial photograph of the neighbourhood surrounding 2408 Adams Avenue. Clearly identified on that photograph was the location of multiple, known counter-surveillance sentinel points.

[36] D./Cst. Astephen testified that the presence of children was a significant factor in the decision to execute the warrant in the early morning hours. He believed it was likely the children would be in bed and, therefore, there was less chance a child would be near the entry door to be breached or, if weapons were involved, endangered.

[37] The officers further acknowledged in their testimony that most, if not all, dealer drug searches in the Uniacke Square area proceed by hard entry. This is not, they testified, reflective of a departmental policy but driven by the nature of the drug operations in the area (largely retail cocaine), the presence of counter-surveillance and inability of the police to clandestinely observe the targeted premises.

[38] Officers Carlisle, Astephen and Chatterton all testified that, in preparing to obtain and execute a search warrant, there is a system of peer review. Senior officers (in this case Sgt. Chatterton) review the search plan, which includes information about the type of drug being sought, circumstances of the accused and the alleged trafficking activity, the location of the search, the proximity of the general public, the potential for the presence of weapons, whether there may be children present at the search location, and the potential for counter-surveillance. The search plan may be modified by the senior officer. The variables pertaining to each situation are evaluated and include:

a. Geographical make-up of the search location;

b. Weather conditions;
c. Known associates of the drug dealer;
d. The presence of children;
e. The presence of deterrent measures such as dogs or barricades;
f. Whether the quantity of the drug is amenable to easy destruction; and
g. Threat assessments with respect to the public near the search location and the police officers conducting the search.

[39] The judge determined that the police did, in fact, have a policy or practice of hard entry for drug searches in the Uniacke Square area and that was the reason for their hard entry into 2408 Adams Avenue. In concluding that the police entry without announcement was unreasonable and therefore violated s. 8 of the **Charter** she said:

> [41] The police made their decision to use a no-knock, hard entry because this has become the norm with respect to drug searches, particularly in Uniacke Square and other drug hot spots. As Sergeant Chatterton states, "It is practical." While I acknowledge that the police have a number of factors to consider in determining how a search might be conducted most effectively, at no time on January 27 did the officers consider something less invasive than a no-knock, hard entry in the event that they arrived at the residence and found the house in darkness with the occupants seemingly asleep. It is apparent from the comments of the officers, particularly Detective Constable Carlisle, Detective Constable Astephen and Sergeant Chatterton that there is indeed an unwritten policy, or at least a practice, regarding forced entries in a vast percentage of drug searches in this area.
>
> [42] As a result of this practice, the police, in this instance, neglected to exercise their discretion as the events of the early morning hours unfolded. Had they done so, it would have been apparent that the manner of entry contemplated earlier at the police briefing session was not required.
>
> [43] An "announced" entry into a family home by seven officers in the middle of the night would have been a sufficient and significant intrusion in these circumstances and would have served to provide the required shock value being sought.
> (Emphasis added)

[40] The judge's focus on a hard entry policy as fatal to the method of search presumably derives from a line of cases where courts have concluded that an

unannounced forced entry into a dwelling, made pursuant to such a policy, is an unreasonable search. For example, in **R. v. Lau**, **supra**, under the authority of a valid warrant, the police made an unannounced forced entry into a premises believed to house a marijuana grow operation. The police detective who testified at trial about the entry decision acknowledged that they had no information about a risk of weapons or drugs at the house in question nor did the police discuss the likelihood of such. While he said the decision was based upon concerns that weapons were usually present at drug operations, he further testified that, in fact, weapons are actually found at less than ten percent of marijuana grow operations. The detective acknowledged that at the time the warrant was executed it was the general practice of the police not to knock and announce. There was, he agreed, no concern that the drugs would be destroyed prior to entry. On this evidence the appellate court was satisfied that the trial judge did not err in finding there were no exigent circumstances and that the search was unreasonable. Similarly, in **R. v. McAllister**, [2000] B.C.J. No. 963 (Q.L.), 2000 BCSC 223, the judge concluded that without evidence of exigent circumstances relating to the specific premises where a marijuana grow operation was believed to be located, the police were not entitled to execute a **NCA** warrant without first knocking and announcing their presence. As in **Lau**, **supra**, the officers there were acting in accordance with a general "no knock" policy.

[41] The judge's determination here that the "hard entry" was unreasonable may have been influenced by her conclusion in the decision on the constitutional issues, that "a warranted search which violates the knock/notice rule will generally violate s. 8 of the **Charter**, because the manner of search is unreasonable" (at para 42). In support she cited a number of cases where an unannounced forced entry was held to be unreasonable. None of those cases bore a factual similarity to the search of the DeWolfe premises. In each case, where the forced entry was found to violate s.8 of the **Charter**, the police were acting without a warrant (**R. v. Brown**, [2003] O.J. No. 5089 (Q.L.) (Sup. Ct. J.); and/or the forced entry was pursuant to a general no knock policy with no evidence of officer safety or about evidence destruction issues - in all cases, marijuana grow operations (**R. v. Schedel**, 2003 BCCA 364, 175 C.C.C. (3d) 193; **R. v. Lau**, **supra**; **R. v. Ngo**, 2004 BCSC 1414; **R. v. K.C.F.**, 2004 NSPC 70, 235 N.S.R. (2d) 3; **R. v. Mac**, [2005] O.J. No. 858 (Q.L.) (Sup. Ct. J.); **R. v. Mai**, 2005 BCSC 29; **R. v. Li**, [2005] O.J. No. 267 (Q.L.)(Sup. Ct. J.)). She further cited **R. v. Normore**, 2005 ABQB 345, a marijuana trafficking operation and **R. v. Vukelic**, 2005 BCPC 156, a marijuana

grow operation where, in each case, the unannounced entry was found to be reasonable. In these cases where the search was held to be unreasonable the common thread is the policy of forced entry coupled with an absence of specific evidence suggesting safety or evidence destruction concerns.

[42] Here, there was cogent evidence of risks to officer safety arising from the nature of the operation (retail crack distribution); Mr. DeWolfe's criminal history of threats and weapons charges; the known counter-surveillance in Uniacke Square; and the anticipated presence of a pit bull in the residence. In addition, there was a real chance of the destruction of the relatively small quantity of crack cocaine should the police announce their presence or be detected by counter-surveillance. Finally, the police were worried about occupant safety arising from the possibility of weapons and the presence of children. The judge did not discount this evidence or suggest that it did not provide sufficient reasons for a forced entry.

[43] The judge framed the issue as follows:

> [18] The second issue in Part II of the application being made on behalf of Mr. DeWolfe relates to the manner of search and can be set out as follows:
>
> > Did the police violate the knock/notice rule thereby rendering the search unreasonable and in violation of the Applicant's s. 8 Charter rights?

[44] She appears to have accepted that a plan to force entry was warranted up to the time the police arrived at the door of 2408 Adams Avenue at 2:20 a.m. and found the windows in darkness. I repeat what I consider to be a key point in the judge's reasoning:

> [42] As a result of this practice, the police, in this instance, neglected to exercise their discretion as the events of the early morning hours unfolded. Had they done so, it would have been apparent that the manner of entry contemplated earlier at the police briefing session was not required.

[45] The judge seems to have concluded that the fact that the police did not re-evaluate the planned forced entry upon arriving at the scene, demonstrates that they were acting only in accordance with a policy to force entry and not due to exigent circumstances.

[46] It is my respectful view that the judge erred in two ways: (i) in failing to consider whether the exigent circumstances which warranted the police planning a forced entry had changed when the police reached the door of the residence; and (ii) by taking into account facts which could not have been known to the police prior to entry and, in any event, which were not relevant to the decision to force entry. The decision to force entry must be made on the information available to the police in advance of the search. Just as the "Crown cannot rely upon *ex post facto* justifications" (**R. v. Genest**, **supra**, at p. 89) *per* Dickson, C.J.C.) neither can the defence attack the decision on the basis of circumstances that were not reasonably known to the police.

[47] The judge did not elaborate upon how the fact that the windows of the residence were in darkness when the police arrived negated their legitimate concerns about officer and occupant safety and the destruction of the evidence.

[48] The judge's criticisms of the forced entry were: (i) the police should have tried the handle to the front door of the residence to determine if it was unlocked; (ii) they should have had a female officer present, anticipating that they might find Mr. DeWolfe's wife, Angela, in bed without clothes on (as it turned out, was the case); (iii) they should have made a less dramatic entry to occasion less stress to the children; and (iv) a dog was not found at 2408 Adams Avenue.

[49] The danger to the police in testing the door to the premises is obvious. As D./Cst. Carlisle testified - it risked alerting the occupants (including the dog) to the presence of an intruder and, even if the door knob is unlocked, there may be a bolt, chains or barricades which prevent entry. The occupants would not know whether it was the police or rival drug dealers and might respond with weapons or other deterrent measures. That children were present and would likely be in bed, thus safer, was a factor considered by the police. They were aware that Mr. DeWolfe's wife lived in the premises. In executing the warrant at 2:20 a.m. it would not be surprising to find the occupants in bed. That Ms. DeWolfe would be in bed without clothing could not have been known to the police in advance, nor did it have any relevance to their concerns for officer safety and destruction of the evidence. Neither did the fact that the occupants were in bed mean they would not have had an opportunity to destroy the evidence had the police announced their presence and awaited entry. Finally, Charles Bellefontaine, one of the occupants

of 2408 Adams Avenue, testified that Mr. DeWolfe had kept a pit bull in residence, but that the dog was stolen before the search. It is my respectful view that the issues identified by the judge do not contradict the police assessment that there were exigent circumstances warranting a forced entry.

[50] Even assuming, as was found by the judge, that it was police practice to effect a hard entry for cocaine operations in the Uniacke Square area, it was incumbent upon her to determine whether, on the information known to the police about the specific operation at 2408 Adams Avenue, the location of the premises and the nature of crack shop distribution, exigent circumstances existed here. That she did not do.

[51] With respect, by failing to consider relevant factors (whether exigent circumstances existed) and by considering irrelevant factors (information unknown to the police until their entry into the premises) the judge erred at law in finding that the manner of search violated s. 8 of the **Charter**.

DISPOSITION

[52] I would allow the appeal and order a new trial.

Bateman, J.A.

Concurred in:
Saunders, J.A.
Fichaud, J.A.