PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Lachance*, 2018 NSPC 15

Date: 20180523
Docket: 3000506, 3000506
Registry: Truro

Between:

R.

v.

Anne Lachance

Judge:	The Honourable Judge Catherine M. Benton,
Heard:	February 26, 2018, in Shubenacadie, Nova Scotia
Decision	Decision on Charter Application
Charge:	267(b) CC, 221 CC
Counsel:	Rick Hartlen, for the Provincial Crown Brian Stephens, for the Defence

By the Court:

Background

[1] Anne Lachance was charged on or about the 15th day of January, 2015, at or near Elmsdale, Nova Scotia, did in committing an assault upon Findley Larkin, cause bodily harm to him, contrary to Section 267(b) of the Criminal Code. And furthermore at the same place and time did by criminal negligence, to wit, failing to provide adequate child care, cause bodily harm to Findley Larkin, contrary to Section 221 of the Criminal Code.

[2] On January 25, 2015, the residence of the accused, Anne Lachance, located at 15 Hemlock Drive, Elmsdale, Nova Scotia, was searched pursuant to a search warrant issued under section 487 of the **Criminal Code**. As a result of this search, bloody baby wipes were seized.

[3] The defence filed a charter motion requesting that the court find that Lachance's right to be free from unreasonable search and seizure pursuant to Section 8 of the **Charter** has been violated. Specifically the defence submitted that the Information to Obtain did not contain reasonable and probable grounds to be issued. The resulting search, the defence submitted, was therefore without

a warrant and thus unreasonable in the circumstances. The defence further sought that the results of this search be excluded pursuant to Section 24(2) of the **Charter**.

Contents of Information to Obtain

[4] The ITO was sworn by Constable David Wagner on January 25, 2015 after reviewing the reports of two officers (Constables McGrath and Morrison), the statement of the child's parents, the cautioned statement of the accused Anne Lachance and a statement of Lachance's son.

[5] On January 15, 2015, Constable Anthony McGrath attended the I.W.K. After speaking to the parents of Findley Larkin, Christine and Sheldon Larkin and to Doctor Holland who was the attending physician, he learns that the parents took the child to the babysitter, Anne Lachance that morning. The child had not suffered any injury prior to taking the child to the babysitter. In the afternoon Ms. Larkin received a call from Ms. Lachance wherein she indicates that when she changed the child's diaper earlier that morning he was red and raw under the penis. After a nap she changed the child again and he was then bleeding. Mr. Larkin picked up the child. There were bite marks on the forehead and the nose of the child. He was told by Ms. Lachance that

Lachance's daughter had bitten the child. He saw a gash, not a rash, and a bruise to the tip of the child's penis. Dr. Holland opined that the gash was caused by a cut or a strong pull.

[6] On January 16, 2015, statements were obtained from Christine and Sheldon Larkin. Both indicated that Ms. Larkin changed and readied the child dropping him off at Lachance's residence around 7:30 a.m. on January 15, 2015. At approximately 2:30 p.m. Ms. Lachance called Ms. Larkin and indicated that when she had changed the child's diaper she noticed that he was red and raw under the penis. After the nap when she changed the child again, the child was bleeding. Ms. Larkin then texted Mr. Larkin to advise him of her conversation with Ms. Lachance. Mr. Larkin picked up the child and they both noted that there were bite marks on the child's forehead and nose. They noted a gash not a rash to the underside of the child's penis, and a bruise on the tip of the penis.

[7] On January 16, 2015, a cautioned statement was obtained from Anne Lachance. She indicated that the child was dropped off to her around 7:40 a.m. on January 15, 2015 by Christine Larkin. Around 10:00 a.m. she changed the diaper and noted a cut underneath the penis but it was not bleeding. She put on Polysporin. The child went down for a nap around 11:30 a.m. After the nap she changed his diaper again and noted a little blood. She subsequently called

Ms. Larkin. She never referred to the cut as a rash. She indicated that her daughter Hannah had bit the child on the forehead.

[8] On January 23, 2015, Constable Morrison spoke to the social worker Micah MacIsaac who had spoken further to Dr. Holland. He indicated that the doctor opined that it was not logical that the injury happened prior to the child being dropped off to the babysitter that morning. If the injury had occurred prior to being dropped off, the child would have still have been bleeding. There would have been a large amount of blood present in the diaper. The injury was not likely caused by a child. Photos of the forehead were sent to a forensic dentist who did not believe that the injury resulted from a bite.

[9] As well on January 23, 2015, the social worker and Cst. Morrison took a statement from Cameron Kaizer (Lachance's seven-year old son). Cameron Kaizer indicated that his mother changes the diapers on the carpet in the living room. She then puts the diapers in a bin in the kitchen, described as a white bin, with a lid and used only for diapers. His mother puts the used wipes in the garbage.

[10] On January 24, 2015, Constable Morrison attended the residence of Christine and Sheldon Larkin. He obtained consent from the Larkins to search for

used diapers. However, he was told by the Larkins that any diapers that were used would have been already put in the garbage. There had been a garbage pickup on January 22, 2015.

Law

[11] Section 8 of the **Charter** reads as follows: "Everyone has the right to be secure against unreasonable search or seizure." Section 24(2) of the **Charter** reads as follows: "Where in proceedings under subsection (1), a court concludes that the evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this **Charter**, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

[12] There are five main questions that must be answered in an information to obtain before a search warrant should be granted.

1. That the items specified exist.

2. The items specified will be found in the place to be searched.

3. That an offence has been committed.

4. The item specified will afford evidence of the alleged offence.

5. The place to be searched is the location where the items are located.

[13] In reviewing the grounds cited in an information to obtain (ITO), I must not substitute my view as to whether this particular search warrant should or should not have been issued. Instead I must review the grounds placed before the issuing justice and I must ask myself could the search warrant have been issued. If the search warrant could have been granted based on the information that was provided to the issuing justice, then I am not to interfere with that authorization.

[14] The **Garofoli** standard was recently reiterated in **R v. Morelli** 2010 SCC 8 Can LII, and **R v. Campbell** 2011 SCC 32 at paragraph 14.

> "The relevant legal principles are not at issue in this appeal, Juriansz J. A. correctly followed the approach to reviewing the sufficiency of a warrant application recently reviewed by this Court in ***R. v. Morelli*** 2010 SCC 8 (Can LII), [2010] 1 S.C.R. 253. In order to comply with s. 8 of the ***Charter***, prior to conducting a search the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search." (***Hunter v. Southam Inc.***, 1984 Can LII 33 (SCC), [1984] 2 S.C.R. 145 at p. 168). The question for a reviewing court is "not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence" to permit an issuing justice to authorize the warrant (***Morelli*** at para. 40). In conducting this analysis, the reviewing court

> must exclude erroneous information from the ITO and may have reference material properly received as "amplification" evidence. ***R v. Araujo***, 2000 SCC 65 Can LII, [2000] 2 S.C.R. 992 at para. 58; ***Morelli*** at para. 41)."

[15] The burden is on the defence to show on a balance of probabilities that the issuing justice, based on the information provided to them, could not have properly granted the search warrant. **Morelli** supra at paragraph 131.

[16] The analysis to be applied when reviewing an ITO can be found in **R v. Sanchez and Sanchez** 1994 Can LII 5271 (ON SC). The Ontario Supreme Court found that a reviewing judge must consider the following, at page 13

> "Search Warrants are statutorily authorized investigative aids issued most frequently before criminal proceedings have been instituted. Almost invariably a peace officer prepares the search warrant and information without the benefit of legal advice. The specificity and legal precision of drafting expected of pleadings at the trial stage is not the measure of quality required in a search warrant information"
>
> The appropriate approach for judicial review of an information to obtain a search warrant, is scrutiny of the whole of the document, not a limited focus upon an isolated passage or paragraph….
>
> A search warrant information draftsperson or affiant is obliged to state investigative facts sufficient to establish reasonable grounds for believing that an offence has been committed, that the things to be searched for will afford evidence, and that the things in question will be discovered at a specific place.
>
> An issuing justice is entitled to draw reasonable inferences from stated facts and an informant is not obliged to underline the obvious."

[17] Reasonable grounds are provided when credibly-based probability replaces suspicion.

[18] In **R. v. McNair** 2009 NSPC 31, Campbell J. P. C., as he was then stated:

> 4. "For a search warrant to be granted there must be a credibly-based probability both that an offence has been committed and that there is evidence of it to be found in the place to be searched. The reasonable belief of the person signing the affidavit is not enough. The ITO must disclose the substantial basis for that belief…..
> 7. The sufficiency of grounds for the granting of a search warrant must be considered having regard to the totality of the circumstances. No single factor is decisive in determining whether a standard of reasonableness has been met. **R. v. Durling** 2006 NSJ 453, 2006 NSCA 124"

[19] In **R v. Wallace 2016 NSCA 79**, the Court of Appeal confirmed the proper test to be applied in Garifoli challenges.

> "[25] …the reviewing judge or court does not determine whether the justice of the peace *should* have been satisfied on the evidence presented to him, but rather *could* he have been satisfied on the evidence set out in the ITO that there were reasonable and probable grounds for believing that the articles sought would be of assistance in establishing the commission of an offence and would be found in the premises sought to be searched. (See: re ***Carroll and Barker and The Queen*** (1989) 1989 Can LII 2006 (NS CA), 88 N.S.R. (2d) 165 (N.S.S.C.A.D.)….

> [27] A succinct and helpful statement of the test a reviewing judge is to apply was penned by Fichaud, J. A. in ***R v. Shiers***, supra:
>
> > [15] "Based on these principles, the reviewing judge should have applied the following test. Could the issuing judge, on the material before her, have properly issued the warrant? Specifically, was there material in the Information from which the issuing judge, drawing reasonable inferences, could have concluded that there were reasonable grounds to believe that a controlled substance, something in which it was contained or concealed, offence-related property or anything that would afford evidence of an offence under the **CDSA** was in Mr. Shiers' apartment"

However, I am cognizant that an authorizing justice must carefully review the information being offered by the officer seeking the judicial authorization for a search warrant to ensure there are facts supporting the officer's belief in reasonable and probable grounds, belief going beyond mere suspicion. Although it is permissible for an officer to draw conclusions, they must flow as a logical consequence from the chain of facts tendered in support of that request.

Section 8 Charter

[20] In the matter before the court, based on the I.W.K. doctor's opinion there would have been significant bleeding and thus a large amount of blood that would have been present in the child's diaper. There is no question that an alleged offence has been committed and that there is corroborating evidence of that alleged offence that could be found.

[21] The defence argues that at the time of the drafting of the ITO., 10 days after the injury to the child, it is not probable that the diapers, bloody wipes, etc. would still be at the location to be searched.

[22] The Crown argues that the justice could have inferred from the evidence placed before him that it was not probable that the used diapers and wipes would still be found at the location to be searched, however it is equally possible that the justice could have also inferred from the same evidence that the used diapers and wipes could still be at that location.

[23] From the interview of the child of Ms. Lachance, we glean that Ms. Lachance disposes of any used diapers in a bin in the kitchen described as a white container with a lid that is used only for diapers. The used wipes are put in the garbage. Paragraph 14 of the ITO under the summary concisely states the reasons for the officer's belief that perhaps the diapers are still present at Lachance's residence…

> "It is reasonable to believe that the diapers and wipes are still located in the house, as by Kaizer's description, it appears that Lachance is using a unit that holds dirty diapers for an extended period of time. Though it has been 10 days since the day of the injury and there has been a garbage pickup, there is only one other child that uses diapers while in the care of Lachance. In my personal experience with using a similar

> device to store dirty diapers, it is not unreasonable to believe that the unit has not been emptied yet…."

[24] As the defence points out, Constable Wagner infers that this white bin (also referred to by the officer as a unit or device) holds diapers for an extended period of time. Is this a logical inference from the evidence that has been placed before the issuing justice? The defence proposes the following relevant questions:

1. What type of bin is it specifically?

2. How big is this bin?

3. How many diapers does this bin hold?

4. How full was it at the time when the child was there on January 15, 2015?

5. How often is the bin emptied?

6. Does Ms. Lachance not take out the used diapers on garbage day?

[25] The officer in his summary provides from his personal experience of using a similar device that perhaps the bin has not been emptied. No basis is provided

as to how the officer is making the connection between the diaper bin used at Lachance's residence and his own to show that it is possible that the diapers are still there. Additionally, no mention is made as to why the officer has a belief that the bloody wipes (which according to the child are thrown into the garbage) and the bloody cloths would still be present. This is especially concerning since there has been a garbage pick up between the injury and the search of the residence. Given these circumstances it is difficult to accept the officer's conclusion that the diapers, wipes, cloths or rags still would be located in Ms. Lachance's residence.

Conclusion

[26] This does not reach the standard required of credibly-based probability of items being in the residence at the time of the search. There is only what amounts to suspicion. However, I would note there would have been a very different result had the Information to Obtain been drafted and the search conducted shortly after the injury rather than 10 days post injury.

[27] Accordingly, I find that Ms. Lachance's right to be free from unreasonable search and seizure pursuant to Section 8 of the **Charter** has been violated and quash the search warrant.

Section 24(2) Charter

[28] The test for exclusion under section 24(2) of the **Charter** is provided in **R v. Grant** [2009] 2 S.C.R. no. 353 The focus is to be on maintaining the integrity of and the public confidence in the justice system.

> "The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the ***Charter*** would conclude that the admission of evidence would bring the administration of justice into disrepute." (para. 68)

[29] In analyzing an application to exclude evidence the court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

1. Seriousness of the Charter-Infringing Conduct

[30] Accordingly the court must review how the evidence was obtained. Good faith, minor or technical errors would lean towards the inclusion rather than the exclusion of evidence. Whereas negligent, wilful or reckless disregard for Charter rights resulting in reducing the public's confidence in the administration of justice would favour exclusion of the evidence. At paragraph 72 in **Grant** supra, the court indicated:

> "the first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to disassociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the ***Charter*** violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law."

[31] In my respectful opinion Constable Wagner stretched his belief that a search of Lachance's residence would afford evidence of wipes, cloths, rags or any other material that would clean up blood knowing the information he received had provided for the wipes to be disposed in the garbage ten days earlier. On top of that information, he was aware that there had already been a garbage pickup. Not enough information had been collected concerning this diaper bin to be able to say that the used diapers from that day, ten days previous, would be still present in the residence, especially with the garbage pickup. Accordingly, this favours exclusion of the evidence.

2. Impact of the Breach of the Charter-Protected Interests

[32] At paragraph 75 in **Grant** supra, the court indicated:

> "this inquiry focuses on the seriousness of the impact of the ***Charter*** breach on the ***Charter***-protected interests of the accused. It calls for

> an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of the ***Charter*** breach may range from fleeting and technical to profoundly intrusive."

[33] The impact of the charter breach on the accused's protected interests is significant. Absent a bodily search, a dwelling house attracts the highest expectation of privacy. When searches are deemed illegal, this unreasonably impacts the privacy interests of the home dweller. Thus, this favours, as the crown agrees, exclusion of the evidence in this circumstance.

3. Society's Interest in the Adjudication on the Merits

[34] At paragraph 79 in **Grant** supra the court indicated

> "Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion."

However, the truth-seeking function of a trial is only one aspect of the 24(2) inquiry. It is understood that it is inconsistent with the **Charter** to seize and admit reliable evidence regardless of how it was obtained. On the one hand, the seriousness of the offences and the consequences for the accused are significant, thus making it incumbent on the justice system to ensure that her rights are protected and respected. However, the seriousness of the offences also weighs in

favour of admitting the evidence of the bloody wipes so that the matter can be decided on it's merits. The value of the evidence of these wipes is considerable in that the exclusion of the evidence would negatively affect the Crown's ability to obtain a conviction.

[35] The results of this search which is non-bodily, physical evidence is highly reliable and essential to the Crown's prosecution of this matter. This would favour inclusion of the evidence given the truth-seeking function of the court. The evidence seized, the bloody baby wipes having been tested and confirmed to contain the blood of the child is highly reliable and necessary for the Crown to prove it's case.

Conclusion

[36] However, in reviewing and balancing the interests as defined by the **Grant** test, I am of the opinion that factors pointing towards admitting the evidence do not outweigh the significant harm in the long-term repute of the administration of justice. Accordingly, I am excluding the results of the search conducted at the residence of Ms. Lachance located at 15 Hemlock Drive, Elmsdale, NS, on January 25, 2015.

Catherine M. Benton, JPC