IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Taylor, 2006 NSSC 280

Date: 20060925
Docket: SH 257619
Registry: Halifax

Between:

Terry E. Taylor

Applicant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	March 27th & April 11th, 2006, in Halifax, Nova Scotia
Counsel:	Duncan Beveridge, Q.C., for the Applicant Christa MacKinnon, for the Respondent

By the Court:

Introduction

[1] This is an application for an Order in the nature of *certiorari* (pursuant to Rule 58 and s. 482(3)(c) of the *Criminal Code*) relating to the issuance of a search warrant on May 3, 2005. The warrant was based on an Information to Obtain sworn by Paul Patterson, a Canada Revenue Agency (CRA) officer. The warrant

authorized the search and seizure of the applicant's accounting records for the period January 1, 2001 to December 31, 2003. The warrant alleged that the applicant, an accountant who runs his business out of his home, filed a fraudulent T4 and created false T4 income in order to obtain a tax refund, and misreported HST sales. An earlier Information, sworn on April 21, 2005 had been a basis for a prior warrant issued that day. The warrants were identical except for a clarification in the May 3 warrant specifying what records were to be the object of the search. The May 3 warrant was executed by Mr. Patterson and other CRA officers on May 5.

[2] The applicant seeks ancillary relief of a declaration that his rights under ss. 7 and 8 of the *Charter of Rights and Freedoms* were infringed. The specific grounds are as follows:

> 1. THAT the information Sworn to Obtain the search warrant contains incomplete and misleading information and, in any event, the learned Justice of the Peace erred in concluding that the necessary grounds existed for the issuance of the search warrant;
>
> 2. THAT the learned Justice of the Peace ought to have recused himself from considering the application to issue a search warrant, having previously acted in a solicitor/client relationship with the spouse of the Applicant, creating a reasonable apprehension of bias and depriving the Applicant of natural justice.

[3] After the search the applicant demanded the return of the seized documents. He says that some of the documents, but not all, were eventually returned.

Standard of Review

[4] The warrant was issued by a Justice of the Peace pursuant to section 487 of the *Criminal Code*. Subsection 487(1) sets out the requirements for an information to obtain a search warrant:

> 487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
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> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
>
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
>
> (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
>
> (c.1) any offence-related property,
>
> may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
>
> (d) to search the building, receptacle or place for any such thing and to seize it, and

> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

[5] The entry and search of private premises by public officers without legal warrant is a severe infringement of civil rights: *The Queen v. Paint* (1917), 51 N.S.R. (2d) 114 (S.C.) at pp. 117-118. In order to comply with section 8 of the *Charter of Rights and Freedoms* a search must be authorized based on reasonable and probable grounds to believe that an offence has been committed and that there is evidence to be found on the premises: *Hunter et al. v. Southam Inc.* [1984] 2 S.C.R. 145.

[6] Hill J. discussed “reasonable and probable grounds” in *R. v. Sanchez and Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. Ct. – Gen. Div.) at p. 367:

> Section 487(1) of the *Code* requires *reasonable grounds* as the standard of persuasion to support issuance of a search warrant. Judicially interpreted, the standard is one of *credibly based probability*....
>
> Mere suspicion, conjecture, hypothesis or "fishing expeditions" fall short of the minimally acceptable standard from both a common law and constitutional perspective. On the other hand, in addressing the requisite degree of certitude, it must be recognized that reasonable grounds is not to be equated with proof beyond a reasonable doubt or a *prima facie* case.... The appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted.
>
> Not only must the affiant subjectively or personally believe in the accuracy and credibility of the grounds of belief, but lawful issuance of a warrant also requires that the peace officer establish that, objectively, reasonable grounds in fact exist.

> In other words, would a reasonable person, standing in the shoes of the police officer, have believed that the facts probably existed as asserted and have drawn the inferences therefrom submitted by the affiant.... [Emphasis in original. Citations omitted.]

[7] In *Re Carroll and Barker and The Queen* (1989), 88 N.S.R. (2d) 165 (S.C.A.D.) MacDonald J.A. said, at para. 7:

> From its earliest beginnings, English law has recognized the sanctity of a person's home and, therefore, the issuance of a warrant to search a private dwelling is not a perfunctory matter. Warrants must not be issued to enable the police to go on a "fishing expedition" but rather can only be issued after the justice of the peace is satisfied that the information offered in support of the request for a search warrant meets the requirements of s. 487(1) of the *Code*.

[8] MacDonald J.A. went on to describe the scope of review at para 9:

> A justice of the peace in deciding to grant a search warrant is performing a judicial function. The scope of review of his decision is limited to an inquiry whether or not there was some evidence upon which he, acting judicially, could be satisfied that reasonable grounds existed for believing any of the things set out in s. 487(1)(a) to (c) of the *Criminal Code*. The reviewing court cannot substitute its opinion as to the sufficiency of the evidence. The test is, therefore, not whether the justice of the peace should have been satisfied on the evidence presented to him, but rather could he have been satisfied on such evidence 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.... [Citation omitted.]

[9] In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, Sopinka J., writing for the majority, said, at para. 56:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, 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. In this

> process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[10] *Garofoli* involved wiretap authorizations, but the principles are relevant in the context of search warrants: *R. v. Morris* (1998), 173 N.S.R. (2d) 1 (C.A.) at para. 37.

[11] An informant seeking a search warrant is obliged to make full and frank disclosure to the presiding judicial officer. Errors in the information presented to the Justice of the peace must be removed from the Information Sworn to Obtain the warrant: *R. v. Hosie* (1996), 107 C.C.C. (3d) 385 (Ont. C.A.). However, such errors, even if they are fraudulent, do not automatically vitiate the issuance of the warrant. The question is whether there is "sufficient independently verifiable information ... upon which an authorization could reasonably be based": *R. v. Bisson*, [1994] 3 S.C.R. 1097 at para. 2. The process requires candour on the part of the informant, as Cromwell J.A. noted in *Morris* at para. 34:

> The nature of the process demands candour on the part of the police. They are seeking to justify a significant intrusion into an individual's privacy. This is especially so when it is proposed to search a dwelling house which has long been recognized as the individual's most private place. The requirement of candour is not difficult to understand; there is nothing technical about it. The person providing the information to the justice must simply ask him or herself the following questions: "Have I got this right? Have I correctly set out what I've

> done, what I've seen, what I've been told, in a manner that does not give a false impression?": see *R. v. Dellapenna* (1995), 62 B.C.A.C. 32 (B.C.C.A.) per Southin J.A. at para 37.

Discussion

[12] Under the heading “Things to be Searched For” in the Information, the informant, Mr. Patterson, stated that he had reasonable and probable grounds to believe that certain things – namely “the business records for the accounting periods of Terry E. Taylor for the period from January 1, 2001, to December 31, 2003" – would be found at Mr. Taylor’s place of business, located in his and Ms. Taylor’s residence, and in any storage facilities occupied by Mr. Taylor at that location.

[13] The “things to be searched for” included banking records (including statements, cancelled cheques, deposit slips, debit and credit card memoranda, cheque stubs; cheque registers credit card statements and bank drafts); correspondence, documents, memoranda, agreements and contracts; and working copies of T1 and HST returns, including financial statements, correspondence, documents memoranda and notes relating to the taxation years 2001, 2002 and 2003, belonging to or pertaining to Mr. Taylor, or Mr. Taylor and Ms. Taylor

jointly. The Information also sought Mr. Taylor's accounting records, including sales invoices, purchase orders, lease documents, expense vouchers and supporting documents, invoices for capital dispositions and invoices for capital expenditures for the same period. Finally, the informant intended to search for computer storage media containing records pertaining to the same matters, as well as the hardware and software required to access the records.

[14] The Information to Obtain alleged that the applicant had made false or deceptive statements in a tax return with respect to a refund, an offence pursuant to s. 239(1.1)(a) of the *Income Tax Act*, and claimed a refund exceeding that to which he was entitled, an offence pursuant to s. 239(1.1)(e). A large part of the April 21 Information – which was adopted by the May 3 Information – described the inquires made by the informant, Mr. Patterson, with respect to an allegedly false T4 slip filed by Mr. Taylor. The informant then stated that these inquiries had raised a question about Mr. Taylor's HST returns:

> 20 In the course of his inquiry, the Informant confirmed that the professional accounting services that Terry E. Taylor provides are considered as fully taxable supplies with regards to HST sales in accordance to the Excise Tax Act. The Informant confirmed with the audit division of CCRA that reported annual T1 income should be consistent with reported HST annual taxable sales.
>
> 21 In the course of his inquiry, the Informant conducted a comparison of Terry E. Taylor's reported annual HST taxable sales amounts and his

> reported annual T1 Returns of Income and as a result revealed significant discrepancies....

[15] The alleged discrepancies were set out in a table purporting to show discrepancies between "Total HST Sales" and "Reported Net Income" for the years 2001-2003. It showed a discrepancy of $209,583.49 over the three years. The informant continued:

> 22. During the course of his inquiry, the Informant noted that Terry E. Taylor reported his total gross income for the calendar year 2001 as $4,478.00, which is the same amount he reported for HST sales for the last quarter, October 1st to December 31st 2001. As the table shows in paragraph 21, Terry E. Taylor did not include the remaining $53,204.00 as T1 business income.

[16] Mr. Patterson stated that this inquiry provided the reasonable and probable grounds necessary to justify a search warrant:

> 23. As a result of the Informant's inquiry in paragraph's [sic] 20, 21, and 22, the Informant has reasonable and probable grounds to believe and does verily believe that he needs to seize and secure the items listed in paragraph 1, (a) to (g), inclusive, of the Things to be Searched For, in order to address the discrepancies listed therein.

[17] Paragraph 26 summarized the basis for seeking the warrant:

> 26. As a result of the Informant's inquiry in paragraphs one (1) to twenty-four (25) [sic] above, the Informant has reasonable and probable grounds to believe and does verily believe that Terry E. Taylor has reported fraudulent T4 employment income 2001, 2002 and 2003 and has also improperly reported his T1 Returns of Income for 2001, 2002 and 2003, and/or his HST sales, for the purpose of claiming tax refunds from CCRA.

[18] The applicant, Mr. Taylor, claims that paragraphs 20–23 of the April 21 Information were misleading. With respect to the 2001 shortfall (paragraph 22) he says his HST returns were amended in 2002 and that he received a Notice of Reassessment. He says Mr. Patterson had no explanation for not knowing this, even though he had in his file materials confirming a statement of audit adjustments (for the period July 1-September 30, 2001) in February 2002. Further, the applicant says, the entries on the table for 2002 and 2003 suggest that he over-reported his income, which could have been explained by a "genuine inquiry" to a CRA auditor.

[19] In cross-examination Mr. Patterson agreed that there were errors in paragraphs 20, 21 and 22 of the April 21 Information. When asked whether paragraphs 20-23 were the "crux" of the Information, he said, "I would say so." He agreed that he would not have sought the warrant without those paragraphs. On redirect, however, he was directed to paragraph 26, which he said "wraps up" Information. Counsel then asked whether, if the defective paragraphs were removed, "would you still have gone to get ... a search warrant." Mr. Patterson

answered “[i]f those were excluded, yes, based on that paragraph, I probably would feel more comfortable.”

[20] The applicant argues that the impugned paragraphs must be struck from the Information, and alleges that but for the allegations in paragraphs 20-23 the respondent would not have sought the warrant. The respondent does not claim that paragraphs 20-23 can be preserved, but argues that there is no evidence that Mr. Patterson intended to deceive the Justice of the Peace. The Agency claims that the “things to be searched for” had relevance beyond the discrepancies, and argues that if paragraphs 20-23 are removed the Court must still consider what remains in order to determine whether the Justice of the Peace could have found reasonable and probable grounds upon which to issue the search warrant. The respondent suggests that even without paragraphs 20-23, there were reasonable and probable grounds to issue the warrant.

[21] In dealing with the issue of whether Mr. Patterson would have sought a warrant in the absence of the defective paragraphs, it is important to be mindful that he had in his file information that would have addressed his concern about HST reporting.

[22] In his answers on redirect, Mr. Patterson did not say that he would have sought the warrant in the absence of the defective paragraphs, but only that he would have been “more comfortable” without them. As I understand his comment, he meant that he would be more comfortable omitting information that he now knows to be erroneous. In light of his clear statement on cross-examination, I am satisfied that Mr. Patterson’s own evidence supports the inference that he would not have pursued a warrant without paragraphs 20-23 in the Information.

[23] As to the allegations arising from the allegedly fraudulent handwritten T4 employment form submitted by Mr. Taylor, Mr. Patterson stated that he was advised Mr. Taylor did not appear as an employee on the T4 summary prepared by the trustee in bankruptcy on behalf of AMTL for 2003. He was advised that John William Perry, the president of AMTL, and Sean MacNeil, the trustee’s representative, stated that Mr. Taylor was not an employee of the company. Furthermore, Mr. Patterson also contacted the Nova Scotia Assessment Office to determine if Mr. Taylor was assessed for business occupancy purposes at 110 Thornhill Drive, Halifax and was advised there was no such assessment. Mr. Taylor had filed a T4 employment slip reporting income of just over $108,000. On cross-examination, Mr. Patterson acknowledged that Mr. Perry would have been

exposing himself and the company to liability if the company had failed to remit taxes and necessary deductions on Mr. Taylor's income. He also agreed on cross-examination that he was familiar with the practice of "income averaging, which might cause an employee to report income higher than that which was actually received in a particular year.

[24] The material that remains in the Information essentially relates to the T4 slip and payroll anomalies. I am satisfied from his evidence that Mr. Patterson would not have proceeded on the strength of an allegedly fictitious T4 employment statement alone, without first pursuing other avenues short of the extreme measure of searching a private home. The Agency did not approach the applicant for clarification, for instance by commencing an audit or seeking an explanation from him directly. I note that the search of Mr. Taylor's home produced a letter signed by Mr. Perry stating that Mr. Taylor was an employee. While this letter was, of course, not available to Mr. Patterson before the search, Mr. Taylor could have produced it in response to an inquiry without the need for a search.

[25] The errors in paragraphs 20-23 of the Information are undisputed, and serious. The errors occurred despite the presence of contrary information in the

informant's file. The informant regarded these paragraphs as the "crux" of the Information and stated that he would not have proceeded without them. I accept this. Once the allegation of misleading and inaccurate HST reporting is removed, the substance of the Information rests upon the handwritten T4 submitted by Mr. Taylor that did not appear to be reconciled with the company payroll. Without denying the potential seriousness of these allegations, I cannot conclude that they rise above the level of "suspicion" to make out reasonable and probable grounds for a warrant to search the applicant's (and his wife's) home.

Bias and Apprehension of Bias

[26] Mr. Taylor testified that Mr. Angus MacIntyre, the Justice of Peace who issued the Search Warrant, had provided independent legal advice to his wife, Lisa Taylor, in respect of a mortgage transaction around 1998. He had contacted Mr. McIntyre to represent his wife. Initially, both he and Ms. Taylor went to Mr. McIntyre's office. Mr. MacIntyre provided advice and presumably his fees were paid by Mrs. Taylor or by the lending institution. Any documents completed by Mr. McIntyre would likely have been forwarded to the lending institution.

[27] Several years later, Mr. Taylor estimates around 2000, Mr. and Ms. Taylor were having marital difficulties and Ms. Taylor retained Mr. McIntyre. Mr. McIntyre did not prepare a separation agreement or write to Mr. Taylor. It appears that office consultations occurred. There were no court proceedings under the *Divorce Act* or the *Matrimonial Property Act*. It appears that these marital difficulties were resolved and Mr. McIntyre did not have continued involvement.

[28] Mr. MacIntyre also represented Ms. Taylor with respect to a claim against her by Canada Trust. Apparently she had signed either the mortgage or a guarantee on the covenants.

[29] On behalf of the agency, it is pointed out that Mr. MacIntyre did not act on Ms. Taylor's behalf in respect of any tax investigation. Furthermore, his representation occurred five to seven years before the issuance of the warrant. Mr. McIntyre did not appear in court on behalf of Ms. Taylor, and did not correspond with Mr. Taylor on her behalf.

[30] Mr. Taylor said he was unaware that Mr. MacIntyre had been consulted by his wife in relation to any of the income tax investigations carried on by the CRA.

At no time did Mr. MacIntyre make any claim against him, directly or indirectly. He added that Mr. MacIntyre had never represented him and he had not appeared in court in any proceeding where Mr. MacIntyre represented the opposite party.

[31] The issue is whether there is bias or a reasonable apprehension of bias. The applicant maintains that the contacts between Ms. Taylor and Mr. McIntyre give rise to a reasonable apprehension of bias. The agency suggests that the contacts here were too indirect or inconsequential to raise the issue of bias, citing the following passage in R. D. Kligman, *Bias* (Toronto: Butterworths, 1998) at p. 14:

> For the issue of bias to arise, the relationship must not be too indirect or inconsequential. Thus, the mere fact that someone involved in the decision-making process has previously acted for a party in a professional capacity does not necessarily give rise to a reasonable apprehension of bias…
>
> Of course, the result can be different where the relationship is recent or is one that can be said to have touched on matters in issue. Thus, in *Turpin v. Wilson*,[(1995), 130 D.L.R. (4th) 158 (Ont. Gen. Div.)] it was held to be inappropriate for an arbitrator of a matrimonial property dispute who was a lawyer, to act where he had represented the husband in previous matrimonial proceedings.

[32] And at p. 12:

> In *R.v. Godin*, [(1996), 141 Nfld. & P.E.I.R. 88 (P.E.I.S.C.A.D.)] it was held that the fact that a trial judge once acted as counsel for the accused in another matter did not necessarily give rise to a reasonable apprehension of bias or constitute an infringement of the right guaranteed by section 11(d) *Canadian Charter of Rights and Freedoms*....

[33] The Agency refers to *Chisolm v. MacDonald* (1985), 68 N.S.R. (2d) 337 (S.C.T.D.), where an accused charged under the *Criminal Code* sought an Order for Prohibition to remove a provincial court judge from presiding at his trial because the judge, when he was a lawyer, pursued a civil action against the accused. Further, the judge had publicly proclaimed an attitude towards sentencing for offences of the kind with which the accused was charged. The issue was whether there was a reasonable apprehension of bias. The civil action had been settled short of trial. There was no evidence of what stage proceedings had reached at the time of settlement or of any further contact between the judge and the accused. At para 10 Grant J. said:

> As I understand the state of the law, it must be shown that there is a real likelihood of bias, or that it is perceived that there is a real likelihood of bias: see De Smith, *Judicial Review of Administrative Action*, p. 250:
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> > "In developing the modern law relating to disqualification of judicial officers for interest and bias, the superior courts have striven to apply the principle that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done,'..."
>
> and at p. 399:
>
> > "The usual remedy for breach of the rules of natural justice is certiorari to quash; but in a proper case prohibition may issue to prevent a tribunal that is disqualified for interest or likelihood of bias from proceeding further with a matter over which it has assumed jurisdiction."

[34] Grant J. concluded that the facts did not support a reasonable apprehension of bias.

[35] In *R. v.Dunn* (1996), 138 Nfld. & P.E.I.R. 46 (P.E.I.S.C.T.D.), affirmed (1996), 140 Nfld. & P.E.I.R. 269 (P.E.I.S.C.A.D.), application for leave to appeal dismissed, [1996] S.C.C.A. No. 359, the application sought the disqualification of a provincial court judge from hearing his trial on the basis of an apprehension of bias. The applicant claimed the judge had represented him in criminal matters when she was a legal aid lawyer, and that he had dismissed her as her counsel in the last matter on which she had been retained. The charges before the Court were not related to those in respect of she had acted as a lawyer. DesRroches J. stated that provincial court judges were trained to disregard facts not in evidence and were bound by an oath to truly and faithfully execute his or her duties as a judge. At para. 10, the Court noted:

> It has been judicially held that prior judicial contact with an accused will not, *per se*, satisfy the test. In *R. v. Bolt (R.I.)* (1995), 162 A.R. 204 Russell J.A., speaking for the Court, says this:
>
> > "… It is inevitable that there will be occasions when an experienced trial judge will have had some prior judicial contact with an accused. We are confident that trial judges are capable of disabusing their minds of that fact in considering the guilt or innocence of the accused in relation to the specific charge before them. Unless real bias can be shown, such prior contact is not a factor in determining an appearance of bias."

[36] DesRoches J. referred to *Chisolm* and stated that where the judge had acted in a civil case against the accused that was unrelated to the matter before the court

it was necessary to establish a real likelihood of bias. He also referred to the Supreme Court of Canada decision in *R. v. Genereux* [1992] 1 S.C.R. 259 which provided a guideline for assessing impartiality under s. 11(d) of the *Charter Rights and Freedoms*. In that decision, Lamer C.J.C. stated:

> To assess the impartiality of a tribunal, the appropriate frame of reference is the 'state of mind' of the decision maker. The circumstances of an individual case must be examined to determine whether there is a reasonable apprehension that the decision-maker, perhaps by having a personal interest in the case, will be subjectively biased in the particular situation.

[37] The applicant also refers to relies the comments of Vancise J.A., for the majority of the Saskatchewan Court of Appeal, in *R.v. Baylis* (1988), 66 Sask. R. 268 (C.A.). In *Baylis* the accused, charged with various drug offences, argued that the search violated s. 8 of the Charter because the Justice of the Peace who issued the warrant was not neutral and impartial. The Justice of the Peace was an airport commissionaire who reported to the RCMP at the airport. Vancise J.A. said:

> [37] A justice issuing a search warrant is acting judicially. Dickson J., in *Attorney-General of Nova Scotia et al. v. MacIntyre* (1982), 65 CCC (2d) 129 at 141, 132 D.L.R. (3d) 385 stated:
>
> > "The issuance of a search warrant is a judicial act on the part of the justice, usually performed ex parte and in camera, by the very nature of the proceedings."
>
> A justice required to decide whether there is sufficient evidence to justify issuing the search warrant must be unbiased, neutral, detached, as between the State and the citizen, and there must be no real or apprehended perception of partiality.

[38] The concept of impartiality and neutrality embraces the concept of bias or reasonable apprehension of bias. The principle that a person exercising a judicial function must be free of bias was expressed by Viscount Cave in *Frome United Breweries Co. Ltd. et al. v. Bath Justices*, [1926] A.C. 586, at 590:

> "My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called courts, have to act as judges of the rights of others."

[39] The test to be applied to determine whether bias or reasonable apprehension of bias exists is that set forth by Laskin C.J.C., speaking for the majority, in *Committee for Justice & Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369; ... 68 D.L.R. (3d) 716 at 733:

> "This Court in fixing on the test of reasonable apprehension of bias ... was merely restating what Rand, J., said in *Szilard v. Szasz*, [1955] 1 D.L.R. 370 at p. 373, [1955] S.C.R. 3 at pp. 6-7, in speaking of the 'probability or reasoned suspicion of biased appraisal and judgment, unintended though it be'. This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest."

[40] The trial judge concluded that there was no evidence of bias. In so finding he relied on the fact that Pearce had not been subject to any disciplinary action, and that there had been no inquiry with respect to the quality of her work. With respect, that determination misses the mark. The question to be decided is whether any reasonable person would have a reasoned suspicion that the person authorizing the search could not assess the evidence presented to him or her in an impartial, neutral, and detached manner.

[41] The purpose of requiring prior authorization of a warrant to search and seize by a neutral and detached person is to ensure that the individual's right to privacy and to be secure against search and seizure will only be breached if the State demonstrates that the appropriate standard has been met judicially in a neutral, detached and impartial manner. The neutral and impartial assessment of the evidence of probable cause, which has long been guaranteed by the Fourth

> Amendment in the United States, is a concept similar to the requirement that there is reasonable cause for believing that things exist in the place to be searched prior to the issuance of a search warrant....

[38] Vancise J. A. held that the Justice's close contact with the RCMP created a reasonable apprehension of bias such that a reasonable person would believe that there was a "real danger of bias" on account of the Justice's "perceived susceptibility ... to intimidation or coercion by the R.C.M.P." There was no evidence that this had actually occurred, August 22, 2006 but, Vancise J.A. said, this was not the issue. The issue, rather, was "that of impartiality, of neutrality, and detachment in the performance of judicial duties, and the requirement that there be no reasonable suspicion of partiality, bias or lack of neutrality." In the circumstances there was a reasonable apprehension of bias, and, as such, the search was made under an inappropriately obtained warrant, rendering it illegal and unreasonable under s. 8 of the *Charter*. The evidence was excluded pursuant to s. 24(2). The infringement was not a technical or inadvertent one, nor was it an isolated incident or a case of urgency. The fact that the search was made in good faith was irrelevant. Vancise J.A. summarized:

> [90] To summarize, the factors which support the exclusion of the evidence are that it was obtained in an illegal and unreasonable search of a dwelling-house; the warrant was obtained as a result of a deliberate course of conduct followed by the R.C.M.P.; good faith can be ruled out; the violation was deliberate and blatant, and not trivial. The factors which support the admission of the evidence include the fact that the evidence was real, it existed notwithstanding the violation of the

> Charter; it was crucial for the successful prosecution and conviction of the accused; the offence is a drug offence; the evidence could have been obtained in any event by the proper obtainment of a search warrant.
>
> [91] This, in my opinion, is one of those circumstances where the administration of justice could, and indeed will, be brought into disrepute if the evidence is admitted. If the police can violate fundamental rights and freedoms guaranteed by the Charter in order to obtain evidence, the Charter will become a meaningless document. Confidence in the administration of justice and respect for the judicial system will be diminished and seriously impaired. The rights and human dignity of the individuals must be respected and protected. In my opinion, the administration of justice will be brought into disrepute if the right to be secure against unlawful search and seizure is seen by the average citizen as being diminished when the police can commit warrantless searches and seizures and only have the evidence excluded when they do something unreasonable in the course of the search. The system of justice will be better served by the exclusion of the evidence. The insistence that there be a valid warrant will not hamper or inhibit the police in their investigative function, if they carry out their functions in a lawful manner.

[39] In the case at bar the search warrant authorized a search of the premises of Mr. Taylor and also those of Lisa Taylor. The applicant maintains that Mr. MacIntyre was not completely impartial, neutral and detached as to whether a search warrant ought to issue for the home of him and his wife.

[40] It is impossible to determine what information Ms. Taylor imparted to Mr. McIntyre when she retained him to act on her behalf with respect to marital difficulties. It is possible that she could have related to him her knowledge of the business and financial affairs of the applicant. Though it was outside the period for

which the search warrant was issued, it is possible that Ms. Taylor discussed her husband's business affairs or his approach in dealing with matters within the purview of the Agency. There is, however, no evidence to suggest the nature of the discussions between Mrs. Taylor and Mr. McIntyre, except that it involved the provision of independent legal advice in respect of mortgage security, and advice and general representation regarding a family dispute or marital difficulties.

[41] In the circumstances, would an objective person have a reasonable apprehension that the justice of the peace would be biased against Mr. Taylor? The justice of the peace is required to swear an oath whereby he will act impartially in carrying out the duties of his office: see s.6(1) of the *Justices of Peace Act.* The last time Mr. McIntyre represented Ms. Taylor was approximately five years prior to the issuance of the warrant. This militates against an apprehension of bias by a reasonable person.

[42] I am satisfied that a reasonable person, given all of the facts, would not conclude that there was a reasonable apprehension of bias. To paraphrase DeRoches J. in *Dunn,* I am satisfied that Mr. McIntyre would have been capable of

disabusing his mind of the previous professional contact with Mrs. Taylor at the time of considering the Application for a search warrant.

Conclusion

[43] For the reasons above, I allow the application to quash the search warrant.

[44] If the parties are unable to agree on costs, I will ask them to submit their representations within three weeks of the date of the filing of this decision.

J.