SUPREME COURT OF NOVA SCOTIA

Citation: *R v. Johnston*, 2014 NSSC 131

Date: 20140324
Docket: CRS No. 413327
Registry: Sydney

Between:

Her Majesty the Queen

v.

George Thomas Johnston

Judge:	The Honourable Justice Patrick J. Murray
Heard:	March 7, 2014, in Sydney, Nova Scotia
Oral Decision:	March 26, 2014, in Sydney, Nova Scotia
Counsel:	Wayne MacMillan, for the Crown William Burchell, for the Defendant, George T. Johnston

By the Court (Orally):

[1] In the matter of her Majesty the Queen vs. George Thomas Johnston, date of birth, August 18, 1977, this is my decision in respect of the Charter Motion made by the Defence on behalf of Mr. Johnston.

The Charge

[2] Mr. Johnston is charged that he did on or about the 13th day of February, 2012, unlawfully produce cannabis marijuana, a substance included in Schedule 2 of the *Controlled Drugs and Substances Act* and did thereby commit an offence contrary to section 7(1) of the *Act*. He is also charged that at or near North Sydney, Nova Scotia on or about the 13th day of February, 2012, he did unlawfully have in his possession for the purposes of trafficking cannabis marijuana a substance included in Schedule 2 of the *Controlled Drugs and Substances Act* and did thereby commit an offence contrary to section 5(2) of the *Act*.

Charter Motion

[3] This is a charter motion by the Defendant, Mr. Johnston, in which he argues that his rights pursuant to section 8 of the *Charter of Rights and Freedoms*,

Canada Act 1982 (UK), 1982, c 11, were violated as a result of the initial warrantless search of 109 Peirce Street. Mr. Johnston seeks that the evidence obtained as a result of the search be excluded from the proceedings against him pursuant to section 24(2) of the *Charter of Rights and Freedoms*.

Issues

[4] The Court must decide two issues:

1. Was the warrantless search of 109 Peirce Street unreasonable contrary to section 8 of the *Charter?* and

2. Should the evidence obtained as a result of the search be excluded under section 24(2) of the *Charter?*

Facts

[5] A brief summary of the facts is as follows. On February 13, 2012 two employees of Easyhome Rentals, Stephen Penny and Cory Swan, attended 109 Peirce Street, North Sydney, to speak with Robert Iannetti regarding a default in payment.

[6] As they approached the residence the Easyhome employees noticed the front door was ajar, they called out to anyone who might be inside. They could see in partially and noticed that things in the home seemed to be thrown around. They

described the home as being "tossed". Before they left, they returned the door to the closed position. Upon returning to their office, which is a short drive from the residence, Mr. Penny phoned the Cape Breton Regional Police to report what they had found. In doing so, Mr. Penny stated his primary reason for calling was to cover himself in case the property had been broken into.

[7] Shortly thereafter, Constable Anthony Melski was dispatched to the address arriving there at approximately or just after 3:00 p.m. On arrival he found the Easyhome business card in the front door and the front door locked. Constable Melski went to the side door which was closed but not locked. He opened the door and announced himself as "Regional Police" several times but received no response. As he entered the home he noticed a dog and a cat. He felt they were acting strangely. He stated the house was in disarray. As he entered the house, Constable Melski called out to alert anybody of his presence. As he went further in the house, he continued to call out to make his presence known. In the living room he saw over turned cushions and multiple items on the floor. He also saw a computer and flat screen tv.

[8] Constable Melissa MacDonald arrived to assist him. When she arrived Constable Melski was already in the residence. Constable Melski noticed a strong

smell of furnace oil or kerosene emanating from inside the home. Constable Melski proceeded up the stairs to the second floor. The reason for doing so was to check for human safety and to ensure that no person in the residence was in distress. He opened the first bedroom door on the right at the top of the stairs where he found several marijuana plants and heat lamps. Constable Melski opened the second and third bedroom doors after opening the first. Later Constable Timmons arrived to assist and found some additional plants in another bedroom. The Officers noticed mail addressed to Robert Iannetti and George Johnston on a computer desk. It was determined there was nobody in the home. The house was secured and a search warrant was later obtained.

[9] These are the bare facts and they are subject to expansion and refinement based on the evidence given.

[10] The Crown's position is that the warrantless search of the residence was reasonable because the police officers were in execution of their common law powers to investigate crime, and ensure human safety pursuant to the call made to dispatch. As a result, Mr. Johnston's rights pursuant to the *Charter* were not violated.

[11] Alternatively, the Crown submits if the Court decides that the search of the residence was unreasonable, the Crown argues that the evidence obtained from the search should not be excluded from the proceedings because having regard to all the circumstances, admitting the evidence would not bring the administration of justice into disrepute.

Burden of Proof

[12] This being a warrantless search in a private home, the onus is on the Crown to establish on a balance of probabilities that the search of 109 Peirce Street was a reasonable one. It is well established that a search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search was conducted is reasonable. (**R** v. **Collins**, [1987] 1 SCR 265.)

[13] The burden of convincing the Court that the evidence should be excluded from the proceedings under section 24(2) of the *Charter* is upon the Applicant, Mr. Johnston. It is for him to establish on the balance of probabilities that the appropriate remedy for the breach of his charter rights is exclusion of the evidence. (**R** v. **Collins**); (**Hunter** v. **Southam,** [1984] 2 SCR 145 (SCC), as to the onus of proof being on the Crown).

Crown's Position

[14] Based on the evidence before me, the Crown is relying upon common law powers given to police to carry out their duties, which includes the protection of life and preservation of property. The leading case with respect to the scope of such police powers is **R** v. **Godoy**, [1999] 1 SCR 311. The police here maintain that they entered the residence and carried out activities therein to ensure the safety of persons who may have been in the residence as a result of the report of a possible break and enter.

Defence Position

[15] The Defence maintains that the conduct of Constable Melski and the other police officers constituted a clear breach of Mr. Johnston's common law rights. The sanctity of a home and private residence is paramount. This was not a 911 distress call, the call was not made from an occupant or person within the home. It was call made by independent or third parties to cover themselves, just in case there had been a break and enter into the residence. There is no concrete or solid evidence other than the door being ajar and some overturned cushions to suggest there had been a break and enter. This information was readily available had the police taken the short amount of time needed to verify the details of the call to

dispatch. Further, the police pursued no alternatives prior to searching the second floor of the residence and the private bedrooms where the evidence sought to be excluded was obtained. The police therefore exceeded their powers which resulted in a breach and should result in the evidence being excluded.

[16] The Defence further maintains there was no evidence of imminent danger or harm to any persons. In fact, there was no evidence of any persons in the home. There was no blood, no moaning, and no signs of occupancy other than the behaviour of the animals. There is evidence the animals behaved in a friendly manner.

[17] The Defence submits the existence of the computer and the flat screen tv made it evident that no break and enter had occurred. The position of the police that they were worried about occupants in the home in distress is not credible, say the Defence. There were means which the police could have employed, short of searching the residence to determine whether there was a problem. The house was empty, they could have followed the lead of Easyhome and phoned someone, they made no attempt to find out the owner or occupants of the home. "Zero" steps were taken with the result that Mr. Johnston's rights were violated unnecessarily, the Defence argues. The Defence has submitted numerous cases which shows that

exigent circumstances did not exist here. Simply put, the police had no basis for searching the home other than what they witnessed, which was messy housekeeping and an open door. The Defence argues there was no other evidence that a break and enter had occurred; no one was in danger or in distress. The Defence submits respectfully the Court should not tolerate or permit such a breach of Mr. Johnston's rights and as a result, should exclude the evidence under section 24(2) of the *Charter*. I turn now to the analysis in respect of this matter, and the evidence at the motion hearing.

I. Section 8 - Analysis

[18] The main witness for the Crown was Constable Melski. He was the first officer to enter and he was the one who made the decisions regarding the search once entry was made. Constable Melissa MacDonald also gave evidence as to the reasons for the entry and search, but she was there as back-up to assist Constable Melski.

[19] The Easyhome employees gave evidence as did Constable Gillard who prepared the search warrant. I am not going to summarize the evidence of each witness, but instead highlight the portions which I have found material for my decision.

[20] The Easyhome employees both confirmed they attended 109 Peirce Street on February 13, 2012. They differed on several points. Mr. Swan's recollection was they visited the home in the morning, between 10 – 12 a.m. Mr. Penny, the manager, said it was early afternoon. Mr. Swan said the door was open 1 – 2 feet, and the door was not closed when they left. He said they were there for about five (5) minutes, that they knocked and yelled loudly, and there was no one there. He saw nothing to indicate the place was tossed.

[21] Mr. Penny testified they were there, but it was early afternoon. He said the place was a "little bit" in disarray, he saw clothes on couch and throws on the floor. He was concerned about the neighbours, and that they themselves would be accused of break and enter. He would tell police the the door was ajar and that no one was there. He said he phoned dispatch right away from their office, about a two and one half minute drive away. He said they closed the door before they left but did not lock it.

[22] A partial transcript of the phone call was entered in evidence as Exhibit #1. It is clear Mr. Penny called dispatch, and that the call was not a 911 call, strictly speaking. It is also clear, it was made to protect themselves and protect their asset. As Mr. Swan said their product was still in the house.

[23] In terms of their ability to see inside the house, Mr. Penny said the front door was open, about 6 – 8 inches. Mr. Swan said they identified themselves and were looking for Robert Iannetti, for non-payment and that they walked around the outside of the house. Mr. Penny was certain he brought the door back to the closed position.

[24] Constable Melski, according to Exhibit #2, the partial transcript of the call, was dispatched to the residence. He went to the front door, found the Easyhome card. He looked in through the window and said he saw disarray. He tried the front door, it was locked. He then went to what he described as the back or side door, the other door. He found it to be unlocked. He opened it, announced himself and walked in. He said there was a dog outside that followed him in and a cat on a ledge meowing. He said both animals were excited.

[25] Once inside, Constable Melski testified the kitchen was in disarray, but it was "nothing major". He continued to announce himself. He said the cushions were turned up, that was pretty much it. Constable Melissa MacDonald then came in to assist. They went through the first floor. When they saw the new computer and the big screen TV, they thought perhaps there was no break and enter.

[26] Also, he said there was a strong odour of kerosene or furnace oil, and decided to keep checking to make sure there was no one in distress. He kept announcing, "police". He went to the basement door, took a couple of steps down. There was no answer. He shone his light and came back up.

[27] He then proceeded upstairs. There were 3 doors upstairs. Constable MacDonald says Constable Melski knocked and announced, on the first door upstairs. He opened the door immediately to the right, upstairs, and as soon as he opened it, he saw plants and detected a strong odour of marijuana. He then checked the other rooms. They were dark with the curtains closed. They were a bit messy, but there was no one in them. No entry was made into the rooms.

[28] Constable Melski did not recall if any of the rooms were locked, but stated the door to the first room containing the marijuana was closed, but was not locked. It was also a laundry room with a washer and dryer, he said. He then called the duty Sergeant who advised him to "hang tight" while he sent Constable S. Timmons.

[29] Constable Melski is a senior officer. While his evidence was given in a straightforward manner, he did not have his notes available, as he misplaced them.

It was he who went up the stairs to the second floor and made the entry to the first bedroom. As the Crown says, his evidence is key.

[30] In cross-examination, Constable Melski said first he looked through the front windows of the house and it looked in disarray, so he then went around back to the side door. He was asked, "Q: So you didn't look through the front windows? A: No, not just through the door." It was suggested that it too had blinds on it, and he said, "They must have been open…because I could see through them. I could see inside the house."

[31] Some of the key evidence, going to this issue to be decided was given by Constable Melski in cross-examination. Constable Melski was asked, "Q: So…why did you enter", he answered "A: Because there was a possibility of a break and enter, and I wanted to make sure, there was nobody inside."

[32] In further questioning, "Q: So what was your justification in entering the home? A: That a break and enter had possibly occurred." These questions pertained to the initial entry in the side door. He was further questioned about the situation, once he was inside the home.

> Q: Saw cat and a dog and things weren't the tidiest?
>
> A: Uh huh.

Q: And saw some cushions on couch?

A: Uh huh.

[33] He was then asked about reasons people turn up cushions, because of the animals, and he said he had animals himself.

Q: Okay, so it's not unusual pillows would be turned up?

A: No, it is not.

Q: And you say the flat screen tv?

A: Yes.

Q: Okay, and you saw the computer?

A: Yes.

[34] And more to the point he was asked:

Q: Okay, so you knew at that point there was no break and enter?

A: At that point yeah.

Q: Yeah.

A: I was thinking that possibly a break and enter did not occur.

Q: Yeah, it did not occur.

A: Uh huh.

Q: So why did you continue to search the rest of the house?

A: There was such a strong smell of kerosene, I mean a strong smell that I thought it would be prudent, to check to make sure there was no body.

[35] Constable Melski described the strong smell as oil or kerosene. Some kind of fuel smell. He said, "I assumed it was coming from the basement downstairs…".

[36] He was further asked:

> Q: Whatever okay, so you decided you would search the rest of the house, even though you knew there was no break and enter, that occurred and your, your purpose of your call had ended?
>
> A: Yes.

[37] He was then asked by Mr. Burchell, what right he had to search the rest of the house. Constable Melski then referred to the strange behaviour of the animals, especially the cat and cats in general, and how strong the smell was and said, "I thought I better check to make sure there is nobody in distress".

[38] Constable MacDonald gave evidence as to the reason for searching the rest of the house, stating it was to ensure no one was hurt. She said she looked in the other two rooms upstairs. She was cross-examined about what was in her notes and in her report, and in particular, it was suggested in them she did not mention anything about people being hurt. She confirmed that her notes did mention safety, and that she was referring to "person safety", not "officer safety". It appears she did not mention hurt but did mention safety in her notes. Her evidence on this

point referred to the second and third bedrooms, after the first room had already been opened.

[39] Significantly, she stated they were still not 100% sure that a break and enter had not occurred. She mentioned nothing in her testimony, (direct or cross), regarding the strong smell of kerosene or furnace oil.

[40] Both officers referred to the call as a 911 emergency call, about a possible break and enter. The evidence is clear that the primary reason for the call was for the Easyhome people to protect themselves.

[41] I turn now to discuss the caselaw which has been provided to me. I have reviewed and considered all of the cases and the pre-motion briefs.

Caselaw

[42] In **R** v. **Richards and MacLean**, 2012 NSSC 254. Scaravelli, J., stated at paragraph 11.

> It is not necessary that a call originate as a 911 call from the particular residence being investigated, as long as appropriate circumstances of distress relative to the residence are communicated to the police, **R** v. **Timmons**.

[43] In **R** v. **Timmons**, 2011 NSCA 39, the Nova Scotia Court of Appeal noted that the police activity following entry and before the issuance of a warrant,

amounted to a warrantless search and was *prima facie* unreasonable. In order to be lawful the search had to have been conducted pursuant to the common law police powers. If it was not lawful, it is then necessary to consider whether the evidence obtained as a result should be excluded under s. 24(2) of the *Charter*.

[44] The leading case on emergency calls and forced entry is **R** v. **Godoy**. Whether police have authority to enter into a dwelling-house in the course of an investigation of a 911 call, will depend on the circumstances of each case.

[45] Whether the police conduct falls within the general scope of police powers and whether the conduct involves an unjustifiable use of those powers are considerations for the Court. This is the test as outlined in the **R** v. **Waterfield**, [1963] 3 All E.R. 659, which was raised in the Crown's brief.

[46] This was not an emergency 911 distress call in the usual sense. It was made by third party agents visiting the home. Reportedly, no one was there, but the police could not be 100% sure. It was a possible break and enter but primarily was a call made out of an abundance of caution.

[47] As stated, the law is that it need not be a distress call *per se* to engage the common law police duty. (See **Timmons**, para 11). Section 529 of the *Criminal Code of Canada* authorizes a warrantless search of exigent circumstances exist.

Exigent circumstances are defined in s. 529.3. The Crown in its submission and brief did not cite this section and relies on the common law entry power, (as in **Godoy**), which is not restricted by this section.

[48] At a minimum the Cape Breton Regional Police in the present case, received the message reporting a possible break and enter. Given that, the Court must and should address, just what the common law police powers would encompass in these circumstances.

[49] In **Timmons,** the Nova Scotia Court of Appeal stated that intrusion into a dwelling to ascertain the safety of a caller was limited to protection of life and safety. Quoting Chief Justice Lamer, Oland, J.A. cited the following clear and instructive passage at paragraph 47:

> The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reason for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident's privacy or property.

[50] In **Timmons** the Court allowed an appeal, because police made entry to Mr. Timmon's home and bedroom, but failed to consider other alternatives, short of policy entry, and search of a person's home without authorization by warrant. In that case, the trial judge referred a "perceived scream" from within the house.

[51] In **Timmons,** the Court of Appeal followed **Godoy** in their reasoning and found that the police could have found out if there was anyone in the house who was in trouble, by questioning the person alleged to have been abused, to step outside for a face to face conversation. No such person was present or available here.

[52] In **R v. Butthof**, 2006 BCPC 383, the facts have some similarity to the present case. It involved a warrantless search. There was a broken window which could have been used for forced entry, similar to an open door. The police continued calling out and knocking which failed to produce a response. The Court stated that preservation of the peace and the protection and safety of the public are essential police responsibilities.

[53] The Court in **Butthof** found that the information provided by the informant, and the observations made by the officers led to an entirely reasonable concern that the safety of persons inside could be in danger. (paragraph 42).

[54] In **R v. Shea**, 1982 CanLII 2167, the facts are somewhat similar in that a third party (the landlord's agent) requested the assistance of police to make entry to repair a leak from a hot water tank. No warrant was obtained. Upon entry the first

officer observed, what he suspected to be hash oil on the kitchen table. A second officer attended and seized the articles.

[55] In that case the Court held that the first officer had the right to enter the apartment to attend to the emergency. The conduct of the second officer entering and removing the articles offended two legal principles: 1) the principle of sanctity of a person's home and 2) the principle of ignoring the judicial process of obtaining a search warrant.

[56] I have considered other cases cited by the Crown including **R** v. **Nguyen**, 2000 BCSC 1547, and **R** v. **Ngo**, 2009 BCSC 153. In **R** v. **Nguyen**, there was a man seen in the window of the house who refused to open the door. It was a 911 call from a neighbour and the Court considered it crucial that the apparent intruder would not respond to police by coming to the door.

[57] In **R** v. **Ngo**, the 911 caller was also a neighbour. Persons were seen running across the lawn, and a screen from a second floor open window was lying on the lawn. When the police knocked the accused answered. A smell of marijuana was emanating from inside the house. Clearly, they were interrupting a crime when they entered. The Court considered it was not simply a break and enter, but a "drug rip" which led police to a search.

[58] In the present case, I am satisfied the officer was justified in entering the premises at 109 Pierce Street, in the first instance, through the side door. At that point, while it was not a typical distress call, the police had reason to believe a break and enter may have occurred. It was forced in the sense that Constable Melski opened the door, but otherwise it was not overly intrusive, at least prior to searching the second floor. He announced that he was there and continued to announce his presence, as he viewed some of the items which were strewn about, on the first floor. As these items included a new computer and flat screen tv, any further searching, may have been called into question.

[59] The entry, however, was part of his duty to respond to a call from an independent observer of a possible crime, limited as it was, with the caller explaining it was to protect himself. In short, the entry itself was reasonable and an essential part of his police responsibility to preserve the peace, and protect the public by investigating a crime.

[60] What happened after that, however, and in particular, the search upstairs required a further level of scrutiny by the police. It is apparent there was a shift in focus, and emphasis from that being a break and enter to a situation where there was a strong odour or fuel smell, coupled with animals behaving strangely.

[61] Were the police at this point justified in continuing to search the house and opening the bedroom doors on the second floor; which was clearly a more invasive search of this private residence? I have concluded they, Constable Melski and Constable MacDonald, were not justified in so doing, and later seizing the articles under the warrant.

[62] By his own admission, Constable Melski stated he made the decision that a break and enter had not occurred and that he was simply doing his job as a prudent officer to continue to search upstairs, in case there was someone in distress.

[63] It is difficult to argue in these circumstances with what could be considered prudent actions, the exercise of common sense, or acting out of an abundance of caution, whichever description one might wish to use to describe the police actions.

[64] Mere suspicion or curiosity may be insufficient, when the sanctity of a private home is in issue. There must be reasonable grounds to suspect. The law permits a certain degree of intrusion so as to allow officers to fulfil their duty. If they are within their duties, then it is not an infringement because it is within the scope of powers given to police authorities.

[65] The law tells us however that the scope is limited when the police are responding to calls such as this. It is limited to protection of life and safety.

[66] Police may investigate the call, located to caller, determine the reason for the call, and provide assistance, but no more. Here there was no caller that was in the residence. Once the police determined there was no break and enter, the reason for the call had ended. This occurred by Constable Melski's own admission, before he and officer MacDonald went further, by continuing to search upstairs.

[67] Now, how do they know there is no one in the rooms, that there were not people there, which were unaccounted for? The Court in **Timmons** informs us that alternatives ought to be considered before, for eg. private bedroom doors are entered. Unlike **Timmons**, there was no one at the residence to ask in the present case, but no effort was made to contact the owner, clarify the observations of the caller, or try to find out information about those in the residence.

[68] Further, in terms of reliability of the Crown evidence, Constable Melski could not recall whether any of the doors had a latch of the type entered into evidence as Exhibit #3. Had his notes been available, he may have been able to clarify or shed further light on his evidence.

[69] Further, I observe that the actions of the officer were not entirely consistent with his reasons for continuing to search the second floor rooms, or even his own evidence. He said in evidence he thought the source of the problem was the furnace, but also said he took only a couple of steps down the stairs to the basement, shone the light on went back upstairs. This is not consistent with his stated reason for continuing the search, that is, to further investigate the source of the problem. He simply called out after taking a couple of steps down to the furnace room. His investigation was cursory only.

[70] Also, the evidence of Constable MacDonald, while indicating they wanted to insure no one was hurt, did not once mention the strong odour of kerosene or furnace oil as causing that concern, during either her direct evidence or her evidence given on cross-examination.

[71] In my view, there is a lack of corroboration, from Constable MacDonald that it was the strong smell that warranted the search of the second floor rooms. She was challenged as to their justification by the Defence. She said they were not 100% sure that no break and enter had occurred. Constable Melski had clearly moved beyond the break and enter in his evidence. The officers therefore were,

arguably at least, at cross purposes as to the reason for continuing on with the search, which resulted in the marijuana plants being made open for viewing.

[72] Finally, may I say in considering the **Butthof** case relied upon by the Crown, that there were more factors present in **Butthof** than here, which the Court relied upon to authenticate the search. Three or four men were actually seen around the residence, there was evidence or concern of a "drug rip", and the house had in the past been suspected of drug activity.

[73] To the police, I say, the Court recognizes the dilemma faced by them in this circumstance, and in such circumstances, which can be common. It is in many ways a "catch 22". If someone had been hurt, they would surely be accountable for not having checked the residence.

[74] There is not an easy answer except to say that caution must be exercised where the sanctity of a private residence is concerned. Judgement calls will still be required. That will not change. Police must continue to be practical.

[75] I find, however, that the serious danger contemplated by Justice Lamer in **Godoy**, to justify intrusion was simply not present in these circumstances. I have considered the sections of the *Criminal Code* and the *Controlled Drugs and*

Substances Act referred to by the Defence in its brief. My decision herein is based on the common law powers given to police.

[76] I therefore find that Mr. Johnson's Charter rights pursuant to s. 8 of the *Charter* were infringed, and that the search was unreasonable, even though the initial entry was not.

[77] I turn now to s. 24(2) of the *Charter*, and whether the evidence obtained as a result of the search should be excluded.

II. Section 24(2) - Analysis

[78] The second issue before the Court is whether the evidence obtained by the police after the warrantless entry and search of the accused's premises should be excluded. Under the *Charter* the burden is on the accused to demonstrate, on the balance of probabilities, that admitting the evidence would bring the administration of justice into dispute.

[79] The test for determining whether the evidence should be excluded as a result of the charter breach is set out in **R** v. **Grant,** (2009) SCC 32 (SCC). The Courts primary role is to assess and balance the effect of admitting the evidence on society's confidence in the justice system. This confidence in the system goes

hand in hand with whether the administration of justice would be brought into disrepute. The notion is to maintain the public's confidence.

[80] The Court in **Grant** outlined three (3) criteria or lines of inquiry which are to be considered in assessing and balancing this question. In **Timmons**, the Nova Scotia Court of Appeal called the exercise of balancing these factors a "delicate one" (paragraph 55).

1. – The Seriousness of the Breach

[81] The Crown submits that any police charter infringing conduct, is of a minor or inadvertent nature. The police were called to be of assistance, and believed themselves to be acting within their duty to protect and preserve the residence from danger. The pre-text was none other than a call to assist.

[82] But even allowing there were those extenuating circumstances, the police knew or should have known, they were on "thin ice", when it became apparent, no crime had been committed. After that they made a conscious decision, to search or look in the private bedrooms by opening the closed doors. Constable Melski stated his interest or curiosity was peaked. In my view, this line of inquiry would favour exclusion.

2. – Impact of the Breach on the Accused's Charger Protected Interests

[83] Under this factor, the impact on the accused's rights must be assessed. Once again we are talking about Mr. Johnston's privacy rights, and the sanctity of his home. The intrusion into the home was minimal, consisting of the opening of doors. The house is exposed to several streets in a busy intersection. That does not make the intrusion any less or more of a violation, but it makes the impact of the breach on Mr. Johnston more public. Mail addressed to Robert Iannetti and Mr. Johnston were observed downstairs.

[84] Under this criteria there are factors which favour both admission and exclusion. That said, the expectation of privacy in a bedroom, is arguably higher than in other areas of the home.

3. – Society's Interest in the Adjudication of the Case on its Merits

[85] The Crown submits that the reliability of the evidence as well as the importance to the Crown's case favours admitting the evidence. Without the evidence obtained from the search of 109 Peirce Street, the Crown will not be able to prove the charges against the Applicant. Therefore, the evidence should be admitted as part of the truth seeking function of the justice system. Not admitting

the evidence says the Crown, would undermine society's interest in insuring those who breach the law are brought to justice.

[86] While I agree that third factor would favour admission in the present case, I do not agree, considering all three (3) factors that excluding the evidence, over time would bring the administration of justice into disrepute. Over the long term the public would have more confidence in the justice system by knowing that individual rights are respected and those rights if violated, will be protected by the Courts.

[87] It doesn't get any more individual than a person's home and the privacy associated with it. I am therefore satisfied for the reasons given that the Applicant, Mr. Johnston, has met the burden upon him of establishing that admission of the evidence obtained, would bring the administration of justice into disrepute. I am therefore excluding the evidence obtained pursuant to s. 24(2).

[88] Respectfully, this concludes my decision. I wish to thank counsel, Crown and Defence for the excellent briefs I have received on this motion.

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Murray, J.