

**IN THE TERRITORIAL COURT OF YUKON**  
Before: His Honour Judge Cozens

REGINA

v.

Douglas Hamilton and Carolyn Johnson and Lorraine Foubister

Appearances:

K. C. Komosky

E. J. Horembala

Gordon Coffin

Counsel for Crown

Counsel for Douglas Hamilton & Carolyn Johnson

Counsel for Lorraine Foubister

**RULING ON VOIR DIRE**

[1] Douglas Hamilton, Carolyn Johnson and Lorraine Foubister are charged with having committed offences contrary to ss. 7 and 5(1) of the *Controlled Drugs and Substances Act* (“CDSA”). Mr. Hamilton is further charged with having committed offences contrary to ss. 86(1) and 91(1) of the *Criminal Code of Canada*.

**Overview**

[2] On October 20, 2008, Mr. Hamilton’s employer, Gord Peterson, contacted the Whitehorse RCMP Detachment and reported that Mr. Hamilton had not shown up at work and, based upon this fact and observations made by Mr. Peterson at Mr. Hamilton’s Marsh Lake residence, he was concerned.

[3] As a result of this phone call, Cst. Greet attended Mr. Hamiltons’ residence, which was also the residence of Ms. Johnson and Ms. Foubister. Cst. Greer, based upon his observations at the residence and other information, including a telephone

conversation from the residence with Mr. Peterson, conducted a warrantless search of Mr. Hamilton's residence and an outbuilding, utilizing the services of a locksmith to gain entry. Marijuana in various stages of growth and cultivation was observed during this warrantless search.

[4] As a result of information provided to him by Cst. Greer, Cst. Terleski swore an Information to Obtain and was issued a search warrant for the residence and outbuilding.

[5] Located at the scene were 183 marijuana plants, approximately 10 kg of marijuana shake and 75 grams of dried marijuana bud, bulbs, lighting material and documents, as well as two firearms.

[6] Defence counsel for Mr. Hamilton and Ms. Johnson has filed an application challenging the validity of the search warrant and asking that all evidence seized as a result of the execution of the warrant be excluded from admission as evidence at trial.

[7] Defence counsel is seeking leave to cross-examine Cst. Greer. Although not named in the filed Notice of Application, during submissions counsel indicated that he is also seeking leave to cross-examine Mr. Peterson.

[8] Counsel for Ms. Foubister supports these applications.

[9] The basis for the application challenging the validity of the search warrant is that firstly, there was no statutory authority for the warrantless entry under the *CDSA*, and, secondly, the warrantless search conducted by Cst. Greer was unlawful and without legal authority at common law. While the common law would have allowed for Cst. Greer to enter the residence and perhaps the shed without a warrant for the purpose of the preservation of life, in the circumstances that existed at the time of entry, Cst. Greer did not have sufficient information to believe that Mr.

Hamilton was in danger such as to constitute exigent circumstances sufficient to justify the warrantless entry.

[10] The search warrant was issued on the basis of the observations of Cst. Greer of the marijuana and cultivation equipment in the residence and outbuilding. Defence counsel submits that if the warrantless entry was not authorized at common law, then the observations of Cst. Greer with respect to the interior of the residence and outbuilding should be excised from the Information to Obtain. Without this information, there was no basis for the issuance of the warrant. Crown counsel concedes the latter point.

[11] Defence counsel further argues that the Crown needs to establish that the requisite grounds for the warrantless entry existed in order to justify the issuance of the warrant.

[12] Crown counsel agreed to call Cst. Terleski, as the affiant, to enable defense counsel to cross-examine him, however, while further agreeing to have Cst. Greer present, Crown counsel is opposed to the defence application to cross-examine him as a sub-affiant.

[13] Defence counsel argues that Cst. Terleski is unable to give adequate evidence related to the existence of exigent circumstances such as to justify the warrantless entry and that only Cst. Greer can do so. If Cst. Greer is not made available for cross-examination, then defense counsel is deprived of a reasonable opportunity to challenge the grounds for the warrantless entry.

[14] Crown counsel argues that any additional evidence Cst. Greer may provide in testimony is not relevant and would not have altered the authorizing judge's decision to issue the warrant.

## **Information to Obtain**

[15] The critical portions of the Information to Obtain are as follows:

3. That, on October 10, 2008 at 3:35 p.m. Gord Peterson contacted the Whitehorse RCMP and reported that an employee of his, Doug Alan Hamilton, failed to show up to work for work today, as scheduled. Hamilton and Peterson both work at Northwest Tel and Peterson states such behavior is unusual for Hamilton particularly as he drives a company vehicle to and from work. Peterson attended Hamilton's residence located at 3 Solitude Drive in Marsh Lake south of Whitehorse, Yukon Territory at 3:0 p.m. and made the following observations:

- a) Hamilton's work vehicle, a Northwest Tel 'Bucket Truck' was parked in the residence.
- b) Hamilton's other vehicle, a blue hatchback was not present.
- c) There was a window open on the top floor which struck Peterson as unusual given the present weather conditions.
- d) There was no answer at the door.

5. That, on October 10, 2008, at 3:45 p.m. Constable Greer on the Whitehorse RCMP was assigned the file. Constable Greer queried Hamilton PROS and obtained the following information:

- a) There was only one entry regarding Hamilton on PROS, this was regarding a motor vehicle accident that occurred January 7<sup>th</sup>, 2007. There was no next of kin information on file.
- b) At that time, Hamilton provided his address at 3 Solitude Drive, Marsh Lake, Yukon Territory.

6. That, on October 10, 2008 at approximately 16:05 hours Constable Greer conducted inquiries with the Whitehorse General Hospital and obtained the following information:

- a) Hamilton had not been a patient at the Whitehorse General Hospital in the last ten years and they had no next of kin information on file.

7. That, on October 10, 2008 at 17:43 hours Constable Greer attended 3 Solitude Drive, Marsh Lake, Yukon Territory with a locksmith. Constable Greer knocked on the front door and received no response. Constable Greer during this time made the following observations:

- a) That a Northwest Tel 'Bucket Truck' was located on the property as well as a vehicle bearing Yukon Licence Plate ERF 69.
- b) There was a window open on the top floor.
- c) In addition to the principal residence, Constable Greer noted several outbuildings, vehicles, and campers on the property.

9. That, on October 10, 2008 at approximately 17:45 hours Constable Greer queried Yukon marker ERF 69 on CPIC and obtained the following information:

- a) ERF 69 is associated to a 2004 Chrysler Concorde, Maroon in colour, registered to a Lorraine Foubister of 3 Solitude Drive, Marsh Lake, Yukon Territory.

10. That, on October 10, 2008 at 17:50 hours Constable Greer entered the main residence through the front door after the locksmith opened the door located at 3 Solitude Drive, Marsh Lake, Yukon Territory. Constable Greer noted the following:

- a) The interior of the residence was in a state of disarray.
- b) No odour conducive with a deceased person was noted.
- c) No odour indicative of marihuana was noted at that time.

[16] After entering the residence and walking throughout it, marijuana and equipment for cultivating it were noted, as were the unsecured firearms. Cst. Greer also looked briefly into a green garbage bag and observed marijuana leaves. The Information to Obtain continues as follows:

21. Constable Greer than exited the house and proceeded to investigate the cabin like structure at the rear of the property.

Constable Greer determined there was a possibility the structure could be a type of residence as it had a heating tank, sewer pipers, and electrical cables connected to the building. The door to the structure was on the front and was secured using a deadbolt. Constable Greer determined that it was necessary to remove the lock to facilitate access to the structure in order to eliminate the possibility that Doug Alan Hamilton was within that structure.

22. Constable Greer had the locksmith drill the lock which allowed the door to be opened. Upon loosening of the door, Constable Greer immediately noticed a strong odour of raw marihuana emanating from the structure.

25. Constable Greer did not locate Doug Alan Hamilton anywhere on the property. At the time of this application, Police had not determined his whereabouts and well being.

### **Notes and Occurrence Report of Cst. Greer**

[17] Cst. Greer made handwritten notes and prepared an Occurrence Report. There was additional mention in these notes and Occurrence Report of a telephone call made by Cst. Greer to Mr. Person, while Cst. Greer was at the residence and prior to the warrantless entry. During this telephone call, Mr. Peterson stated that, that to his knowledge, Mr. Hamilton was not suicidal. This was not in the Information to Obtain.

[18] Contrary to what was stated in the Information to Obtain, the RCMP were aware as early as 21:00 hours that Mr. Hamilton was located hunting, according to the notes of Cpl. Pelletier. The warrant was signed at 23:10 hours and executed at 00:06 hours the next morning.

[19] Defense counsel submitted that Mr. Peterson had advised that he had told the RCMP that Mr. Hamilton was probably out hunting. It is not clear, however, whether this was during Mr. Peterson's initial telephone call to the RCMP, or when he spoke to Cst. Greer when Cst. Greer was at the residence. There is no reference to this in the notes or Occurrence Report prepared by Cst. Greer, so it is uncertain

as to whether Cst. Greer was aware of this information when he made the warrantless entry into the residence.

### **Law and Analysis**

[20] The reviewing judge only enquires into whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions for the issuance of a warrant existed.

[21] In this process, "...the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but rather than being a pre-requisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge" (*R. v. Garofoli*, [1990] 2 S.C.R. 1421 at p. 1452).

[22] The test for allowing cross-examination of an affiant as set out in *Garofoli*, was discussed in *R. v. Pires*; *R. v. Lising*, 2005 SCC 66:

There is no question that the right to cross-examine is of fundamental significance to the criminal trial process. However, it is neither unlimited or absolute. The extent to which it becomes a necessary adjunct to the right to make full answer and defence depends on the context. The *Garofoli* threshold test requires that the defence shows a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge. It is grounded in two basic principles of evidence: relevance and materiality. It is also born out of concerns about the prolixity of proceedings and, in many cases, the need to protect the identity of informants. The rule does not infringe the right to make full answer and defence. There is no constitutional right to adduce irrelevant or immaterial evidence. Further, the leave requirement strikes an appropriate balance between the entitlement to cross-examination as an aspect of the right to make full answer and defence, and the public interest in the fair, but efficient, use of judicial resources and the timely determination of criminal proceedings. (para. 3)

[23] The accused must show that there is some reasonable likelihood that cross-examination of the affiant will result in testimony that tends to discredit the existence of one of the preconditions to the authorization such as, in this case, the existence of exigent circumstances. There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence (*Pires*, para. 31).

[24] As stated earlier, Crown counsel takes the position that cross-examination of the sub-affiant, Cst. Greer, would not result in testimony that would impact upon the decision of the authorizing judge.

[25] In submissions, defense counsel points to the lack of reference in the Information to Obtain of Mr. Hamilton being non-suicidal, the possibility of a reference having been made to Mr. Hamilton perhaps being out hunting, and the fact that Mr. Hamilton's whereabouts were determined before the warrant was issued, as being relevant.

[26] These factors may not necessarily add much in the way of additional information that would bear on the issue before me on this review. In fact, with respect to the subsequent determination of Mr. Hamilton's whereabouts, I consider this to quite likely be irrelevant, in that the information forming the basis for the issuance of the warrant had already been obtained by this time. To some extent this determination may be verification of a possible reference to Mr. Hamilton perhaps being out hunting, but this verification, coming when it did, may not add much, if anything, to the consideration of whether there existed exigent circumstances at the time of entry into the residence.

[27] There are some other factors present such as the reference in the Information to Obtain that Mr. Peterson stated that Mr. Hamilton's other vehicle, a blue hatchback, was not present at the residence. That raises a question as to what



impact, if any, that information may have had on Cst. Greer's assessment of the urgency of the situation.

[28] There is also a question of the significance of the observations of the shed that caused Cst. Greer to believe that it was a possible residence that needed to be entered and searched.

[29] In *R. v. Pasaluko* (1992), 77 C.C.C. (3d) 190, the trial judge allowed a defense application to cross-examine several sub-affiants. The affiant had prepared the affidavits in support of three authorizations primarily based upon information provided to him by other police officers. He had, however, conducted very limited active investigative steps himself in relation to this particular matter and, as such, had limited knowledge of some of the relevant issues. The trial judge noted that defense counsel was able to state with some degree of certainty what the expected evidence elicited from a cross-examination of the sub-affiants would be, thus not entering into a "fishing expedition".

[30] In *R. v. Poloni* 2006 BCPC 610, the trial judge also allowed the defense application to cross-examine a police officer other than the affiant. During his cross-examination, the affiant was unable to answer certain questions and suggested another police officer would be better able to answer them.

[31] The Crown relied upon *Pires* and *Lising* in opposing the application, in particular pointing to para. 31 of that case where the court stated: "There is no point in permitting cross examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence. (see para. 28)

[32] The affiant had not been actively involved in the investigation. The trial judge stated in conclusion in para. 31 that: "I am satisfied that it has been demonstrated that Staff Sgt. Lea can provide evidence relevant to the issue of investigative necessity and the utility of that examination has been demonstrated on the testimony

of Cpl. Stoner especially given the number of times he answered, ‘ask Staff Sgt. Lea’.

[33] What differs in one aspect of the present case from ***Pasaluko*** and ***Poloni*** is that the initial step of cross-examining the affiant, Cst. Terleski, in order to exhaust his knowledge on the relevant issues, has not been taken. In the normal course, the application to cross-examine Cst. Greer would be heard after the cross-examination of Cst. Terleski and would be based in part upon what Cst. Terleski was unable to testify to.

[34] In the interests of expediency, and, in consideration of the nature of the expected evidence of Cst. Greer, my understanding of Cst. Terleski’s role in the investigation, and the submissions of counsel, I am prepared to assume that Cst. Terleski would not be able to provide testimony in respect of some of the relevant issues that Cst. Greer would have. As the lawfulness of the entry into the residence and the shed turns entirely on whether Cst. Greer’s belief in the existence of exigent circumstances was reasonable, cross-examination of Cst. Terleski, who was not present at the time, will not likely be productive. In making this assumption, I note that Crown counsel did not raise in argument that this application was premature, but rather argues against the relief being sought on the merits.

[35] I find that, notwithstanding the limited extend to which defense counsel can point to the evidence expected to be elicited from Cst. Greer, in the circumstances of this case the right to make full answer and defense requires that defense counsel be provided the opportunity to cross-examine Cst. Greer. Therefore, I allow the defence application that Cst. Greer be made available for cross-examination.

[36] With respect to the application to cross-examine Mr. Peterson, however, I consider that this application is premature. Cst. Greer must firstly be cross-examined and, dependent on his testimony, the need to cross-examine Mr. Peterson can be better assessed. As such I deny defence counsel’s to cross-examine Mr. Peterson,

subject however, to a right to renew this application at the conclusion of the cross-examination of Cst. Greer.

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COZENS T.C.J.