

Citation: *R. v. Johns*, 2017 YKTC 9

Date: 20170306  
Docket: 16-00089  
Registry: Whitehorse

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

REGINA

v.

RICHARD JOHNS

Appearances:  
Keith Parkkari  
Amy Steele

Counsel for the Crown  
Counsel for the Defence

**RULING ON *CHARTER* APPLICATION**

[1] Richard Johns has been charged with two counts of unlawfully storing a firearm, contrary to s. 86(2) of the *Criminal Code*.

[2] Counsel for Mr. Johns has filed an application alleging breaches of ss. 8 and 9 of the *Charter* and seeks a remedy under either s. 24(1) or 24(2) of the *Charter*.

[3] A *voir dire* was entered into at the start of the trial. This is my decision on the *Charter* application.

**Cst. Boyko**

[4] RCMP member Cst. Boyko testified that he was on general duty on March 14, 2016 in Beaver Creek, Yukon.

[5] He received two calls from separate complainants around 11:00 p.m. that evening, in regard to hearing gunshots coming from or near Mr. Johns' residence. The two complainants lived in residences adjacent to Mr. Johns' residence and within 100 yards of it. Neither of the complainants observed Mr. Johns with a firearm at the time.

[6] Cst. Boyko called Cst. Rousseau for assistance and they together attended at Mr. Johns' residence. They arrived at the residence approximately 20 minutes after receiving the complaints. When they arrived at Mr. Johns' residence they noted that the lights were not on. Initially they walked along the side of the house and shone the flashlight in through the kitchen window. They did not observe anything of note.

[7] Cst. Boyko testified that they knocked on Mr. Johns' front door. The door was opened by a Mr. Erving who, after opening the door, left it open and walked back into the residence. Both police officers followed Mr. Erving into the residence. Cst. Boyko testified that he felt that Mr. Erving had invited him to come into the residence. Mr. Erving turned the lights on as he went back into the residence.

[8] Mr. Johns was sitting on one of the two couches in the living room. Mr. Erving sat on the other couch.

[9] Cst. Boyko smelled liquor coming from Mr. Erving and, in speaking with both men, he noted that they were slurring their words. He did not recall whether he saw any liquor bottles.

[10] Cst. Boyko had had dealings with Mr. Johns both when Mr. Johns was sober and when he was intoxicated. Cst. Boyko considered both Mr. Johns and Mr. Erving to be under the influence of alcohol. He noted Mr. Johns to be upset and aggressive. He felt that Mr. Johns was intoxicated to the point where he might have become combative.

[11] He believed that Mr. Johns asked the officers what they were doing there.

[12] Cst. Boyko stated that his relationship with Mr. Johns had been pretty good until he had arrested him on other matters a week earlier. Cst. Boyko stated that on that occasion he had responded to a complaint at Mr. Johns' residence and both Mr. Johns and Mr. Erving were at the residence.

[13] Cst. Boyko stated that he advised Mr. Johns they were investigating a complaint of shots fired, to which Mr. Johns replied that maybe someone was shooting a moose. Cst. Boyko suggested that Mr. Johns had been firing the shots, which Mr. Johns denied. He stated, however, that he had used one of the rifles about four hours earlier in a separate location near the river.

[14] Cst. Boyko testified that Cst. Rousseau told Mr. Johns that he wanted to take Mr. Johns' firearms and that Mr. Johns said "in there" and pointed to the bedroom. Mr. Johns also told Cst. Rousseau that he trusted him and that he wanted his firearms back in the morning.

[15] Cst. Boyko stated that he told Mr. Johns that, while they could not prove that he had fired the shots complained of, he wanted to take the rifles for safekeeping, as there were safety concerns and that he would return the rifles in the morning.

[16] Cst. Boyko stated that he and Cst. Rousseau pushed open the partially-open bedroom door and located two rifles leaning against the wall in a closet that had no doors. One rifle was .22 calibre and the other a .270 calibre. There was no ammunition with the rifles. There were also no trigger locks on the rifles.

[17] Although the officers would have realized at that point that the rifles were improperly stored, Cst. Boyko testified that Mr. Johns was not detained or arrested. He was never advised of a right to speak to counsel or provided the opportunity to do so. Cst. Boyko did not arrest Mr. Johns as he did not believe that it was necessary to do so. Once he had the rifles there was no urgency and, if charges were to be laid, Mr. Johns could be summonsed afterwards.

[18] Cst. Boyko testified that Mr. Johns was not told that he did not have to consent to his bedroom being searched for the rifles. The search of the bedroom was a warrantless search but he believed that the search was justified on the basis of the consent that Mr. Johns had provided.

[19] Cst. Boyko felt that he had no grounds that would have allowed him to secure the premises in order to obtain a search warrant. He did not know that Mr. Johns had used a firearm or was improperly storing the rifles at the time he arrived at the scene.

[20] He felt that there was a potential threat to public safety, however, based upon the complaints he had received.

[21] Cst. Boyko stated that he was concerned about returning the firearms to Mr. Johns because Mr. Johns did not have the proper equipment to store them securely.

**Cst. Rousseau**

[22] Cst. Rousseau testified that he had been informed by Cst. Boyko that there had been complaints of gunshots possibly coming from Mr. Johns' residence. At the time he arrived at the residence, he was assisting in the investigation into the complaints, and was not of the opinion that Mr. Johns was necessarily a suspect in the commission of any offence.

[23] Cst. Rousseau stated that he knocked on the inner porch door and announced himself as the RCMP. Cst. Boyko was behind him at the time or still outside the outer porch door. Mr. Erving opened the door and, without saying anything, just walked back into the house. Cst. Rousseau felt that he had been invited in so he followed him. He stated that Mr. Johns was sitting on a couch/La-Z-Boy.

[24] Cst. Rousseau had been to Mr. Johns' residence several times before. On some of these occasions he would come inside and sit at Mr. Johns' kitchen table. Coming inside had never been an issue for him on these occasions.

[25] Cst. Rousseau stated that he noticed an empty bottle of liquor on the living room table. He considered both Mr. Erving and Mr. Johns to be intoxicated.

[26] Cst. Rousseau said that he initially explained that they were there because of a complaint about shots being fired. Mr. Erving said he had been sleeping and Mr. Johns denied having heard any shots.

[27] At this point Cst. Boyko continued to discuss the complaint. Cst. Rousseau stated that he suspected Mr. Johns and/or Mr. Erving had fired off the shots while they were intoxicated, and he wanted to obtain the firearms as he was concerned for public safety. He also was concerned about the safekeeping of the rifles and whether they were properly stored. It was his experience in dealing with First Nation individuals over several years that it was a common practice to have unsecured rifles in a residence. He did not know if Mr. Johns' rifles were properly secured or not.

[28] Cst. Rousseau was aware that Mr. Johns possessed rifles as he had seen him carrying them before. On one occasion, when he was speaking with Mr. Johns, Mr. Johns had brought his rifles out of the bedroom to show them to Cst. Rousseau. He was not certain whether Mr. Johns told him where the rifles were kept on that occasion, but he was sure that Mr. Johns went into the bedroom to get them.

[29] Cst. Rousseau stated that he asked Mr. Johns politely if he could take the firearms. He said he wanted to get Mr. Johns to agree to allow him to do so. He noted that he and Mr. Johns had a good relationship at that time. When he made this request, Cst. Rousseau had no intention of necessarily charging Mr. Johns with any offence or of arresting him. He also did not inform Mr. Johns that he did not have to consent to his bedroom being searched and his firearms being taken.

[30] Cst. Rousseau testified that his main concern at the time was public safety.

[31] He did not consider taking steps to obtain a search warrant. It was near midnight and Cst. Rousseau just wanted to obtain the firearms as soon as possible. He stated that he felt that there was no imminent threat at the time he was in the residence with Mr. Johns as there were no visible weapons anywhere. Cst. Rousseau felt that if he and Cst. Boyko were to leave Mr. Johns' residence without the firearms, there would be a public safety concern.

### **Analysis**

[32] Counsel for Mr. Johns states that the police officers entered Mr. Johns' residence without a warrant or the consent of Mr. Johns, thus breaching his s. 8 *Charter* rights. They further breached his s. 8 *Charter* rights when they entered into his bedroom and seized the rifles.

[33] With respect to the entry into Mr. Johns' residence, I disagree that there was a s. 8 *Charter* breach.

[34] I do agree that at the time of entry, there were not sufficient grounds to obtain a warrant to search Mr. Johns' residence. No one had observed Mr. Johns discharge a firearm and the complaint allowed for the possibility that the shots had been fired from a location near Mr. Johns' residence. A search warrant to enter a residence, a place where there is a high expectation of privacy, cannot be based upon a fishing expedition. There must be a reasonable basis for a warrant to be issued.

[35] However, I also find that the officers were invited into the residence. Certainly, once Mr. Erving came to answer the front door, Cst. Rousseau could have explicitly asked to speak with Mr. Johns in order to obtain his consent to enter. However, the knowledge of the police officers that Mr. Erving was a common visitor to Mr. Johns' residence, and the manner in which Mr. Erving left the door open and walked back into the residence, could reasonably have been considered an implied invitation to enter.

[36] Also, Mr. Johns could have chosen to answer the knock at the door himself. He apparently allowed Mr. Erving to go to the door on his behalf, in a sense, acting as his agent. Further, Mr. Johns never asked the police officers to leave the residence. Asking them what they were doing at the residence should not be equated as being a request for them to leave.

[37] I agree with defence counsel, however, that there was a s. 8 breach with respect to the police officers entering into the bedroom in order to search for and seize the rifles. The police officers testified that they relied on Mr. Johns' consent for this search. However, for Mr. Johns to have provided a proper consent, he needed to have been, at a minimum, advised of the fact that he was not required to provide this consent and that, if the officers located anything that was illegal as a result of the search, he could be charged with the commission of a criminal offence. (See *R. v. Wills*, (1992) 52 O.A.C. 321, at para. 69). Mr. Johns was not advised of either.

[38] I am satisfied the officers were not trying to obtain Mr. Johns' consent in order to conduct a search because they were hoping to then charge him with a criminal offence. I am satisfied that they were simply trying to act in a manner that addressed their



concerns about public safety. I find that these concerns about public safety were legitimate. I note that there does not appear to have been an intrusive or expanded search. It appears that the officers simply walked into the bedroom and seized the rifles that were visible in plain view. I have no information that would lead me to believe that they did any more than that.

[39] This said, Cst. Rousseau was aware of the possibility that Mr. Johns' rifles would not be safely stored. While I am satisfied that he did not ask for Mr. Johns' consent to search for his firearms for the reason of determining this to be the case, I am, nonetheless, satisfied that Cst. Rousseau should or would have been aware that Mr. Johns could find himself facing criminal charges under s. 86(2) of the *Code*. As such, he should have been careful to advise Mr. Johns of this possibility in seeking to obtain his consent.

### **Remedy**

[40] The question then becomes whether the evidence of the rifles should be excluded under s. 24(2) of the *Charter* or whether a stay of proceedings resulting from an abuse of process should be entered under s. 24(1).

[41] I find that neither remedy is warranted in the circumstances of this case.

### *Exclusion of Evidence s. 24(2)*

[42] In *R. v. Grant*, 2009 SCC 32, the Court stated that the purpose of s. 24(2) is to ensure that the admission of evidence obtained in breach of the *Charter*-protected rights of an accused does not bring the administration of justice into disrepute. This requires

consideration of "... the long-term sense of maintaining the integrity of, and public confidence in, the justice system..." (para. 68). It is aimed at systemic concerns (para. 70).

[43] The Court hearing a s. 24(2) application must weigh the effect of admitting the evidence on society's confidence in the justice system having regard to:

- the seriousness of the *Charter*-infringing state conduct;
- the impact of the breach on the *Charter*-protected interests of the accused; and
- society's interest in the adjudication of the case on its merits (para. 71).

The seriousness of the *Charter*-infringing state conduct

[44] The courts must not be perceived as "...effectively condon[ing] state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct." (para. 72).

[45] In this case, the seriousness of the breach is on the less serious end of the spectrum. As I have stated, the police officers were acting in accordance with their duty to investigate the complaints about shots being fired. The information that the police officers were provided was sufficient to include, as a realistic possibility, the fact that these shots may have been fired off from someone associated with Mr. Johns' residence.

[46] The police officers entered the residence upon being invited to do so, albeit impliedly. They could hardly have left the residence knowing firearms were in the residence and still have been fulfilling their duties in respect of ensuring public safety.

They obtained the apparent “consent” of Mr. Johns to take the rifles, although, as I have found, the consent was not a valid one as it was not a fully informed consent.

[47] The only other viable option, had Mr. Johns been properly informed as to the nature and potential consequences of the consent he was being asked to provide, and had he then declined to provide such a consent, would to have been to conduct a non-consensual warrantless search for firearms or attempt to obtain a warrant.

[48] Leaving the residence without taking any action to prevent the possible further discharge of firearms in the circumstances would, in my opinion, have quite possibly placed the public safety at risk.

[49] There were issues of officer safety that would have been engaged if one police officer had to leave the residence to prepare a warrant and find a judge or justice to authorize the search. If both Mr. Johns and Mr. Erving were removed from the residence and placed in a secure location while the integrity of the house was maintained until a search warrant could be obtained and executed, the intrusion on their liberty would have been considerable.

[50] There was nothing egregious in the actions of the police officers and there was nothing deliberate in the way in which their actions breached Mr. Johns’ s. 8 *Charter*-protected interests. There was no wilful or reckless disregard of Mr. Johns’ *Charter*-protected interests. It was not part of any pattern of abuse.

[51] In my view, this prong of the test militates in favour of admission of the evidence.

The impact of the breach on the *Charter*-protected interests of the accused

[52] Certainly it is clear that the illegal search of the bedroom of Mr. Johns' residence is, by its nature, an intrusive one. However, the scope of the search was limited to only the rifles that were visible in plain view and went no further than that. There was no force involved and the immediate impact on Mr. Johns was minimal. In fact, as noted above, had the police officers taken all the steps they could have in order to attempt to obtain a warrant, Mr. Johns' immediate liberty and privacy interests could have been more seriously impacted.

[53] Mr. Johns' dignity was not demeaned at any time.

[54] I find that the impact on Mr. Johns' *Charter*-protected interests is on the lower end of the spectrum.

[55] In my view, this prong of the test militates in favour of admission of the evidence.

Society's interest in the adjudication of the case on its merits

[56] In this case the evidence that was obtained was reliable and it is crucial to the Crown's case.

[57] This is not the most serious of charges. As stated in ***Grant***, the seriousness of the offence has the potential to cut both ways. Exclusion of evidence that has the effect of preventing the prosecution of a serious offence can have an immediate impact upon

how the justice system is viewed. This said, it is the long-term impact on the administration of justice that is the focus of s. 24(2).

[58] In some respects it could be viewed that less serious offences provide opportunities, through the exclusion of the evidence obtained, to deliver the message that actions of police officers that violate the *Charter*-protected rights of an individual will not be tolerated, in order to enhance public confidence in the administration of justice in the long-term. Certainly, the less serious the offence, the better the opportunity to send such a message without the resultant negative perception the public may have of the justice system when a more serious offence cannot be prosecuted as a result of the exclusion of evidence.

[59] In the end, as stated in para. 82 of **Grant**, "...The court must ask 'whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial' " (citing **R. v. Kitaitchik** (2002), 161 O.A.C. 169 at para. 47).

[60] In my view, on balance, this third prong of the test is somewhat neutral on admission or exclusion of the evidence.

[61] In balancing these three factors, I am satisfied that the evidence of the rifles that was obtained as a result of the *Charter* breach should not be excluded and, as such, it is admissible at trial.

*Judicial Stay of Proceedings under s. 24(1)*

[62] A judicial stay of proceedings should be granted only in the clearest of cases (*R. v. Regan*, 2002 SCC 12).

[63] As stated in *R. v. Fortune*, 2012 BCSC 2031 at para. 117:

The case must fall into one of two categories. The first category implicates state misconduct that may prejudice the fairness of the trial; the second category relates to state misconduct that flouts fundamental principles of justice, and which undermine the integrity of the judicial process. Whichever of the two categories the analysis falls under, the judge must see that the following three further criteria are present:

1. The prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated to the conduct of the trial or by its outcome. The prejudice must be prospective. The remedy may not be used to redress past prejudice.
2. No other remedy is available or reasonably capable of removing that prejudice.
3. Where a case falls in either of these categories, but the judge remains uncertain whether the prejudice is serious enough to justify a stay of proceedings, the court may engage a third criterion; the balancing of those interests favouring a stay against society's interest in a trial on the merits.

[64] In reviewing the necessary criteria for a stay of proceedings to be granted under s. 24(1), I am satisfied that the actions of the police officers in this case, including the actions that constituted the unlawful search and seizure, fall far short of what would be

required to allow for a judicial stay under s. 24(1) of the *Charter* to be granted. As such, I find that there is not an available remedy under s. 24(1).

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COZENS T.C.J.