

**ONTARIO COURT OF JUSTICE**

**Reasons for Decision**  
**Section 8 Charter Application**

**B E T W E E N :** )

**HER MAJESTY THE QUEEN** )

**Charon Kerr,**  
**for the Crown**

**— AND —** )

**DONALD PELZ (APPLICANT IN THE )**  
**CHARTER APPLICATION) )**

**Calvin Martin, Q.C.,**  
**for the defendant**

**HEARD: March 1, 2, 3, 2004**

**BALDWIN J.:**

[1] Donald Pelz stands charged with 25 counts of weapons offences, namely; 9 counts of Unauthorized Possession of a Firearm contrary to section 91 of the *Criminal Code* of Canada; 9 counts of Careless Storage of a Firearm contrary to section 86 of the *Criminal Code* of Canada; 3 counts of Unauthorized Possession of a Loaded Restricted Weapon or Prohibited Firearm contrary to s. 95 of the *Criminal Code* of Canada; 4 counts of Unlicensed Possession of a Prohibited Device contrary to s. 91(2) of the *Criminal Code* of Canada.

[2] All counts relate to weapons and ammunition seized from the Applicant's home on August 22, 2002.

[3] The Applicant challenges the admissibility of the seized items and submits that his s. 8 rights to be secure against unreasonable search and seizure have been violated. The Applicant submits that the items were not seized pursuant to a search warrant or with the Applicant's consent. It is further submitted that neither s. 489 of the *Criminal Code* of Canada, nor the common law plain view doctrine justifies the seizure. The Applicant submits that the po-

lice were on a fishing expedition in his home at the time the articles were seized. The Applicant submits that the evidence should be excluded pursuant to s. 24(2) of the Charter.

[4] The Crown concedes that the articles were not seized pursuant to a search warrant. They submit that the items were lawfully seized pursuant to s. 489 of the *Criminal Code* of Canada and the common law plain view doctrine. They submit that s. 24(2) should be interpreted to permit admission of the items seized.

### **BACKGROUND**

[5] Donald Pelz is the father of Ruth-Anne Willis. Ms. Willis had previously been married to Russell Bailey. In 1996, Mr. Bailey and Ms. Willis divorced. After the divorce, Mr. Bailey remarried and settled in the Hamilton area. Ms. Willis moved to P.E.I. The divorce was acrimonious and as of August 2002, there continued to be disagreements between the pair over custody and access issues regarding their children.

[6] In August of 2002, Ms. Willis returned to Ontario to deal with the outstanding issues between herself and Mr. Bailey over the residency and custody of their children. She stayed with Mr. Pelz at his residence located at 7555 Bell School Line, R.R. #6, Milton, Ontario. It is alleged that on August 21, 2002, Ms. Willis obtained a .22 calibre Colt handgun from her father's home. The handgun had been kept in an antique stove located in the kitchen. It is alleged that on that day, Ms. Willis drove to Mr. Bailey's residence and shot him dead. She then drove from the victim's residence and was arrested a short distance away. The Colt .22 handgun used to murder Mr. Bailey was recovered from the car she was driving.

[7] Hamilton Police Service began their investigation into the murder of Mr. Bailey and believed Ms. Willis had obtained the handgun from her father's residence. Mr. Pelz was interviewed by Detective Thomas of the Hamilton Police Service at 7:15 p.m. on August 21, 2002. In this interview, a transcript of which was marked as exhibit lettered B on the *voir dire*, Mr. Pelz identifies the .22 Colt in the possession of the Hamilton Police as belonging to him. He agrees to show the officers where he kept the gun in his home. He consents to provide the ownership papers for it to police. He advises the officer that Ms. Willis and his granddaughter had been staying with him at his home in Milton. He advises that Ms. Willis had used the computer in his residence to draft correspondence to Mr. Bailey regarding their disagreements. He advises that his daughter kept copious notes of her problems with Mr. Bailey.

[8] Following the interview, the Hamilton homicide investigation officers decided to get a search warrant to search the home of Mr. Pelz. The focus of the search was to obtain evidence with respect to the homicide investigation. They were looking for documentation and computer equipment supporting a motive of acrimonious proceedings following the divorce and evidence of Ms. Willis's intentions toward Mr. Bailey. They were looking for documentation and evidence regarding the use of the firearm; that being ammunition for the .22, the .22 ammunition storage box, and any registration documents of the Colt .22 handgun.

[9] The search warrant was signed by a Justice of the Peace at 9:20 a.m. on August 22, 2002.

### **THE WARRANT TO SEARCH**

[10] The Warrant was filed as lettered exhibit A on the *voir dire*. It is based on the information of Detective Oscar Husslage of the Hamilton Police Service. It authorizes a search of the building owned by Don Pelz at 7555 Bell School Line, R.R. #6 in Milton, Ontario for certain things, namely:

- personal documents relating to relationship of Ruth-Anne Willis and Russell Bailey
- beige desktop personal computer
- .22 ammunition and .22 ammunition storage box
- any registration documents of a Colt .22 handgun serial #162762-5

that are being sought as evidence in respect to the commission, suspected commission or intended commission of an offence against the *Criminal Code* of Canada, namely that Ruth-Anne Willis did unlawfully commit murder against the person of Russell Bailey contrary to the provisions of section 235(1).

[11] The warrant authorized entry into the premises to search for these things between the hours of 10:30 a.m. and 9:00 p.m. on Thursday the 22<sup>nd</sup> of August 2002.

### **EVIDENCE HEARD ON THE VOIR DIRE**

#### **Mr. Donald Pelz:**

[12] Mr. Pelz is 74 years of age. He is a retired major with the Canadian Army and he has no criminal record. He lives alone on his 23-acre farm at 7555 Bell School Line, R. R. #6 in Milton. He is employed as a Tour Guide. He has two daughters.

[13] Mr. Pelz testified that on August 21, 2002, his daughter, Ruth-Anne Willis, and one of her children, had been staying with him. She took a Colt .22 handgun from an antique

stove in his home and shot her ex-husband to death. He became aware of the allegation when he received a call from a reporter with a Hamilton newspaper. He drove to the Hamilton police station to see what had happened. He was devastated and cooperated 100% with the police. He answered their questions in a videotaped statement. He identified the .22 Colt handgun in the possession of the police as his handgun. He did not tell them that he had other firearms in the home because he was not asked. He was also not asked about the status of his Firearms Acquisition Certificate (hereinafter referred to FAC). He told police about Ruth-Anne having access to a computer in the bedroom she stayed in at his house.

[14] He was at the police station until 7:30 p.m. and then left to get his grandchild from the CAS. The CAS wanted to see his house to be satisfied that it was fit for the baby. The police had earlier told him that they did not want him to go back to the home. The CAS drove his grandchild to his other daughter's home in Mississauga to see if it was suitable.

[15] Mr. Pelz testified that he went back to his home at approximately 1:00 a.m. but could not get in. Three police cars were in his driveway. He had dogs tied up on the property that needed to be fed. He did not recall entering his home that evening.

[16] He stayed with his daughter in Mississauga that night and returned to his residence at 9:00 a.m. the next morning. Police officers were on the premises and he was advised that the warrant was not yet available. He does not recall asking if he could access his house. He offered to give the police the items mentioned in the police interview without waiting for the warrant. He had nothing to hide and was being compliant with police requests. He patiently waited for officers to arrive with the warrant.

[17] At 11:42 a.m., the officers arrived with the warrant. At 12:05 p.m., the police were let into his home. At 12:08 p.m., he was asked to produce his FAC. He complied, believing that it related to the documents pertaining to the .22 Colt handgun. The FAC Mr. Pelz produced was marked as exhibit lettered D. It was issued to him on October 21, 1996 and expired October 22, 2001. Mr. Pelz testified that he did not renew his FAC because he did not plan to purchase any more guns. He misinterpreted the Renewal Form in this regard.

[18] Mr. Pelz could not recall if he was cautioned about possible charges if firearms were found in his home. He did recall being given Rights to Counsel, but he thought it related to items in the search warrant only. He declined to contact counsel.

[19] Mr. Pelz testified that Detective Heller asked if he had any firearms. He testified that Detective Heller said to show us where they are or we will smash down the walls and

cupboards. He later testified that this threat came after the officers had already located a number of firearms that he had not told them about.

[20] Mr. Pelz did not give his evidence in a sequential order. What follows is my best understanding of his version of the events.

[21] At 12:15 p.m., he showed Detective Heller some handguns kept in a downstairs bedroom that had previously been registered with the RCMP. Mr. Pelz testified that he did not appreciate the seriousness of the situation. He was trying to cooperate. He thought no charges would be brought against him because he had done nothing wrong.

[22] He agreed one of the handguns (Iver Johnson) was registered to his deceased father and was never registered in his name. He did not know if it was a prohibited firearm. The Astra handgun he had registered in his name some 25 years ago, when he lived in Mississauga. Mr. Pelz agreed that he did not tell the officers about three (3) rifles in a closet because there was no documentation about them in the possession of the police.

[23] After police found an Enfield Rifle and ammunition in the hall closet, they asked him if he had any more firearms and he replied that he did not. They asked if he minded if they looked for more and he said that he did. He agrees that he purposively did not advise police of any firearms. After the threat to smash down walls, Mr. Pelz took the officers to an inoperable car parked beside his residence. Two handguns were found in the car, both previously registered to the Mississauga address 25 years ago. One of the handguns was loaded. The car contained a loaded magazine for the other.

[24] Mr. Pelz agreed that it took him some time to find documents relating to the Colt .22. He agreed that his guns and ammunition were not kept in locked containers. He testified that he had these weapons to protect his farm animals from prey.

[25] The Crown called eight (8) police officers on the *voir dire*. Three (3) of them, Officers Gardner, Gruber and Filippetto, with the Halton Regional Police, gave evidence with respect to securing the residence prior to the arrival of the search warrant. No issue is being taken with events in this time period, therefore it is not necessary to review their evidence.

**Detective Oscar Husslage (Hamilton Police):**

[26] Detective Husslage was one of the officers investigating the homicide with the Hamilton Police. He drafted the search warrant. He testified that Mr. Pelz was cooperating with police during his interviews at the station on August 21, 2002. He decided to get a search warrant because privacy issues might be raised on the part of Mr. Pelz's daughter.

[27] At the time he drafted the Information to obtain the warrant, he gave no thought as to whether Mr. Pelz was licensed to possess firearms. The warrant was signed at 9:20 a.m. on August 22<sup>nd</sup>. He directed Identification officers to meet him on scene. He also requested the assistance of the Provincial Weapons Enforcement Unit (PWEU). As I understood the evidence, this assistance was sought because the warrant contained items relating to firearms documentation and ammunition and PWEU officers are the experts in this area.

[28] Detective Husslage arrived at the residence at approximately 11:00 a.m. and showed Mr. Pelz a copy of the warrant. Mr. Pelz was cooperative.

[29] Detective Husslage testified that he learned, at some point, that Detective Constable Arsenault (the Firearms Officer with Halton Regional Police) was concerned that Mr. Pelz may have firearms in the house. She advised that Mr. Pelz had three (3) handguns previously registered in his name. Detective Husslage also became aware at some point before entering the house, that Mr. Pelz had shown Constable Mike Thomas (the lead homicide investigator with Hamilton) a long gun in his residence when they entered the house the night before. Detective Husslage was not concerned about this information. The area was rural and Mr. Pelz was being cooperative. Detective Husslage was focusing on the items in the warrant.

[30] At 11:48 p.m., everyone involved in the execution of the warrant was on scene. They entered the house at 12:05 p.m. According to Detective Husslage, as soon as they entered the home, the unsafe storage of firearms became an issue. For officer safety, it became important that all the firearms in the house be found. Constable Heller, together with Detective Thompson (the 2 PWEU officers), took the lead with respect to "securing" the firearms.

[31] Detective Husslage testified that it became apparent that Mr. Pelz was not being truthful with the officers as firearm after firearm was being found in the house. It was not his intent to search for firearms, but he wanted the premises safe while the search for the

items in the warrant was being conducted. He had expected Mr. Pelz to point any firearms out and that they would be secured by the PWEU officers.

[32] Detective Husslage testified that the entire time spent in the house was occupied with searching for items in the warrant. Personal documents pertaining to Ms. Willis and Mr. Bailey were never located during the search.

[33] It was not until 1:15 p.m. that Mr. Pelz located documents relating to the .22 Colt handgun. At 1:35 p.m., the computer was pointed out and seized. During the search, Mr. Pelz pointed out where he had stored the .22 Colt in the antique stove. A black bag for the gun was found there. Three rounds of ammunition for the gun were found in a box under one of the burners at 2:07 p.m. by Detective Thompson.

**Detective Mike Thomas (Hamilton Police):**

[34] Detective Mike Thomas was leading the investigation into the homicide for Hamilton Police. Detective Thomas testified that Mr. Pelz came into the police station on August 21<sup>st</sup>, and Detective Thomas advised him that his daughter was under arrest. Detective Thomas testified that he was aware that Mr. Pelz was a victim of the situation as well. During a conversation with Mr. Pelz, he was told that Mr. Pelz had firearms in his house and that everything was properly licensed.

[35] Detective Thomas conducted the videotaped interview with Mr. Pelz at the station. In the transcript of that interview, Mr. Pelz is asked:

Q. We'd like you to point out exactly where you hid the gun.

A. Ya – no problem.

Q. Like that okay, and then maybe we can get the ownership for it and stuff like that.

A. Ya – okay.

Q. And do you consent to that no problem.

A. No problem.

Q. So – that's all we need from you right now.

A. Okay.

Q. I know you have to take off and, as long as you consent with the other stuff....

A. Ya – yep – no problem – yep.

[36] At 9:50 p.m., he followed Mr. Pelz back to his house so that Mr. Pelz could feed his dogs, get his appointment book for the next day for work, and get medication for his incarcerated daughter. They were in the house for approximately 30 minutes.

[37] During that time, Mr. Pelz showed him where the Colt had been hidden in the stove. He also showed the officer a wooden gun box in the hall closet and was told there was a firearm in the box. Detective Thomas did not notice that the box was not locked. Mr. Pelz told him that he had five (5) firearms and that he had the paperwork for them all.

[38] At 11:15 p.m., Detective Thomas called the Halton Firearms office to check the status of the firearms in Mr. Pelz's possession. The office was closed. At 11:30 p.m., he ran a CPIC check for firearms and found three (3) handguns in Mr. Pelz's name and learned that Mr. Pelz's FAC had expired. He does not recall if he advised Detective Husslage of this finding.

**Constable Robert Thompson (Hamilton Police):**

[39] Constable Robert Thompson testified that he was employed with the Hamilton Police on the PWEU at the time. PWEU's mandate was to investigate illegal possession of firearms and trafficking in firearms. Before 10:00 a.m. on the morning of August 22<sup>nd</sup>, he spoke to Detective Husslage and was asked to assist with the execution of the search warrant because they would be looking for documentation pertaining to weapons. At that time, he gave no thought to the owner of the premises being charged with any firearms offences.

[40] Constable Thompson contacted Constable Heller with the Halton Police PWEU, as the search warrant was to be executed in his jurisdiction and to see if he was available to assist. At 11:15 a.m., Constable Thompson was on scene and reviewed the search warrant. Detective Heller and Detective Constable Beth Arsenault, Halton's Firearms Officer, arrived on scene at 11:52 a.m.

[41] At 12:05 p.m., Detective Thompson entered the residence with Detective Husslage, Detective Heller, Detective Constable Arsenault and two Identification officers. At 12:08 p.m., Detective Heller dealt with Mr. Pelz in the residence. Detective Heller cautioned Mr. Pelz about unauthorized firearms that may or may not be in the house. Mr. Pelz assisted by locating pistols on the main floor of the house.

[42] At 1:48 p.m., Constable Thompson was searching an unlocked closet in the north-west bedroom when Mr. Pelz reached into the far left side and pulled out an HW Cooley 12 gauge shotgun. It had no trigger lock and was unloaded. Mr. Pelz also retrieved two .303 calibre Lee Enfield Rifles from the closet. Both were in unlocked rifle bags and were unloaded.

[43] Constable Thompson searched a pine hutch in that bedroom and found three boxes of .303 ammunition, containing 48 rounds per box. This was suitable ammunition for the two (2) of the three (3) rifles in the closet. In the bottom drawers of that hutch, he found three (3) boxes of .303 blanks and 1 box of 7.62 calibre blanks. No 7.62 calibre firearm was found in the room.

[44] Constable Thompson asked Mr. Pelz why he had not disclosed the three (3) rifles found in the bedroom, knowing that police were there with a search warrant. Mr. Pelz did not reply.

[45] Constable Thompson was asked how he interpreted the words "Registration Documents" on the search warrant. He replied that these documents consist of the Registration Certificate, Transfer Documents and Bills of Sale. It could also include an FAC, as that document shows that the person is entitled to register the weapon.

[46] It is now the law that every firearm must be registered. Previously, one only needed to register restricted firearms.

**Detective Jason Heller (Halton Police):**

[47] Detective Jason Heller, with the Halton PWEU, testified that he received a call from his supervisor at 10:18 a.m. requesting he assist with the execution of the warrant. He was told that it was suspected that firearms would be on the premises.

[48] He spoke with Detective Husslage who said that there may be firearms on the property and asked Detective Heller to assist for officer safety.

[49] In order to obtain background information, Detective Heller contacted Halton's Firearm's Officer, Beth Arsenault. Detective Constable Arsenault advised that Mr. Pelz's

FAC was expired and that he had three (3) firearms registered to him at an address in Mississauga. Detective Heller testified that he suspected firearms may be on the premises, but that he did not have reasonable and probable grounds to so believe.

[50] Detective Heller arrived on scene at 11:52 a.m. and was briefed on the search warrant. The plan was that he would deal with Mr. Pelz in regard to any firearms in the residence and seize them.

[51] Once in the residence, Detective Heller asked Mr. Pelz if he could produce his firearms license. Mr. Pelz produced the expired FAC from his wallet. Detective Heller advised Mr. Pelz that if they came across any firearms, he would be subject to criminal charges. He cautioned Mr. Pelz in that regard and told him he was not required to say anything. He gave him Rights to Counsel.

[52] Detective Heller asked Mr. Pelz if he would assist in finding any firearms on the premise. Mr. Pelz was upset with this request but did take the officers to the bedroom located in the northwest corner of the residence. Within 10 minutes of the initial conversation at the front door, Mr. Pelz handed over two (2) handguns that were contained in a pouch and hidden in clothing in the pine hutch. Both were in holsters. One handgun was the Iver Johnson – a prohibited firearm under the *Criminal Code* of Canada. It was unloaded and there was no ammunition in the pouch. The second gun was an Astra handgun. It is a prohibited firearm under the *Criminal Code* of Canada. It was not loaded and there was no ammunition with it. There were no trigger locks on the two (2) handguns. On the open shelf of the pine hutch, Detective Heller located a magazine for the Astra handgun, containing three (3) bullets.

[53] Detective Heller seized the handguns and locked them in the trunk of his car. He returned to the house and asked Mr. Pelz if there were any other firearms in the premises. Mr. Pelz replied that they had found enough.

[54] Eventually, Mr. Pelz took officers to a derelict motor vehicle that was located 30 to 40 feet from the residence. Mr. Pelz stated that there were firearms in the backseat. Two handguns were located - a Beretta 6.35 mm (25 calibre) handgun with a magazine in the pouch containing 5 rounds of ammunition; and a High Standard Supermatic .22 calibre with a loaded magazine in the handgun.

[55] Detective Heller secured these items in the trunk of his car and they re-entered the house. Mr. Pelz was again asked to point out any other firearms in the house. Mr. Pelz took

them to a hall closet and produced a wooden box. This unlocked box contained an unloaded .303 Lee Enfield Rifle, described as a sniper rifle commonly used by the military in World War Two. Ammunition for this firearm was found in the box. Detective Heller secured these items in his car.

[56] He returned to the house and again asked Mr. Pelz if there was anything else. Mr. Pelz replied, you have enough guns – you have all the guns. Detective Heller continued searching and located ammunition and handgun cartridges in an unlocked dresser in one of the five (5) bedrooms of the house (reference exhibit list attached as Appendix A for detailed list of all items seized).

[57] At 1:18 p.m., Mr. Pelz stated that there were no more firearms. The rifles mentioned in the evidence of Constable Thompson, reviewed above, were later located from the bedroom closet along with ammunition.

[58] Detective Heller left the residence at 2:34 p.m. He was advised by Mr. Pelz that more ammunition would be found in the barn located approximately 100 feet from the house. One of the Identification officers located a box of 7.62 calibre ammunition in the barn.

[59] Detective Heller did not charge Mr. Pelz with any offences that day.

**Detective Beth Arsenault (Halton Police):**

[60] Detective Arsenault testified that she is the Firearms Officer for the Halton Police. Her duties include issuing, approving, reviewing and revoking FACs.

[61] On August 22<sup>nd</sup> at 10:14 a.m., she became aware of the homicide investigation. She ran a check and learned that Mr. Pelz had an expired FAC and that he had previously had three (3) handguns registered to him at a Mississauga residence. (I note that the three (3) handguns registered to Mr. Pelz at the former address did not include the .22 Colt).

[62] Detective Arsenault testified that she gave this information to Detective Heller at 11:20 a.m. She testified that she attended the scene to assist the Hamilton officers with the search.

[63] Detective Arsenault overheard the conversation in the doorway of the house between Mr. Pelz and Detective Heller. Mr. Pelz produced the expired FAC and was cautioned and given Rights to Counsel.

[64] Detective Arensault gave evidence with respect to the search for weapons, which then followed. She did not search for items in the home. She sat in the living room of the home with Mr. Pelz as the PWEU officers searched the home for firearms. She heard Mr. Pelz say a number of times that he had no more weapons and that the police had taken enough.

[65] On October 29<sup>th</sup>, 2002, Detective Arsenault issued a summons to Mr. Pelz for the 25 weapon offences.

## FACTS

[66] It appears to me that there were three separate police activities going on at the time police entered Mr. Pelz's house on August 22, 2002.

[67] The first activity was to search for the items contained in the search warrant related to the homicide. Detectives Thomas and Husslage were focused on this activity alone. They regarded Mr. Pelz as cooperative with them from the outset. In fact, he had already consented to provide them with all the information in the search warrant without the necessity of obtaining a warrant.

[68] The Hamilton detectives knew before they entered the house that Mr. Pelz had identified the .22 Colt handgun, found after the murder, as his gun. He had shown Detective Thomas, the evening before, exactly where it had been stored in an antique stove in his kitchen (which would have been storage in an unsafe manner). Mr. Pelz made statements indicating that there were five (5) other firearms in the house.

[69] Before entering the house, the Hamilton detectives knew that Mr. Pelz had an expired FAC. They knew that the .22 Colt was never registered in his name. They knew that he had previously registered three (3) other firearms in his name at a former address. I conclude that they had reasonable grounds to obtain a search warrant with respect to firearms offences. They were not interested in charging Mr. Pelz with any criminal offence. In fact, he has never been charged in respect of the unlicensed possession and unsafe storage of the .22 Colt handgun.

[70] The second activity involved securing the scene for officer safety prior to the search for items in the search warrant. This activity was undertaken by the PWEU officers at the request of the Hamilton homicide detectives. The objective here was to locate and “secure” any firearms. It is during this search that the items in question are located.

[71] The third activity involved the investigation of Mr. Pelz for firearms offences. This activity was engaged in by Constable Heller (Halton PWEU) and Detective Constable Arsenault, Halton’s Firearms officer. They had all the same information that the Hamilton homicide detectives had regarding the presence of firearms in the house, with the exception of the conversation between Constable Thomas and Mr. Pelz while in the home the night before.

[72] Based on their information with respect to the possession of the .22 Colt handgun and the expired FAC, they had reasonable and probable grounds to arrest Mr. Pelz before they entered the home. As I have stated, he has never been charged in this regard.

[73] It appears that the Halton officers elected to assist with executing the homicide warrant and to see how matters unfolded in the home with respect to firearms offences. However, it should be noted that Detective Arsenault did not assist with searching for any items in the home. It is reasonable to infer that her primary objective was to investigate firearm offences.

[74] Immediately upon entering the home, Mr. Pelz was asked to produce his FAC. He did so. I find that the request was lawful, as it would constitute a registration document pertaining to the .22 Colt handgun as contained in the search warrant. However, the officers already knew before entering the house that the FAC was expired, so nothing new was learned by obtaining this piece of documentary evidence.

[75] Mr. Pelz was then cautioned that he did not have to say anything with respect to possible firearms offences. He was then repeatedly asked to locate firearms in the residence despite the caution, over his objection, purportedly in the interests of officer safety.

[76] Once the first handguns were produced, the officers had the reasonable and probable grounds to arrest Mr. Pelz - they did not do so. They had grounds to obtain a warrant. They did not do so.

[77] There was no evidence of exigent circumstances.

## ANALYSIS

[78] As the search for the firearms was warrantless, it was *prima facie* unreasonable and the onus rests with the Crown to demonstrate, on a balance of probabilities, that the search was reasonable. In accordance with the test set out in *R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, 38 D.L.R. (4<sup>th</sup>) 508, it could only be found reasonable if: (1) it was authorized by law, (2) the law itself was reasonable, and (3) the manner in which the search was carried out was reasonable.

[79] There were no exigent circumstances in this case. There was no evidence of a danger concerning the immediate loss, removal, destruction, or disappearance of evidence if the search and seizure had been delayed to obtain a warrant with respect to firearms. Sections 117.02(1) of the *Criminal Code* of Canada regarding exigent seizure of evidence of weapons offences, and s. 117.04(2) regarding exigent public safety seizure of weapons, are not applicable on these facts.

[80] The officers could have obtained a search warrant. Certainly the Hamilton homicide officers had the grounds to do so before they entered the house. They were not concerned with the investigation of firearm offences.

## APPLICATION OF S. 486 OF THE CRIMINAL CODE

[81] Section 489 of the *Criminal Code* of Canada reads as follows:

489. (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer be-

believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[82] Before s. 489 can operate to permit a person to **seize** things not mentioned in the warrant, the person has to believe on reasonable grounds that the things seized will satisfy the conditions set out in the section.

[83] The evidence here was that the two (2) PWEU officers, together with Detective Arsenault, were on scene to assist the Hamilton homicide officers execute the warrant in respect of the homicide investigation.

[84] Immediately upon entering the house, Detective Heller cautions Mr. Pelz with respect to firearms offences.

[85] The two (2) PWEU officers then **search** the house and a car and seize firearms and ammunition. The Hamilton Homicide officers are not involved in this search. They do not come upon any firearms in searching for items contained in the warrant (reference Appendix A).

[86] The issue is whether the PWEU officers did more than they were allowed to do under the search warrant. The firearms and related ammunition seized were not evidence relevant to the homicide offence specified in the search warrant.

[87] For the seizure of the firearms to be lawful under s. 489 or the common law plain view doctrine, they must have been immediately obvious to, and discovered inadvertently, by officers engaged in activities authorized in the search warrant.

[88] Although some of the items in question may very well have been discovered in this manner, that was not the case in the evidence heard here.

[89] The evidence here was that the PWEU officers were **searching** for firearms to secure any firearms before the homicide officers looked for the items set out in the homicide warrant. In the course of this ‘pre-search’, Mr. Pelz was repeatedly asked to produce any firearms, after being cautioned that he did not have to say anything to incriminate himself in this regard.

[90] During the course of this ‘pre-search’, Mr. Pelz took them to a car parked outside of the residence and produced two (2) firearms. There was no legal authority to search a vehicle on Mr. Pelz’s property. There was also no authority to search the barn, located 100 feet from the house, for ammunition.

[91] The plain view doctrine confers a seizure power not a search power. It does not permit an exploratory search to find other evidence [reference *R. v. Fawthrop* (2002), 166 C.C.C. (3d) 97 at page 17 (Ont. C.A.)].

[92] The search for the firearms and ammunition (other than the ammunition specified in the warrant) was unreasonable and is not admissible under s. 489 or the plain view doctrine.

### S.24(2) ANALYSIS

24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

#### (1) Trial Fairness:

[93] Although firearms are “real” evidence, and some of them would have been discoverable in the valid execution of the search warrant, there was no lawful authority which permitted the PWEU officers to **search** for firearms as discussed above.

[94] Further, Mr. Pelz was compelled to incriminate himself, despite being cautioned otherwise, to locate many of the items in dispute. Some of these items were found in a car that was not an area to be searched included in the warrant.

[95] Admission of the impugned items would therefore be contrary to trial fairness.

**(2) Seriousness of the Violation:**

[96] In this case, the s. 8 violation was not merely inadvertent. The PWEU officers and the Firearms Officer were on scene to assist with the execution of a homicide offence based search warrant. They were not authorized to be in the premises to investigate weapons offences. I am satisfied that they used their lawful right to be in the premises to assist in the execution of the search warrant, to conduct activities outside of the warrant. In other words, they ‘piggy-backed’ the homicide investigation in conducting a firearms investigation.

[97] This activity is not justified on the basis of officer safety. There was no evidence that Mr. Pelz presented an officer safety risk. The evidence was that he was cooperating with the homicide detectives in the investigation of his daughter.

[98] The evidence was that Mr. Pelz became defensive, upset and uncooperative with the PWEU officers when he became the target of a separate investigation in his home.

[99] The breach of the Applicant’s s. 8 rights was therefore serious.

**(3) Administrative Fairness**

[100] The Supreme Court of Canada has stated that firearm offences are serious offences as they are directly related to public safety [reference *Re Firearms Act*, (2000) 144 CCC (3d) 385].

[101] However, as with almost all offences in the *Criminal Code*, there are gradations of ‘seriousness’ inherent in the particular facts that make out the offence. That is to say, that unsafe storage of ammunition in a rural area barn, for which there is no firearm on premise that the ammunition relates to, is not as serious as having a loaded firearm stored in an unsafe manner.

[102] However, in the circumstances of this particular case, to fail to exclude the impugned evidence would be to sanction the results of a ‘fishing expedition’, or ‘pre-search’,

by police. I have already concluded that the Halton officers could have obtained a warrant, but they elected not to.

[103] To rule that the evidence is admissible would seriously diminish the Applicant's section 8 Charter rights by giving approval to the practice of obtaining a warrant to search a home for items which the police have reasonable grounds to believe may be found in an individual's home, and to use that warrant as a means to engage in a separate investigation altogether (reference *R. v. Fawthrop, supra*).

#### DISPOSITION

[104] The Application is granted. All firearms and ammunition seized in respect to these charges are excluded from evidence.

Released: May 10, 2004

A handwritten signature in black ink, appearing to read "L.M. Baldwin", is written over a horizontal line.

Signed: "Justice L.M. Baldwin"

## APPENDIX 'A'

<u>Location</u>	<u>Firearm/Ammunition</u>	<u>Exhibit #</u>	<u>Found By</u>
<p><u>Northwest Bedroom</u></p> <p>Pine Hutch, open shelves</p> <p>Pine Hutch, open shelves</p> <p>Pine Hutch, bottom drawers</p> <p>Closet</p>	<p><u>In Pouch:</u></p> <p>Iver Johnson Handgun No ammunition</p> <p>Astra 7.65 (32 cal.) Handgun with magazine, with ammunition in it. (3 bullets) not in gun.</p> <p>3 boxes .303 cal. ammunition. 3 boxes .303 cal. – blanks. 1 box 7.62 mm blanks.</p> <p>Cooey Rifle</p> <p>Lee Enfield Rifle .303 calibre</p> <p>Lee Enfield Rifle .303 calibre</p>	<p>F 1 – 6 Series</p> <p>F 1 – 6 Series G 1 – 3 Series</p> <p>C – 6</p> <p>C 1 – 5 Series</p> <p>C 1 – 5</p> <p>C 1 – 5</p>	<p>Heller</p> <p>Heller</p> <p>Thompson</p> <p>Thompson</p> <p>Thompson</p>
<p><u>Vehicle on East Side of Residence</u></p> <p>Backseat</p>	<p>Beretta 6.35 mm (25 calibre) Handgun with magazine in pouch 5 rounds of ammunition beside firearm</p> <p>High Standard Supermatic .22 calibre (<u>loaded magazine in handgun</u>)</p>	<p>H Series H 1 – 3</p> <p>H Series H 1 – 3</p>	<p>Heller</p> <p>Heller</p>

## APPENDIX 'A'

<p><u>Master Bedroom,</u> <u>Main Floor,</u> <u>Northeast Side of</u> <u>House</u></p> <p>Closet</p> <p>Dresser, Top Drawer</p> <p>Dresser, Bottom Drawer</p>	<p>Springfield Rifle .22 calibre</p> <p>3 magazines (1 loaded)</p> <p>.303 calibre loose ammunition</p> <p>.22 calibre ammunition</p> <p>.22 calibre ammunition</p> <p>Shotgun ammunition</p> <p>.303 ammunition</p> <p>.25 calibre box</p> <p>Loaded handgun magazine</p> <p>50 centre fire cartridges</p>	<p>K 1 - 3 Series</p> <p>J 1</p> <p>J 1</p> <p>J 1</p> <p>J 2 - 4 J 4</p> <p>J 4</p> <p>J 4</p> <p>J 4</p> <p>J 4</p>	<p>Heller</p> <p>Heller</p> <p>Heller</p> <p>Heller</p> <p>Heller</p> <p>Heller</p> <p>Heller</p> <p>Heller</p>
<p><u>Main Floor</u></p> <p>Hall Closet</p>	<p>Lee Enfield Rifle .303 calibre</p> <p>.303 calibre ammunition</p>	<p>I 1 - 4 Series</p> <p>I 1 - 4 Series</p>	<p>Heller</p> <p>Heller</p>
<p><u>Barn</u></p>	<p>7.62 mm ammunition (1000 rounds)</p>		<p>Heller</p>