

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Bornyk*,
2013 BCSC 1927

Date: 20131022
Docket: X076411
Registry: New Westminster

Between:

Regina

v.

Timothy Dale Bornyk

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Crown: P. Bhatti

Counsel for the Accused: A. Hoem

Place and Date of Trial: New Westminster and Vancouver, B.C.
April 10-12, July 19,
September 5 and 30 and October 7, 2013

Place and Date of Judgment: Vancouver, B.C.
October 22, 2013

I. INTRODUCTION

[1] The accused has been charged with the offence of break, enter and theft.

The charge reads:

Timothy Dale BORNKYK, from the 6th day of July, 2010 to the 7th day of July, 2010, inclusive, at or near Surrey, in the Province of British Columbia, did break and enter a dwelling house, situate at 16988 83A Avenue and commit an indictable offence therein, to wit: theft, contrary to Section 348(1)(d) of the *Criminal Code*.

[2] At the opening of the trial, Crown counsel stated that the Crown’s case “relies on a single fingerprint found inside the home”.

[3] Crown counsel is correct. The only evidence that may connect the accused to the subject home is one fingerprint, which I will refer to as the “latent fingerprint”.

II. BACKGROUND

[4] The testimony of the two homeowners established that while they were away at their cottage in Washington State, their home was broken into and entered. Their testimony confirmed the pictures taken by the RCMP investigators showing a ransacked home and clear signs of forcible entry. They also testified that many of their personal items were missing as a result of the break and enter and that these items were not recovered.

[5] The subject home was for sale at the time of the crime. There had been several “open houses”. The responsible realtor testified that no one who attended when she showed the home was the accused and it would not have been possible for the accused to have been at an open house without the realtor seeing the accused.

[6] One of the homeowners had a hobby/business of purchasing novelty items, displaying them in the home, and then reselling them at an opportune time. The homeowner would order items which he searched for and found on the internet. The latent fingerprint was found on the plastic wrapping of a box containing a carnival ghoulish doll. It was the only fingerprint found in the home.

[7] The homeowner bought the doll and box as part of a group from a U.S. supplier. A private parcel carrier (such as FedEx or UPS) shipped the group of individually packaged dolls directly to the homeowner in one large carton. The homeowner had removed the boxes containing the dolls from the shipping carton and stored them on an upper shelf in the room he had set aside for his collection of novelty items.

[8] The subject box was approximately the size of a large tissue box and was in the shape of a coffin. The box was wrapped in transparent plastic, and the enclosed doll was clearly visible. Printing on the box indicated that the doll and box were part of a series of “Living Dead Dolls”.

[9] The latent fingerprint was found near the bottom of the right side of the Living Dead Dolls box. A large portion of the fingerprint was distorted by ripples in the plastic wrap. For practical purposes, it was a partial fingerprint. The highly distorted portion of the fingerprint included the part where ridge formations such as loops and whorls are normally found.

[10] The case turns on whether the latent fingerprint is, beyond a reasonable doubt, the accused’s fingerprint. All of the other evidence presented excluded any possibility of an innocent explanation for the accused’s fingerprint to be found on the Living Dead Dolls box. Our Court of Appeal’s decision in *R. v. O’Neill*, [1996] B.C.J. No. 398, sets forth the rule that a conviction for a break and enter may be based on a single fingerprint if no other explanation for the fingerprint raises a reasonable doubt.

III. LATENT AND KNOWN FINGERPRINTS

[11] Corporal Wolbeck, an RCMP Forensic Identification Specialist, was qualified without objection as an expert in the identification, comparison and individualization of fingerprints.

[12] In this case, Corporal Wolbeck was first engaged as an investigating officer. He attended the crime scene the morning the break and enter had been discovered,

saw the Living Dead Dolls box and identified its plastic wrap as a surface on which a fingerprint might be found. He used magnetic black powder to locate the latent fingerprint. Ms. E. McGreevy, who was employed by the RCMP as a forensic identification specialist, took a photograph of the latent fingerprint. The photograph was subsequently adjusted in size (smaller or larger as required) and changed for richness from colour to black and white.

[13] Corporal Wolbeck explained that after a person has been fingerprinted his or her fingerprints are placed in the Automated Fingerprint Identification System (“AFIS”), a database of known fingerprints. An unknown latent fingerprint may be compared by an algorithm to all known fingerprints in the AFIS for a possible match.

[14] Shortly after obtaining and adjusting (to a smaller size and to black and white) the photograph of the latent print on the Living Dead Dolls box, Ms. McGreevy submitted it to AFIS. The response was negative and read, in part: “The case has been filed to our unsolved latent base and will be reverse-searched daily against all new incoming 10-point entries.”

[15] The “10-point entries” refers to RCMP form number C-216 which is used to record fingerprints from known individuals which are then added to the database. On the form, each finger and thumb is “printed” individually and also printed as two groups of five (the four fingers of the hand are printed together and then the thumb) of the left and right hands.

[16] On May 4, 2011, Ms. McGreevy received a further response from AFIS indicating a possible match based on a form C-216 from 2006. For Corporal Wolbeck’s expert analysis, he used form C-216 fingerprints taken from the accused on July 21, 2010. At trial, there was no clear explanation as to why neither the 2006 set of fingerprints nor the July 21, 2010 set of fingerprints (the “known fingerprints”) produced a possible match sooner than May 4, 2011.

IV. CORPORAL WOLBECK'S REPORT AND TESTIMONY

[17] Corporal Wolbeck prepared a short report, "Friction Ridge Analysis", with respect to the latent and known fingerprints and gave expert opinion evidence. In his report he stated that he used "[t]he scientific process referred to as ACE-V". ACE-V is the mnemonic for Analysis, Comparison, Evaluation and then Verification. With respect to each of these four steps, his report reads, in part:

Analysis:

The purpose of the analysis has two goals. The first is to determine if there is sufficient ridge detail present to continue with the comparison process while the second allows an individual to understand and explain any discrepancies between the latent and the known fingerprint impressions. Several components make up the analysis which follows here.

(The further components were: anatomical factors, matrix, development medium, deposition pressure, lateral distortion, clarity, and tolerance.)

Comparison:

... is a process where visual comparative measurements, and sometimes physical comparative measurements, are made between the latent impression and the impression from a known donor. The measurements are sequential, spatial and configurative in nature.

Evaluation:

Friction ridge identification is established through the agreement of friction ridge formations, in sequence, having sufficient uniqueness to individualize. During my comparison of the latent impression marked R1 to the known impression, I have found the friction ridge formations were in agreement taking into consideration the various distortions mentioned during the analysis. There are, in my opinion, sufficient unique details to individualize the latent impression to the known.

Verification:

My analysis, comparison and evaluation were verified by Cpl. A. McNaught, a Forensic Identification Specialist. Cpl. McNaught validated my conclusion of individualization.

[18] Corporal Wolbeck concluded:

Based on my training, knowledge and experience, I formed the opinion that the latent impression marked R1, located on the side of the "Living Dead Dolls" box, and the inked impression of the right ring finger, as recorded on the fingerprint form bearing the name of Timothy Dale BORNYK, were deposited by the same person.

[19] In his report, Corporal Wolbeck reproduces enlargements of the latent print as well as the known print of the right ring finger (from the July 21, 2010 C-216). His review focusses on the least distorted portion of the latent print (i.e. that portion not distorted by the ripples in the plastic on the Living Dead Dolls box). As part of the Analysis step, he writes: “[a]reas on the left side of the impression possess a lower level of tolerance and discrepancies in this area should be minimal.”

[20] In his report Corporal Wolbeck illustrated the Comparison step by placing a red dot at a point on the latent print where three ridges (described as a “delta”) joined. From that point on the latent fingerprint, he highlighted in different colours the three ridges and two nearby ridges and then did the same on the enlargement of the known print. The report states: “[t]he friction ridge comparison was completed in sequence between the latent print impression and the known impression until all available ridges had been compared.”

[21] In the Evaluation step, Corporal Wolbeck found that the friction ridge formations of the latent fingerprint and the known fingerprint “were in agreement taking into consideration the various distortions mentioned during the analysis”.

[22] During his testimony, Corporal Wolbeck described his role, his report and the process of his analysis covered by the ACE-V approach. Some noteworthy aspects are:

(a) No Errors Tolerated

[23] The RCMP does not tolerate errors with respect to fingerprint identification:

... It’s interesting to note that any fingerprint individualization that’s made, whether it be at the Canadian Police College or throughout my apprenticeship, if there is any errors made on a fingerprint, it’s immediate withdrawal or removal from the program. There’s no errors allowed in fingerprint identification. That continues today. There is no errors permitted in fingerprint identification.

Q So then does that mean, then, Corporal, that every time you have looked at like an unknown print, or a found print, and compared it to the known print, if you’ve made an identification that’s incorrect, then you are no longer in the position that you’re in, you’re not longer a forensic identification expert?

- A That's correct. We're removed from the program immediately.
- Q You've never made an error?
- A I've never made an error. ...

(b) Relative Size of the Usable Portion of the Latent Fingerprint

[24] The usable portion of the latent fingerprint was small:

... There's something called digit determination, that if I have a fingerprint pattern, I can look at the pattern and I can make a reasonable estimation of what digit that might be.

In the case of R1 here that we found at the scene, we don't have a complete pattern. All we have is what we call the delta, off to the side, a little bit of our fingerprint. We're not able to determine what possible digit that may come from. Fingerprints are broken up into several different patterns, rolls, loops, arches. In this case, when I look at R1, it could either be a loop pattern or a [whorl] pattern, something to that effect.

There's only one of them. There's other smearing beside it, but it's not really that useful to help me figure out which digit it is. ...

(c) High Level of Detail

[25] The level of detail in the usable portion of the latent fingerprint was high:

So we have ridges present. Level 1 clarity alone is not enough to individualize a fingerprint. I can see that there might be ridges present, but if there's no more detail than that, I can't individualize it. There's not enough information present. So I look for level 2 detail. Level 2 detail is the specific ridge path of the friction ridges. Can I follow those ridges, and where do they go? Each ridge is followed, whether the ridge comes and stops abruptly and the other ridge is filling around it, or that particular ridge bifurcates, meaning it splits off into [two].

So that's what I'm looking for with level 2 detail. The bifurcations and the ridge endings, the minutiae or the Galton characteristics, if you will, of that particular fingerprint. They used to be called points. Okay? So the points of the fingerprint. That's what I'm looking for in level 2. If I have sufficient level 2 detail, I can individualize a fingerprint from there. Those are the unique details of everybody's fingerprints. Identical twins may have similar – or the same DNA, but they will have different fingerprints. Everybody's fingerprints are unique in that manner.

The third level of detail, level 3 detail, is the intrinsic fine detail of a fingerprint. These include the actual end shape of

the ridges. When that ridge comes up and comes to an abrupt stop, what is the shape of that ridge? Does it come to a pointed stop or is it a rounded stop? Is the edge of the ridge, as we follow it along, is it jagged? Does it jut out suddenly and then pull back in? Those are the intrinsic level 3 details of a fingerprint. Really fine detail. In fact, [in] a very clear fingerprint, each individual pore can be observed, following along that fingerprint. That is level 3 detail. And if that information is present in a fingerprint, that can have very – it's very unique, and the weight that's put on that information can be very large.

Q And looking at R1, then, Corporal, did you have what you would consider to be or what is considered to be level 3 detail with respect to the latent print R1?

A Yes, there's certainly an abundance of level 2 detail and there is also level 3 detail. I see pores along some of the ridge lines. I see ridge shapes throughout this particular fingerprint.

(d) Low Tolerance

[26] The clearest portion of the latent fingerprint gave rise to low tolerance:

... However, the information contained in the centre of that particular impression, because of the low tolerance, is extremely reliable and the discrepancy between the latent and the known should [be] minimal.

Needs to be pointed out that differences in inking – we're dealing with a fingerprint that was deposited on a surface. I'm also looking at a fingerprint that was deposited on a fingerprint form. There can be some discrepancies, based on the amount of pressure that was put down. The ridge ending that looks like it comes up and stops may, in fact, be a bifurcation, depending on how much pressure is pushed down on that fingerprint when it is being deposited. However, even though some minor discrepancies may be observed between what's a bifurcation and what ridge ending is, the relative location of those characteristics needs to be consistent between the impressions.

(e) Comparison - July 21, 2010 Photocopied Form C-216

[27] For comparison, a photocopy, not the original, of the known fingerprint was used:

Q Do you get a photocopy or an original when you do that comparison?

A Typically it's a photocopy. It's not – it's not a concern. As long as the ridges are clear, I can work with a photocopy without difficulty.

Ideally, an original is best, however, a photocopy is certainly suitable for what I need to do, as long as the ridges are clear on it.

(Ms. McGreevy testified that she gave Corporal Wolbeck a photocopy)

[28] As noted above, the C-216 form from 2006 was not used for the purpose of providing known fingerprints.

(f) Comparison – Detail

[29] The tracing of ridges was used to compare the latent and known fingerprints:

Now, this activity that I just explained is conducted on the entire fingerprint, so there are some very unique details with this fingerprint within the clear area. There's – you continue on throughout the fingerprint, moving up, there's small short ridges which are very unique. There's some ridge features below at the bottom of the fingerprint that are also very unique detail. Within this fingerprint, I counted, without difficulty, approximately 20 – 20 specific ridge details on this fingerprint that I compared. It's not just the points, as they used to call them, that are important, but it's actually the actual shape of each ridge as it proceeds along the ridge path that is also important, and that's why we call this a qualitative and quantitative analysis of the fingerprint. No longer just counting points. It's an actual look at each particular ridge and how it's flowing and how it relates to the ridges around it.

Once I've compared all the ridges available on the latent impression to those on the known impression, I have to evaluate the information that I have – I had looked at. And I have to ask – I have to ask myself questions when I'm looking at this. Is there agreement between the friction ridge formations between the latent impression and the known? And in this case, yes, there is agreement between the friction ridge – friction ridges of both the latent and the known. And is there sufficient uniqueness to individualize this impression? And again, yes, there is sufficient uniqueness to individualize this fingerprint.

At that point, I form a conclusion, and my conclusion is that based on my training, knowledge and experience, I formed the opinion that the latent impression marked R1, located on the Living Dead Dolls box, and the inked impression of the right ring finger, as recorded on the fingerprint form bearing the name of Timothy Dale Bornyk, were deposited by the same person.

(g) **Verification**

[30] Corporal Wolbeck explained the Verification step and the role of the verifier :

Once I have completed this particular stage [evaluation] and reached my conclusion, I then send my file for verification. The purpose of verification is twofold. The verifier needs to ensure that I followed the proper process, my ACE V, my analysis, my comparison, my evaluation process to reach my conclusion. This individual ensures that I have done that. She examines my bench notes, the information that I marked down on my fingerprint, and she also conducts a comparison, as well. And the second reason is to validate my conclusion. She agrees – this individual agrees that I came to the correct conclusion when I did this evaluation.

[31] Corporal Wolbeck testified that Corporal McNaught, an RCMP Forensic Identification Specialist, verified his “analysis, comparison and evaluation” and validated his “conclusion”. Corporal McNaught was not called as a witness.

V. FURTHER LEGAL ARGUMENT

[32] Following a day of legal argument I reserved judgment. During reserve, I became aware of further materials that I brought to the attention of counsel and arranged time for further argument. The further materials are:

- (a) Rt. Hon. Sir Anthony Campbell, “The Fingerprint Inquiry Report”, Scotland, 14 December 2011, APS Group Scotland, Edinburgh;
- (b) National Research Council of the National Academies, “Strengthening Forensic Science in the United States, A Path Forward”, The National Academies Press, Washington, D.C., 2009.
- (c) Expert Working Group on Human Factors in *Latent Print Analysis*. *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach*. U.S. Department of Commerce, National Institute of Standards and Technology, Washington, D.C., 2012.
- (d) S.A. Cole and A. Roberts, “Certainty, Individualisation and the Subjective Nature of Expert Fingerprint Evidence”, [2012] Crim L.R. Issue 11.

[33] Sir Anthony Campbell, the author of the first report, had previously served as a Lord Justice of Appeal of the Court of Appeal of Northern Ireland. Sir Anthony’s report refers to the National Research Council’s study “Strengthening Forensic Science in the United States, A Path Forward”. A co-chair of that study was Chief

Judge Harry T. Edwards, formerly Chief Judge of the United States Court of Appeals in the District of Columbia Circuit.

[34] Prior to further legal argument, Crown counsel sent to me and to defence counsel the following three journal articles:

- (a) Heidi Eldrige: "Meeting the Fingerprint Admissibility Challenge in a Post-NAS Environment", *Journal of Forensic Identification*, 61(5), 2011 at 430.
- (b) Glenn Langenburg: "A Performance Study of the ACE-V Process: A Pilot Study to Measure the Accuracy, Precision, Reproducibility, Repeatability, and Biasability of Conclusions Resulting from the ACE-V Process", *Journal of Forensic Identification*, 59(2), 2009 at 219.
- (c) Michelle Reznicek, Robin M. Ruth and Dawn M. Schilens: "ACE-V and the Scientific Method", *Journal of Forensic Identification*, 60(1), 2010 at 87

[35] I note in Crown counsel's first article that Ms. Eldrige states (at 443): "[m]ost of the well-known errors have occurred in cases involving a single, distorted impression."

[36] Considering limitations and concerns about ACE-V, the Expert Working Group on Human Factors in Latent Print Analysis observes (in part) (at 8):

At every step in the ACE-V process, human factors can affect the outcome. Latent print examiners rely heavily on their training and experience to make the required judgments. Subjectivity is an inextricable part of the process. In the Analysis phase, for example, accurate identification of the characteristics that make prints of value depends on the examiner's knowledge, training, and experience. Likewise, in the Comparison phase, variable factors, such as the elasticity of skin and uneven pressure, mean that there will never be perfect congruence between two prints, even if they originate from the same source. The examiner must resolve the question of whether there is sufficient agreement "within tolerance." As Chapter 3 points out, the examiner at least implicitly relies on a sufficiency threshold to resolve that question, and in setting this threshold, the examiner draws on professional knowledge and experience. There is little research at present that provides objective metrics for determining these tolerances.

Of course, the mere existence of subjective elements does not make the process unreliable or invalid. Humans can perform many tasks involving subjective judgments quite accurately and consistently. For example, by holding a heavy book and a much lighter one in each hand, most people can subjectively - but correctly - tell which is heavier. Thus, the mere presence of

subjectivity is not a valid criticism of the technique, but it does mean that issues related to human factors can be especially salient to the outcome.

Although ACE-V is a systematic process, meaning that the examination proceeds in an orderly and logical fashion, this does not, by itself, demonstrate that the results are accurate and reproducible. In 2009, a committee of the National Research Council (NRC) stated that ACE-V is “a broadly stated framework for conducting friction ridge analyses. However, this framework is not specific enough to qualify as a validated method for this type of analysis. ... Merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results.” Additional study is required to ascertain precisely how well examiners using the process perform under either controlled conditions or in casework, and Chapter 2 describes several possible approaches to developing such information.

Although many in the latent print community describe the ACE-V process as a scientific method (see Chapter 6), the issue is not the label that can or should be attached to the process with respect to human factors. ACE-V is a systematic, skill-based, and widely used process for determining whether two impressions have a common origin. ACE-V designates a logical sequence for a complex process of judgment, but ACE-V itself does not provide substantive guidance about standards to be applied within this sequence. Therefore, even though two examiners might both assert (correctly) that they are using ACE-V, they may be employing different cognitive processes. Those differences create opportunities for human factors to come into play.

VI. FINGERPRINT EVIDENCE IN COURT

[37] The Scottish Fingerprint Inquiry made the following recommendation (at 749):

COPFS [the prosecution authority in Scotland] should pay particular attention to ensuring that fingerprint evidence is presented to the court in such manner as to be readily understood by the judge and jury.

[38] Earlier in its Report, the Inquiry stated (at 610):

... The Inquiry has no reason to doubt that it takes a trained eye to spot a relevant pattern but, once observed, a trained fingerprint practitioner should be able to demonstrate the existence of at least some ‘event’ to the fact-finder, be that a judge or the members of a jury. ...

It is recommended that the test be adopted that features (or ‘events’) on which examiners rely should be demonstrable to a lay person with normal eye sight as being observable in the mark. The fact-finder can trust the evidence of his own eyes: either he sees some ‘event’ in the location indicated or he does not. If not, the evidence of the examiner on that point can be discounted.

VII. TROUBLING ASPECTS

[39] A number of troubling aspects arise from Corporal Wolbeck's report and testimony.

1. *Institutional bias*

[40] The "no errors tolerated" policy may not be as laudatory for fingerprint identification as it would appear at first blush. Institutional bias may result. For example, a forensic identification specialist, believing that an AFIS possible match is more often than not reliable, may subconsciously perceive something as confirmatory when it is not.

[41] Further, if the verifying specialist does not validate the conclusion of the initial specialist and if the verifying specialist is wrong, the verifying specialist will lose his or her position as a specialist. If the verifying specialist is correct then the initial specialist may lose his or her position. Where the matter is close, the verifying specialist may subconsciously be inclined to validate the initial specialist's conclusion because it is less likely to be controversial.

[42] Finally, science and scientific thought, like many areas of learning, thrive on the freedom of thought and the challenge of ideas. While the Court may expect an expert to hold his or her opinion firmly, the Court expects an expert to testify with thought not shackled by the fear of losing his or her position if he or she changes his or her opinion.

2. *Photocopy versus original*

[43] When there is subjective examination of a matter containing precise and fine detail where a person's liberty is at stake, the use of a photocopy rather than the original should, in my view, only occur in the most exceptional of circumstances. Break and enter of a home is a very serious offence: *R. v. Arsenaault*, 1999 BCCA 578.

3. *Bench notes not in evidence*

[44] Corporal Wolbeck's bench notes were not disclosed to defence counsel. On the last afternoon of legal argument, Crown counsel realized that she had been given Corporal Wolbeck's bench notes and Corporal McNaught's verification form prior to the preliminary inquiry which preceded the trial. Defence counsel did not see the records until he was shown them that last afternoon of legal argument.

4. *Corporal McNaught*

[45] Corporal McNaught was not called as a witness. The only evidence that the Court has as to the Verification step, and in particular Corporal McNaught's procedure for verification and her findings, is found in Corporal Wolbeck's report and testimony. Corporal Wolbeck's description of Corporal McNaught's alleged verification is inadmissible hearsay. Although I did not find a Canadian authority directly on point, the New Hampshire Supreme Court (New Hampshire's appellate court) ruled such evidence to be inadmissible hearsay: *New Hampshire v. Langill*, 161 M.H. 218, 13 A. 3d 171 (2010).

[46] Crown counsel agreed that Corporal Wolbeck's description, if tendered to prove Corporal McNaught verified his conclusion, would be inadmissible hearsay. Crown counsel stated that the Crown was only relying on Corporal Wolbeck's description to prove his belief the ACE-V procedure had been followed. That said, without Corporal McNaught's testimony, there is no proof of verification, and no proof that the ACE-V procedure was in fact followed.

5. *That which is not seen in a partial print*

[47] Where there is a partial print, or as in the case at bar a distorted print, the risk arises that there could be exculpatory information unseen in the highly distorted portion of the latent print. As Corporal Wolbeck noted, the latent print did not provide sufficient information to determine which finger it came from without reference to the known print.

6. *Subjective certainty*

[48] The subjective certainty of Corporal Wolbeck's conclusion is not made clear. For example, if one is told that there is one four-leaf clover in a patch of three-leaf clover to be found, although the four-leaf clover may be difficult to find, once found, there is absolute certainty. It may be a different matter, however, to find with absolute certainty in the patch of three-leaf clover a three-leaf clover with a particular yet subtle vein structure which is shown in a photocopy.

[49] The ACE-V technique employs two experts to individualize a latent fingerprint to a known print. This aspect of ACE-V suggests that the certainty of print individualization is closer to that of identifying a particular three-leaf clover in a patch of three-leaf clover than it is to identifying a four-leaf clover in the same patch. If the absolute certainty associated with identifying a four-leaf clover existed, a second expert would not be necessary.

[50] In legal argument Crown counsel described Corporal Wolbeck's conclusion as not excluding other possible matches.

THE COURT: Well once you say the same source is the -- don't you exclude everybody else?

MS. BHATTI: Well --

THE COURT: I mean -- I mean or one of my --

MS. BHATTI: I would say no. I would say you are not excluding. You are leaving that door open for someone to say well here is a source that we say matches that latent print. What do you say now, Corporal [Wolbeck]? And then we have an inquiry. Then we have a space to create evidence that would give Your Honour something -- or your Lordship to give -- something to give doubt in Your Lordship's mind about the Crown's case. We don't have that here, but I say the door is open. The door was always open for my friend to bring evidence to the contrary.

This witness had no doubt that these were from the same source. There was certainly options for another witness, an expert called by the defence perhaps to give, you know, doubt to that, but that was the opinion of our expert who was qualified to give the court that opinion and he had no doubt in his mind, after having done this comparison, that they were from the same source. If he was provided a different source and asked if they were the same that might change his

opinion, but he wasn't asked that question and he wasn't offered an alternate source.

[51] Crown counsel's description raises the question as to whether there would have been other "hits" for Corporal Wolbeck to consider if another or a larger database had been used.

7. *2006 C-216 evidence*

[52] In reaching his conclusion, Corporal Wolbeck did not consider the 2006 C-216 evidence that resulted in the AFIS possible match. To the extent the known fingerprint from 2006 was of better quality than the July 21, 2010 C-216 fingerprints, that evidence should have been used. Again, fingerprint identification has a subjective component often based on fine detail.

[53] Moreover, to the extent there were discrepancies between the 2006 C-216 and the July 21, 2010 C-216 fingerprints, further questions could arise as to the general reliability of the form C-216 process. Corporal Wolbeck testified that some forms C-216 are not satisfactory for fingerprint identification purposes as a result of the manner by which the known prints were taken.

[54] I understand that the 2006 form C-216 was also not disclosed to defence counsel.

8. *Unexplained discrepancies*

[55] In argument, defence counsel noted unexplained discrepancies between the latent and the known fingerprints. Of particular note, in the area of the latent fingerprint stated to be of "low tolerance" and "extremely reliable", two gaps on the latent fingerprint are not visible on the known fingerprint.

[56] If one goes to the ridge immediately to the left of the respective red dots marking the centre of the delta on the latent and the known fingerprints and traces a line towards the top of the page, on the known fingerprint there is a continuous ridge, whereas on the latent fingerprint there is a gap, a further ridge, another gap, and then a further ridge.

[57] In the Evaluation portion of his report, Corporal Wolbeck wrote: "I have found the friction ridge formations were in agreement taking into account the various distortions mentioned during the analysis." His report does not address the gaps. His report states that the area of low tolerance of the latent impression "was not impacted by the existence of the ripples" and does not note this area as "affected by lateral motion of the digit during deposition" (as were the areas near the top and bottom of the impression). Corporal Wolbeck's evidence was also that the latent print was formed as a result of "normal deposition pressure" and that the fingerprints on the C-216 form had been taken properly.

[58] The Court has no evidence from Corporal McNaught if, and if so, how she may have viewed the discrepancies noted by defence counsel, including these two gaps and ridges to the left of the red dot marked on the latent print.

VIII. FINDING AND CONCLUSION

[59] As Corporal Wolbeck testified:

In the case of R1 here [the latent print] that we found at the scene, we don't have a complete pattern. All we have is what we call the delta, off to the side, a little bit of our fingerprint.

[60] In the usable low tolerance portion of the fingerprint, I see unexplained gaps in the latent fingerprint which do not appear on the known fingerprint. As the Scottish Fingerprint Inquiry stated (at 610):

... The fact-finder can trust the evidence of his own eyes: either he sees some 'event' in the location indicated or he does not. If not, the evidence of the examiner on that point can be discounted.

[61] While the usable portion of the latent fingerprint and the known fingerprint are quite similar, I have more than a reasonable doubt that there is a match of the latent fingerprint to the known fingerprint. Accordingly, I acquit the accused.

"Funt J."