Citation: *R. v. Liang, Yeung, Zhu, Zhai, Wen, Zhou, Jiang, Cheung and Xu*, 2007 YKTC 18

Date: 20070405
Docket: 05-00640
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

R e g i n a

v.

Zhu Dong Liang, Kiu Tin Yeung, Guang Xian Zhu, Wei Min Zhai,
Wei Xiong Wen, Jian Xiong Zhou, Min Shan Jiang,
Kwok Yiu Cheung and Zhi Jiang Xu

Appearances:

Ludovic Gouaillier	Counsel for Crown
Mitch Foster	Counsel for Kiu Yeung, Guang Zhu, Jian Zhou and Min Jiang
Gordon Coffin	Counsel for Kwok Cheung
Ken Westlake	Counsel for Wei Wen

RULING ON VOIR DIRE

INTRODUCTION:

[1] This case involves eight individuals jointly charged with numerous counts of production and possession of marijuana and theft of electricity in relation to marijuana grow operations found in six residences in the Whitehorse area. In addition to these joint charges, one defendant, Wei Xiong Wen, stands solely charged with possession of property obtained by the commission of an offence.

[2] This decision relates to a number of preliminary applications brought on behalf of the defendants, which challenge the validity of search warrants and the admissibility of evidence allegedly obtained in breach of the *Charter*. While the

defendants stand jointly charged with 18 of the 19 counts, the facts as presented on the voir dire and the preliminary applications relating to each of the defendants differ substantially. Accordingly, for ease of reference, my findings in relation to the applications before me have been organized by both defendant and/or issue as follows:

1. Yeung and Zhu: traffic stop September 18, 2005
2. Wen: traffic stop September 22, 2005
3. Zhou and Jiang: lawfulness of arrest at 16 Sitka Crescent
4. Zhou, Jiang, Yeung, Zhu, and Zhai: admissibility of fingerprints and photos
5. Wen, Zhou, Jiang, Yeung, Zhu and Zhai: section 10(b)
6. Validity of search warrant for 16 Sitka Crescent
7. Validity of search warrant for 86 Falcon Drive
8. Exclusion of evidence: section 24(2)

1. KIU TIN YEUNG & GUANG XIAN ZHU: Traffic Stop September 18, 2005

[3] Mr. Yeung and Mr. Zhu first came to the attention of the police with respect to this investigation as a result of a traffic stop conducted by Corporal Hamilton on September 18, 2005. As a result of the traffic stop, Mr. Yeung and Mr. Zhu produced identification and provided answers to questions which led to the information filed as exhibit 'i' in these proceedings.

[4] Counsel for Mr. Yeung and Mr. Zhu argues that the traffic stop, the questioning of both accused, and the search, meaning the production of identification and the information flowing therefrom, were in breach of sections 8, 9 and 10(b) of the *Charter*, and therefore, should be excluded pursuant to section 24(2).

Facts:

[5] In the summer of 2005, the Whitehorse RCMP developed suspicions regarding possible marijuana grow operations in several Whitehorse residences. By September of 2005, the various investigations were amalgamated into one

investigation, entitled Project Mobile, under the leadership of Corporal Thomas Wyers.

[6] Corporal Hamilton and Sergeant Hache both reside on Sitka Crescent in close proximity to one of the alleged grow operations located at 16 Sitka Crescent. Over the course of the summer of 2005, both had become suspicious of the activity at 16 Sitka Crescent, suspicions which they discussed with each other and with other neighbours in the area. Neither Corporal Hamilton nor Sergeant Hache had an active role in the Project Mobile investigation, though both forwarded their observations to lead investigators.

[7] Both officers provided evidence on the voir dire in relation to the traffic stop of Mr. Yeung and Mr. Zhu.

[8] Sergeant Hache indicated he had seen a grey van in the area approximately six times. He was not able to identify the van either by licence plate or driver, but was satisfied that it was the same grey van. On one occasion, he saw the grey van parked on Engleman Drive (Sitka Crescent is a crescent off of Engleman Drive) along with a brown van which he had previously seen at 16 Sitka Crescent. He observed four individuals with the two vans and noted them exchange a ladder.

[9] On September 17, 2005, or thereabouts, Sergeant Hache was able to observe the driver of the grey van, whom he describes as an Asian male possibly of Philipino or Vietnamese descent, for some five seconds.

[10] Sergeant Hache did not at any time see the grey van stop at 16 Sitka Crescent.

[11] On September 18, 2005, Sergeant Hache observed a green van while standing and speaking to Corporal Hamilton. He advised Corporal Hamilton that

he believed the driver of the green van to be the same individual he observed driving the grey van the day before, in response, Corporal Hamilton decided to stop the vehicle.

[12] Sergeant Hache indicated he did not at any time see the green van on Sitka Crescent.

[13] Corporal Hamilton confirmed that he had a discussion with Sergeant Hache on September 18, 2005, though his recollection of it is somewhat different. Corporal Hamilton says that he and Sergeant Hache were standing near Corporal Hamilton's driveway when they saw a green van drive past them on Sitka Crescent. He did not see the vehicle stop or slow down, and in particular, did not see it pull into 16 Sitka Crescent. Corporal Hamilton indicated that he understood from Sergeant Hache that the green van was attached in some way to the residence at 16 Sitka. As a result, he decided to stop the green van. He defined his purpose and authority for the stop as follows: he was aware of suspicious activity at 16 Sitka Crescent; he was aware there was a drug investigation; and he felt it was his duty to stop the vehicle and identify its occupants under the *Controlled Drugs and Substances Act*.

[14] At the time, he was in his dog handler's uniform, consisting of blue combat pants and an RCMP t-shirt. He followed the green van in his unmarked Suburban police vehicle, and using the emergency lights, stopped the vehicle on the Alaska Highway just before Wolf Creek.

[15] Corporal Hamilton approached the vehicle, asked for identification from both the driver and passenger. He was provided with driver's licences, which he used to conduct criminal records checks on each. He also asked for and was provided with insurance and registration for the vehicle, which he used to conduct motor vehicle check. Upon completion of the checks, he returned the documents and engaged both the driver and passenger in conversation, eliciting

statements from them regarding what the driver was doing in the Yukon and where the passenger lived.

Issues:

[16] Issues raised by counsel with respect to lawfulness of the traffic stop of the green van can be summarized as follows:

1. Did Corporal Hamilton have statutory authority to initiate the traffic stop?
2. In the alternative, did Corporal Hamilton have grounds to stop and detain the green van for investigative purposes?

Did Corporal Hamilton have statutory authority to initiate the traffic stop?

[17] The Crown takes the position that the provisions of the *Motor Vehicles Act* authorize peace officers to stop vehicles to determine the identity of the driver and to obtain vehicle registration information for investigative purposes which are unrelated to the enforcement of the *Act*.

[18] In support of this proposition, the Crown relies on *R. v. Duncanson,* [1991] S.J. No. 373 (C.A.) out of the Saskatchewan Court of Appeal. *Duncanson* involved a traffic stop pursuant to a tip in a drug investigation. The police stopped the vehicle, ascertained the identity of the driver and searched the driver, locating narcotics.

[19] In assessing the lawfulness of the stop, Cameron J.A. held that the provisions of the *Highway Traffic Act* authorized peace officers to stop vehicles to determine the identity of the driver even where the purpose of the detention was unrelated to the enforcement of the *Highway Traffic Act*:

> Section 40(8) empowers a police officer to stop a vehicle “while in the lawful execution of his duties and responsibilities”. The only qualification, apart from that, is that the police officer be readily identifiable as such. Obviously, the duties and responsibilities of police officers far exceed the

> enforcement of The Highway Traffic Act, and so read in its ordinary sense, the section empowers a police officer to stop a vehicle for any purpose connected with the lawful execution of his or her duties and responsibilities generally, and however derived.
>
> Had the legislature intended to restrict this power to the enforcement of The Highway Traffic Act, it might readily have done so by adding, for example, to the phrase "while in the lawful execution of his duties and responsibilities", the words "under this Act."
>
> It might have limited the powers conferred by ss. 40(8) and 20(1) in other ways as well, and to have done so with equal ease. The sections might have been enacted with words of limitation such as these: a peace officer who "reasonably suspects" or who "has reasonable and probable grounds for believing this Act" is being violated may stop a vehicle and require production of the driver's license. But no such words of limitation were used.
>
> To construe the provisions in issue in the limited way urged upon us would be inconsistent with their language and the intention, as we see it, of the legislature. (p. 6)

[20] Cameron J.A. went on to say:

> They stopped the taxi for the immediate purpose of requesting production of the operator's driver's license. That they had a secondary purpose in doing so, namely the investigation of the reported violation of the Narcotic Control Act, is neither here nor there, that having been part of their general duties and responsibilities.

[21] It should be noted that while *Duncanson* was appealed to the Supreme Court of Canada, the appeal addressed only the issue of exclusion pursuant to section 24(2) and not the issue of the scope of the authority conferred by the provisions of the *Highway Traffic Act*.

[22] Crown suggests that the provisions of the Yukon *Motor Vehicles Act* regarding vehicle stops and production of licences, registration and insurance are analogous to those of the Saskatchewan *Highway Traffic Act*, and urges me to adopt the reasoning of the Saskatchewan Court of Appeal in *Duncanson*.

[23] With respect, I must decline. In my view, the application of the *Duncanson* decision has been significantly curtailed by subsequent decisions, including subsequent decisions of the Saskatchewan Court of Appeal.

[24] In *R. v. Mellenthin*, [1992] 3 S.C.R. 615, the Supreme Court of Canada addressed the issue of random check stops. In the decision, Cory J. confirmed his earlier decision in *Ladouceur v. The Queen* (1990), 56 C.C.C. (3d) 22, to the effect that while random check stops constitute an arbitrary detention contrary to section 9, they are saved by section 1 in view of pressing highway safety concerns. He confirmed, however, that such stops are lawful only to the extent they relate to motor vehicle activity and not to further inquiries or searches:

> The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search. (para. 15)

[25] The Ontario Court of Appeal decision in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482, involved a situation where an officer had information of untested reliability regarding a suspected crack house. The officer stopped a vehicle observed leaving the residence, and subsequently conducted a search. In rejecting the *Highway Traffic Act* as authority for the police to stop vehicles for purposes relating to the investigation of criminal activities, Doherty, J. found:

> Once, as in this case, road safety concerns are removed as a basis for the stop, then powers associated with and predicated upon those particular concerns cannot be relied on to legitimize the stop. Where the stop and the detention are unrelated to the operation of the vehicle or other road safety matters, the fact that the target of the detention is in an automobile cannot enhance the police power to detain that individual. (p. 492-3)

[26] In *R. v. Ladouceur,* 2002 SKCA 73, the Saskatchewan Court of Appeal considered the use of a check stop program called “Operation Recovery” designed to detect both vehicle infractions and the transportation of illegal contraband. In doing so, the court revisited the scope of its earlier decision in *Duncanson* some 11 years earlier, and found that:

> Our Court’s decision in Duncanson, and the Supreme Court of Canada’s upholding of it, cannot be taken as going so far as to say that the police can stop a motor vehicle and search for any offence under the Criminal Code without reasonable cause … (para. 33)

[27] Jackson J.A. went on to say:

> Simpson, which follows Mellenthin in time, reinforces my view of the limits of Ladouceur and Duncanson. Simpson holds that the police must have articulable cause to stop a vehicle for causes unrelated to traffic safety. (para. 34)

[28] In concurring with Jackson J.A., Bayda J.A. addressed the issue of the lawfulness of checkstops with a dual purpose:

> It is well settled that a check stop that has highway safety as its aim (“to check for sobriety, licences, ownership, insurance and mechanical fitness of cars” to use the words of Cory J. in R. v. Mellenthin, [1992] 3 S.C.R. 615 at 624, 76 C.C.C. (3d) 481) is lawful. It is also well settled – and was conceded by the Crown in this case – that a motor vehicle check-stop that has as its aim not highway safety, but the general detection of crime or the indiscriminate identification of criminals using the highway (an “unfounded general inquisition” to use Cory J.’s phrase in Mellenthin at p. 624) is unlawful.
>
> The question then arises: If both of these aims are combined in one check-stop, does the “highway safety” aim (lawful) cleanse the “general detection” aim (unlawful) to make the check-stop lawful or does the latter contaminate the former to make the check-stop unlawful? Or can both aims operate and coexist independently, rendering that part of the check-stop with the lawful aim as lawful and that part with the unlawful aim as unlawful? In my respectful view, the combination of the two aims I have described produces an unlawful check-stop. The two aims cannot co-exist in a lawful check-stop. My reasons for reaching those conclusions are

> these: As noted, the lawfulness of a check-stop whose aim is highway safety stems not from the non-breach of an individual right but from a s. 1 cleansing of a s. 9 breach. That cleansing effect goes only so far. It is rooted in the need for "reducing the terrible toll of death and injury so often occasioned by impaired drivers and dangerous vehicles" to use Cory J.'s words in Mellenthin (p. 624). The cleansing effect does not go so far as to encompass a general detection of crime and indiscriminate identification of criminals. (paras. 64 – 65)

[29] Following this line of cases, I am satisfied that the provisions of the Yukon *Motor Vehicles Act* provide authority for traffic stops only where the purpose of the stop is related to highway safety matters, and not for the purpose of general investigation of criminal activity.

[30] In this case, Corporal Hamilton was clear in his evidence that the purpose of the stop was to ascertain the identity of the occupants of the vehicle as he believed the vehicle to be connected to a suspected marijuana grow operation. His purpose had nothing whatsoever to do with the *Motor Vehicles Act* or highway safety matters. He did not even suggest that he had a dual purpose in mind in making the stop. In such circumstances, the Crown cannot now argue that the *Motor Vehicles Act* provides authority, in hindsight, for the stop.

In the alternative, did Corporal Hamilton have grounds to stop and detain the green van for investigative purposes?

[31] In the alternative, the Crown submits that the green van was lawfully stopped under the common law power of investigative detention.

[32] In *Simpson* (supra), Doherty J.A. confirmed the existence of a common law power to detain for investigative purposes even if there are no grounds to arrest. In defining the scope of the power, he introduced the requirement the police have "articulable cause" to justify the detention. He goes on to define "articulable cause" as follows:

> These cases require a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The requirement that the facts must meet an objectively discernable standard is recognized in connection with the arrest power, (R. v. Storrey (1990), 53 C.C.C. (3d) 316 at p. 324, [1990] 1 S.C.R. 241, 75 C.R. (3d)1), and serves to avoid indiscriminate and discriminatory exercises of the police power. A "hunch" based entirely on intuition gained by experience cannot suffice, no matter how accurate that "hunch" might prove to be. Such subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria detentions could be based on mere speculation. A guess which proves accurate becomes in hindsight a "hunch". (p. 16)

[33] In considering the common law investigative detention power, the Supreme Court of Canada decision in *R. v. Mann* 2004 SCC 52, incorporates both the "articulable cause" concept in *Simpson* and the two-step test for determining whether a police officer was acting pursuant to the common law power to detain set out in *R. v. Waterfield,* [1963] 3 All E.R. 659:

> The evolution of the *Waterfield* test, along with the Simpson articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test. (para. 34)

[34] From these cases, I conclude that investigative detention will be authorized only where an officer has a reasonable suspicion, beyond a mere hunch, based on an objective view of all of the circumstances. When I consider

the test as set out in *Mann* and in *Simpson* in the context of the facts of this case, I find that the evidence before me falls well short of establishing the requisite grounds, particularly as it relates to the required “clear nexus between the individual to be detained and a recent or on-going criminal offence”.

[35] Corporal Hamilton’s belief that 16 Sitka Crescent was the site of a marijuana grow operation is based on his own observations and his conversations with neighbours regarding suspicious activities at the residence, including the use of power tools late at night, never seeing anyone around the residence, the plastic covering the lattice under the deck, and so on. Corporal Hamilton also referred to black plastic covering the basement windows, though I note this is contrary to the other evidence before me which suggested regular blinds. Corporal Hamilton was also aware that 16 Sitka Crescent was the subject of a police investigation though he was not part of that investigation. While the totality of this information falls well short of reasonable and probable grounds to believe that 16 Sitka Crescent is indeed the site criminal activity, I would find that it is at least sufficient to support a reasonable suspicion of criminal activity.

[36] Where I have difficulty, on an objective assessment of the circumstances, is the connection between the green van and its occupants and 16 Sitka Crescent. The green van itself was never seen at 16 Sitka Crescent. The only connection comes from Sergeant Hache’s belief that the driver of the green van was the same individual he saw for approximately 5 seconds driving a grey van. Sergeant Hache believed that grey van to be the same grey van he had seen approximately six times previously in the neighbourhood, though he was never able to confirm that through identifying it by driver or licence plate. He, in turn, felt there was a connection between the grey van and 16 Sitka Crescent as he had observed a ladder exchange between a grey van and the brown van associated with 16 Sitka Crescent.

[37] In my view, any connection between the green van and its occupants and the suspected grow operation is simply too remote to objectively amount to anything more than a hunch.

[38] In addition, I have some concerns relating to the reliability of the evidence on the observations made. In the first place, neither Corporal Hamilton nor Sergeant Hache was part of the investigation into 16 Sitka Crescent. Accordingly, neither officer kept records or notes of their observations. Secondly, there is conflicting evidence as between the two officers. Most notably, Sergeant Hache said that the green van was never seen on Sitka Crescent, while Corporal Hamilton said it passed in front of them on Sitka Crescent. Lastly, I note that Sergeant Hache had only a brief time to observe the driver of the grey van on one occasion as it drove past him. When I consider this in conjunction with his evidence that the green van did not pass in front of them on 16 Sitka Crescent, I have concerns about his opportunity to see the driver clearly and hence his ability to accurately identify him as the same individual he had seen driving the grey van. In coming to this conclusion, I am also mindful of the frailties of identification evidence, particularly identification of individuals of a different racial background. I should note that it appeared that Sergeant Hache was equally mindful of such concerns in his evidence that while he was satisfied the two drivers were one and the same, he was aware that the identification would not satisfy a court.

[39] In the result, I find there to be a lack of a clear nexus between Mr. Yeung and Mr. Zhu and the suspected criminal activity at 16 Sitka Crescent. Accordingly, I am not persuaded that Corporal Hamilton objectively had reasonable grounds to detain Mr. Yeung and Mr. Zhu for investigative purposes. I find the traffic stop to be an arbitrary detention in breach of section 9 of the *Charter*.

2. WEI XIONG WEN: Traffic Stop September 22, 2005

[40] Mr. Wen's involvement in the charges before the court begins with a traffic stop of a vehicle driven by Mr. Wen on September 22, 2005. This stop occurred against the backdrop of a pending request for, and execution of, search warrants at three Whitehorse residences, including 208 Falcon Drive.

[41] Mr. Wen takes the position that his detention, arrest, and searches of both his person and the vehicle he was driving, violate sections 7, 8, 9, and 10 of the *Canadian Charter of Rights and Freedoms*, and that any evidence obtained as a result ought to be excluded pursuant to s. 24(2) of the *Charter*.

Facts:

[42] In late September of 2005, Corporal Wyers prepared Informations to Obtain Search Warrants with respect to three residences: 208 Falcon Drive, 22 Tigereye Crescent, and 23 Black Bear Lane.

[43] At 1:30 p.m. on September 22, 2005, a briefing was held to discuss the assignment of duties with respect to the execution of the search warrants should they be granted. The evidence clearly establishes that Corporal Wyers gave a direction that any persons departing the residences, while the police were awaiting search warrants, were to be stopped and arrested.

[44] At 2:55 p.m., a green Toyota Camry was observed in the driveway of 208 Falcon Drive. The same green Camry had been observed at 208 Falcon on one previous occasion (by Constable Dunmall) on September 9, 2005. At 2:58 p.m., an individual, later identified as Mr. Wen, was seen exiting 208 Falcon and proceeding to the green Camry. He was not observed to be carrying anything or to put anything in the trunk of the vehicle.

[45] When the green Camry departed, Constable Pratte, the officer assigned to be in charge of the search at 208 Falcon, gave a direction that the vehicle was to

be stopped and the occupant arrested for production of marijuana and theft of electricity, as per Corporal Wyers' direction at the earlier briefing. Constable Pratte had been present at that briefing.

[46] The vehicle was stopped by Constable Fradette, driving a marked police vehicle, at 3:00 p.m. Constable Fradette requested that the driver provide him with his driver's license, insurance and registration. The driver complied and was identified as Mr. Wen. It was further learned that the green Camry was registered to, and owned by, another individual, namely Chi Keung Li.

[47] While Constable Fradette was dealing with Mr. Wen's identification, Corporal Hamilton, the police dog handler, arrived to provide backup. Corporal Hamilton testified that some thirty seconds later, Corporal Jamie McGowan arrived and took over. Corporal McGowan approached the vehicle, took Mr. Wen by the arm, asked Mr. Wen to step out of the vehicle, and arrested him for production of marijuana and theft of electricity.

[48] Corporal McGowan advised Mr. Wen of his rights both from memory and by reading the RCMP *Charter* card. It was clear both to Corporal McGowan and to Corporal Hamilton that Mr. Wen did not understand what was being said to him. Mr. Wen was placed in Constable Fradette's marked police vehicle and subsequently transported to the RCMP detachment.

[49] At some point during the traffic stop, Corporal Hamilton noted a white plastic bag with a knot in it located between the driver and passenger seats in the green Camry. He described the bag as feeling like a 'paint palette book'. As he was unable to undo the knot in the bag, Corporal Hamilton tore it open and found it to contain a large sum of money, later determined to be $11,400. He advised Corporal McGowan who decided to make an application for a warrant to search the vehicle. The vehicle was secured and towed to the detachment. It is important to note that there is some dispute on the evidence as to whether the

money was located before or after the arrest of Mr. Wen. For reasons I will explain later, I am satisfied that the money was located after the arrest, not before.

[50] With respect to the green Camry, a search warrant was sought and obtained. Prior to the completion of this process, however, Corporal Hamilton was asked to enter the vehicle to retrieve two garage door openers to see if they would open the garage at 208 Falcon, thereby eliminating the need to use force to gain entry. The garage door openers were removed from the vehicle and transported to 208 Falcon but were unsuccessful in gaining entry to the residence.

[51] The search of the green Camry later conducted pursuant to a search warrant which was subsequently obtained, located the money found earlier by Corporal Hamilton, but no marijuana.

[52] There is no evidence before me to suggest that Mr. Wen had been residing at any of the residences under investigation (indeed his driver's license denotes a Riverdale address), or that he had been observed at any of the residences under investigation, including 208 Falcon Drive, prior to September 22, 2005. In addition to the garage door openers obtained from the green Camry, keys obtained from Mr. Wen were used without success to attempt to gain entry into 208 Falcon.

[53] **Issues:**

[54] Mr. Wen, through his counsel, has raised a number of issues which can be summarized as follows:

1. Was the initial stop of the green Camry for the purpose of detaining and arresting Mr. Wen lawful?

2. If not, was the stop of the green Camry authorized pursuant to the common law power of investigative detention?

3. If so, were there sufficient grounds to arrest Mr. Wen following the stop?

4. Were the subsequent searches of Mr. Wen's person and of the green Camry lawful?

5. Was the warrant to search the green Camry validly issued and lawfully obtained?

[55] In their response, the Crown concedes that if I find the initial detention and arrest of Mr. Wen to be unlawful, I need not consider the issue of lawfulness of the search of the vehicle itself, as the vehicle would not in all likelihood have been available to the RCMP to search but for the initial detention and arrest.

Was the initial stop of the green Camry for the purpose of detaining and arresting Mr. Wen lawful?

[56] In considering the lawfulness of the stop of the green Camry and the detention and arrest of Mr. Wen, I note that the Crown has not specifically argued that authority for the stop can be found in the provisions and powers of the *Motor Vehicles Act*. Nonetheless, as a starting point, it is worth noting that my comments and findings with respect to that issue in the context of the traffic stop involving Mr. Yeung and Mr. Zhu are equally applicable to the traffic stop involving Mr. Wen.

[57] The evidence clearly establishes that the sole reason underlying the stop of the green Camry was the direction given by Corporal Wyers, as relayed through Constable Pratte, to stop anyone leaving the sites of the suspected grow operations while the police were awaiting the search warrants, and to arrest them for production of marijuana and theft of electricity. Accordingly, the traffic stop involving Mr. Wen had nothing whatsoever to do with the fact that he happened to be in a motor vehicle at the time he was stopped.

[58] As the stop was unrelated to any road safety concerns, authority must be found somewhere other than the *Motor Vehicles Act*. While, as noted by Doherty J.A. in *Simpson*, the fact an individual is in a motor vehicle does not enhance the police power to detain, the converse is equally true. Where the police have the lawful authority to stop or detain an individual if they encounter that individual on the street, they are equally entitled to stop or detain them if they happen to be in a motor vehicle.

[59] The first and most obvious police power to consider in examining the justification for the stop is the power to arrest, requiring an examination of whether, in this case, the police had the requisite grounds to effect an arrest at the time of the stop.

[60] Section 495(1)(a) of the *Criminal Code* provides that:

> 495. (1) A peace officer may arrest without warrant
>
> > (a) a person who has committed an indictable offence or who, **on reasonable grounds**, he believes has committed or is about to commit an indictable offence (emphasis added)

[61] In considering the lawfulness of a warrantless arrest in *R. v. Feeney*, [1997] 2 S.C.R. 13, the Supreme Court of Canada confirmed that the test to be applied requires both objective and subjective grounds:

> Section 495(1)(a) sets out the subjective requirement for a warrantless arrest: the peace officer himself or herself must believe reasonable grounds exist. An objective requirement was added in R. v. Storrey, [1990] 1 S.C.R. 241: objectively there must exist reasonable and probable grounds for the warrantless arrest to be legal. (p. 13)

[62] In this case, the initial stop was conducted by Constable Fradette, and the subsequent arrest by Corporal McGowan. There is no evidence before me as to Constable Fradette's grounds, if any, as he was not called to testify, but Corporal

McGowan was clear in his evidence that at the time he attended at the stop he did not himself have reasonable and probable grounds to arrest Mr. Wen, but was acting on the direction given to him by Constable Pratte. Presumably the same can be said for Constable Fradette.

[63] A similar situation occurred in the case of *R. v. Debot* (1989), 52 C.C.C. (3d) 193, wherein one officer who did not himself have the requisite grounds performed a warrantless search of an individual at the direction of another officer. In addressing the question of whether there were reasonable grounds for the search, the Supreme Court of Canada stated the following:

> Since the decision to stop and search the appellant was made by Sergeant Briscoe and not by Constable Birs, it is immaterial, in my view, what knowledge Constable Birs had when executing Sergeant Briscoe's request. Constable Birs was simply following orders; he had no decision to make upon which to bring his own knowledge and belief to bear. It would have made no difference had he known nothing about the case and had merely been on patrol in the area at the opportune time.
>
> The police officer who must have reasonable and probable grounds for believing a suspect is in possession of a controlled drug is the one who decides that the suspect should be searched. That officer may or may not perform the actual search. If another officer conducts the search, he or she is entitled to assume that the officer who ordered the search had reasonable and probable grounds for doing so. Of course, this does not prove that reasonable and probable grounds actually existed. It does make clear, however, that the pertinent question is whether Sergeant Briscoe and not Constable Birs had reasonable and probable grounds. (p. 214)

[64] In the case at bar, the specific decision and direction to stop the green Camry came from Constable Pratte. Constable Pratte was not called as a witness on the voir dire. The only evidence which can be attributed to him can be found in Agreed Statement of Facts #3, marked as exhibit 's' on the voir dire, which confirms that "Cst. Pratte had been present at a meeting held at 14:30 at which a direction was given to arrest any person seen leaving any of the locations to be searched on that day" (paragraph 4). In addition, "Cst. Pratte had

been conducting surveillance on the residence located at 208 Falcon Drive, awaiting the arrival of a warrant authorizing the search of that residence, had seen the green Camry in the driveway of the residence when he took his position at 2:55 pm, and also seen an individual exit the residence and leave in that same vehicle shortly thereafter" at 2:58 pm. (para. 5)

[65] Other than observing the green Camry at 208 Falcon and its departure, there is nothing before me to suggest that Constable Pratte brought any personal knowledge or belief to bear on his decision to give the direction to stop the green Camry and arrest the driver. Rather, he was essentially acting as a conduit for the direction given by Corporal Wyers at the afternoon meeting. Accordingly, it is the grounds of Corporal Wyers in giving that direction which are at issue.

[66] Corporal Wyers did provide evidence on a number of different matters on the voir dire. For the purposes of this issue, his grounds for giving the direction can be summarized as follows: As a result of the investigation, he believed there to be a marijuana grow operation at 208 Falcon Drive and further believed that anyone arriving at or leaving the residence "quite possibly has something to do with it". (transcript p. 60 line 27)

[67] The only other factor that may have played some part in establishing Corporal Wyers' grounds, was the fact that the green Camry had been seen at 208 Falcon Drive on one prior occasion by Constable Dunmall on September 9, 2005. As lead investigator, Corporal Wyers would have been aware of or at least had access to this information, and indeed, later, he specifically referred to it in the Information to Obtain the search warrant for the green Camry.

[68] However, in terms of the direction given, pursuant to which Mr. Wen was detained and arrested, I cannot find on the evidence that the prior attendance of the green Camry at 208 Falcon Drive constituted, in any way, part of Corporal Wyers' grounds. Firstly, the direction given was a blanket direction to arrest **any**

persons leaving any of the three targeted residences. It did not refer in any way to specific vehicles or persons with previously observed connections to the three residences. In addition, Corporal Wyers agreed on cross-examination that, other than the fact Mr. Wen was observed leaving 208 Falcon Drive, he had no reasonable and probable grounds to arrest him. He makes no mention of the observance of the green Camry at 208 Falcon Drive on one prior occasion. From his response, it is clear that the prior attendance of the green Camry at 208 Falcon Drive did not form part of his grounds.

[69] There is no suggestion that Constable Pratte was aware of the green Camry's prior attendance at 208 Falcon Drive on September 9th. Corporal Wyers confirmed that he was told of the vehicle stop **after** the stop had been made (transcript p. 47 line 23 to 25); therefore, there was no opportunity for Corporal Wyers' knowledge of the green Camry's prior attendance to be relayed to Constable Pratte such that it would have informed Constable Pratte's decision to issue the direction to stop the green Camry and arrest the driver.

[70] Similarly, there is no suggestion that Constable Fradette, Corporal Hamilton or Corporal McGowan were aware or made aware at any time of the green Camry's prior attendance at 208 Falcon Drive.

[71] I am satisfied that the prior attendance of the green Camry did not in any way factor into Corporal Wyers' grounds for directing the detention and arrest of anyone leaving any of the suspected grow operations. If I am wrong in this conclusion, I would adopt the reasoning of the B.C. Court of Appeal in *R. v. Coull and Dawe* (1986), 33 C.C.C. (3d) 186, in which the court noted that "[t]he fact that [the accused] had been seen at the residence once before is equivocal. It certainly does not demonstrate that he lived at the premises or that he exercised any measure of control over them". (p. 191)

[72] With respect to the subjective element of the test, even when faced, on cross-examination, with possible innocent explanations for attendance at the residence, Corporal Wyers steadfastly maintained throughout his belief that anyone arriving at or leaving one of the suspected grow operations could quite possibly have something to do with the grow operation and therefore would be lawfully arrestable. I have my doubts as to whether Corporal Wyers honestly believed this or whether he was simply reluctant to admit the obvious. Furthermore, I am not satisfied that a belief that someone "quite possibly has something to do with" a grow operation can be said to amount to a belief that that someone has committed the offence of production of marijuana, particularly, where there is no individualized information to implicate them, as is the case with Mr. Wen. In my view, Corporal Wyers' subjective belief amounts to nothing more than a suspicion of criminal involvement.

[73] I have similar concerns in conducting an examination of the objective element of the test.

[74] In arguing that the stop of the green Camry was justified on the basis that there were reasonable grounds to arrest Mr. Wen, the Crown relies heavily on the B.C. Court of Appeal decision in *R. v. Le,* 2006 BCCA 463, suggesting that it is factually on point. I note that there are some factual similarities between the two cases, though ultimately the case is distinguishable in my view. In *Le*, the police were awaiting a warrant when a white Honda was seen leaving the residence of a suspected marijuana grow operation. The vehicle was stopped and the occupant arrested. In reviewing the lawfulness of the arrest, the Court of Appeal found the officers to have reasonable grounds to make the arrest on both a subjective and an objective basis.

[75] In my view, however, the *Le* decision is distinguishable on its facts. Firstly, and most importantly, in *Le* there was a significant connection between the white Honda and the suspected grow operation which simply does not exist

in this case. An informant had provided information that that same vehicle had been seen at the property every few days. Police surveillance had corroborated the informant's information to some extent, by observing the white Honda at the residence on five separate occasions. In addition, on the date in question, the white Honda had been at the residence for an extended period of time, in excess of three hours, before departing. All of this information was known to both officers and formed part of their grounds to believe that they had the basis to stop that particular white Honda and arrest its occupant.

[76] In some ways, there are more factual similarities between the case at bar and the B.C. Supreme Court decision in *R. v. Ashtari*, 2004 BCSC 546, notwithstanding the fact the two cases relate to arrests for different offences. In *Ashtari*, the police had received information with respect to a stolen vehicle located at a residence. While surveilling the property, the police officer observed a man leave the residence, and made the decision to arrest him for possession of stolen property.

[77] In addressing the officer's grounds for the arrest, Ehrcke J. stated the following:

> When he saw the accused leave the front door of the residence, he did not know who he was, whether he was the tenant or whether he was the suspect. He agreed that he did not know that the accused had committed any criminal offence. He agreed that he effected the arrest for possession of stolen property of the Volkswagen, before the accused had either reached or touched the vehicle.
>
> I find that there was no objective basis upon which to conclude that there were reasonable and probable grounds to believe that the man leaving the residence was connected with this offence. The offence in question is possession of stolen property of the Volkswagen as that is what Constable Shokar arrested him for. There was simply no evidence that the man leaving the house had asserted any possession or control of that vehicle. (paras. 23 & 24)

[78] Similarly in this case, the officers had no knowledge as to what, if any, connection Mr. Wen had to the property and the suspected grow operation. To their knowledge he was only at the property for a matter of minutes, and was not seen to take anything into or out of the residence. They had absolutely no evidence of active participation in the growing of the prohibited plants or the theft of electricity, or even evidence that Mr. Wen had knowledge thereof.

[79] Absent individualized information as to Mr. Wen's involvement in the commission of the suspected offence, I fail to see how Corporal Wyers can in any way be said, on an objective basis, to have had reasonable grounds to believe that Mr. Wen had committed the offences of production of marijuana and theft of electricity. Having so concluded, I am of the view that the stop of the green Camry cannot be justified on the basis the police had reasonable grounds to arrest Mr. Wen.

Was the stop of the green Camry authorized pursuant to the common law power of investigative detention?

[80] In the alternative, the Crown argues that the stop of the green Camry was justified on the basis of the common law power to detain for investigative purposes. Again, my earlier comments with respect to investigative detention in the context of the traffic stop involving Mr. Yeung and Mr. Zhu are appropriately incorporated here. To briefly reiterate, case law clearly confirms the existence of a common law power of investigative detention. The test to be applied is well summarized by Lowry J.A. in *R. v. Greaves*, 2004 BCCA 484, a decision of the B.C. Court of Appeal:

> In order that an investigative detention not be arbitrary and thereby offend s. 9 of the Charter, it must fulfill two conditions. First, the police must have "reasonable grounds to detain" in the sense that they reasonably suspect that the individual detained was involved in a crime under investigation. There must be both a subjective and objective basis for that belief. Second, the detention must be "reasonably necessary" in all the

> circumstances, including the nature of the liberty interfered with and the public purpose the interference serves. (para. 33)

[81] The standard required is clearly less than would be required for an arrest, but must be more than a mere hunch.

[82] In applying this test to the facts of this case, the relevant grounds to detain are again those of Corporal Wyers. While I have made the finding that the grounds as held by Corporal Wyers were insufficient to support an arrest, I am nonetheless of the view that they provide a sufficient subjective and objective basis for an investigative detention.

[83] With respect to the subjective element, I would reiterate my earlier finding that Corporal Wyers' belief that anyone arriving at or leaving the sites of the suspected grow operations quite possibly has something to do with those grow operations amounts to a suspicion of involvement, insufficient to support an arrest, but sufficient to support an investigative detention.

[84] With respect to the objective element, the police believed 208 Falcon Drive to be the site of a marijuana grow operation. They were in the process of applying for a warrant to search the premises on that basis. The presence of Mr. Wen not just at 208 Falcon Drive, but inside the residence, for however short a period of time, is enough objectively to give rise to a suspicion that he is involved in the suspected grow operation, a suspicion that I would characterize as more than a mere hunch.

[85] In coming to this conclusion, I am mindful of the factual basis for the Court's decision in *R. v. Mann*, in which it was held that the facts of a young man matching the general description of the perpetrator of a break and enter and walking in the general vicinity of the break and enter were sufficient to justify an investigative detention.

[86] With respect to the second branch of the test, reasonable necessity, I am satisfied that given that Mr. Wen was leaving the site of a suspected grow operation in a motor vehicle, and that his identity at that point was unknown to the police, it was reasonably necessary for the police to detain him to pursue an investigation of his identity and his involvement, if any, in the suspected grow operation. There would have been no way of locating him at a later time to pursue the investigation had he not been stopped.

[87] I am satisfied that the test for investigative detention has been met and that the stop of the green Camry was justified on the basis of the common law power to detain for investigative purposes.

Were there sufficient grounds to arrest Mr. Wen following the stop?

[88] The next question is whether the observations made as a result of that lawful stop are sufficient to provide the basis for a lawful arrest of Mr. Wen. In particular, Corporal McGowan stated that both the money located in the green Camry and the smell of fresh marijuana he detected upon approaching the vehicle formed part of his grounds to arrest.

[89] Dealing first with the issue of the money located in the green Camry, I note that there is conflicting evidence before me as to when that money was indeed located.

[90] Corporal McGowan testified that as he was first approaching the green Camry, he was advised by Corporal Hamilton that there was a bunch of money on the passenger seat of the vehicle. He then testified that when he arrived at the vehicle, he was able to observe a white plastic bag on the passenger seat, and while he could not see the actual money through the opaque bag, he was of the view that the wrapping was consistent with the packaging of large sums of

money which he had seized in some 5 to 10 other cases. Corporal McGowan asserted that the presence of a large sum of money in the vehicle formed part of his grounds to arrest Mr. Wen.

[91] Corporal Hamilton, on the other hand, testified that he did not find the money until after the arrest of Mr. Wen. Corporal Hamilton had been asked to secure the vehicle for towing. To do so, he entered the driver's seat of the vehicle to remove the keys, and, it was at that point that he noticed a white plastic bag sitting in between the driver and passenger seats. He picked it up, noting that it felt like a 'paint palette book", which he explained to mean a book of different paint chips such as one might consult in choosing paint colours for decorating. The bag was knotted, and as he was unable to undo the knot, he tore a small hole in the plastic bag through which he observed the contents of the bag to be a stack of money. He advised Corporal McGowan of the money at that point, and Corporal McGowan made a decision to seek a search warrant for the vehicle.

[92] Unfortunately, Constable Fradette was not called as a witness on the voir dire. His evidence was admitted by way of an agreed statement of facts, but there is no mention in that agreed statement of facts as to his recollection of when and how the money was located in the green Camry.

[93] In deciding whether to prefer the evidence of Corporal McGowan or Corporal Hamilton on this point, there are several factors which are important to consider. Firstly, even though Corporal McGowan spent several minutes after arresting Mr. Wen recording items in his notebook, he made no note of the circumstances and timing of the finding of the money. Secondly, Corporal McGowan arrested Mr. Wen only for production of marijuana and theft of electricity as per the direction he received from Constable Pratte. He did not arrest Mr. Wen for possession of property obtained by the commission of an

offence, suggesting to me that the money was not, in fact, something he factored into his grounds for arresting Mr. Wen.

[94] In addition, I found Corporal Hamilton's description of when and how he found the money to be extremely credible. His version was plausible and detailed, and included unique descriptive elements such as the 'paint palette book' which illustrate a clear and detailed recollection.

[95] For these reasons, I prefer the version presented by Corporal Hamilton, and find as a fact that the money was located after the arrest of Mr. Wen, when Corporal Hamilton was securing the vehicle for towing. Accordingly, I find that Corporal McGowan was mistaken as to when the money was located and that the existence of the money in the green Camry did not and could not have formed part of his grounds for arresting Mr. Wen.

[96] With respect to the smell of marijuana, Corporal McGowan indicated that upon arriving at the green Camry he noted a strong smell of fresh marijuana emanating from the vehicle. He testified that through experience and training he has had occasion to smell both burnt and fresh marijuana, and, in particular has had occasion to smell fresh marijuana in excess of 50 times. Corporal McGowan indicated that the smell of fresh marijuana formed part of his grounds to arrest Mr. Wen.

[97] Corporal Hamilton testified that he noticed a pungent smell which smelled like marijuana to him when he arrived at the green Camry.

[98] Again, Constable Fradette did not provide evidence. The agreed statement of facts makes no mention of whether or not he noted a smell of marijuana, when he approached the Camry or at any time while he was assisting in the motor vehicle stop and arrest of Mr. Wen.

[99] There are a number of cases which examine whether smell of marijuana can constitute reasonable grounds for an arrest. *R. v. Polashek*, [1999] O.J. No. 968, out of the Ontario Court of Appeal, involved an individual stopped for a traffic violation. The officer noted a strong odour of marijuana coming from the vehicle. When the police officer stated he smelled marijuana, the accused denied it. Based on the smell, the accused's response, the area where the stop took place, and the time of night, the police officer believed he had grounds to arrest the accused for possession of narcotics and subjected the accused to a search.

[100] One of the issues at trial in *Polashek* was whether the smell of marijuana constituted reasonable and probable grounds to arrest, thereby justifying the search as incident to a lawful arrest. The Ontario Court of Appeal held that in the circumstances of the case, the presence of odour alone did not constitute reasonable and probable grounds to arrest, although other circumstances contributed to make the arrest reasonable. The court noted that

> The sense of smell is highly subjective and to authorize an arrest solely on that basis puts an unreviewable discretion in the hands of the officer. By their nature, smells are transitory and thus largely incapable of objective verification. (para. 13)

[101] However, the court went on to reject the accused's argument that the presence of marijuana alone can never provide the requisite grounds for arrest. The circumstances in which the olfactory observation was made will determine the matter, and officer training and experience will play a role in convincing the trial judge that the arresting officers possess sufficient expertise that their opinion of present possession can be relied upon.

[102] Two important points to take from *Polashek*, therefore, are firstly, that the olfactory perception is highly subjective and must be treated cautiously; and

secondly, that in certain circumstances smell alone may provide grounds for arrest.

[103] In applying these points to the case before me, I conclude that I would give little, if any weight, to Corporal Hamilton's observations with respect to the smell of marijuana. In the first place, he made no mention of observing any smell of marijuana during his direct examination, something one would consider to be a crucial fact in any drug investigation. It was not until specifically asked about smell in re-examination, that Corporal Hamilton referred to having smelled something which smelled like marijuana to him. He provided no description of the type of marijuana, burnt versus fresh, nor did he provide any evidence regarding his training or experience in detecting such smells. For these reasons, his evidence on this point is not persuasive.

[104] With respect to Corporal McGowan's observations as to smell, the evidence clearly establishes that he has the requisite training and experience to detect the smell of marijuana, both burnt and fresh; however, I nonetheless have two concerns with respect to his evidence on this point: reliability and whether smell did indeed form part of his subjective grounds for arrest.

[105] With respect to reliability, Corporal McGowan is a seasoned officer with a great deal of experience in drug investigations. Clearly, he would understand the importance of observations such as smell to such an investigation and the importance of recording such observations in his notes. However, the evidence was clear that while Corporal McGowan took several minutes to record a number of facts and observations in his notes while at the scene, including such things as Mr. Wen's name, birthdate, driver's licence number and address, all items arguably of somewhat lesser importance than the smell of marijuana and the officer's grounds for making an arrest, Corporal McGowan made absolutely no notes with respect to his observations concerning the smell he says he detected emanating from the green Camry. When I couple this failure with the fact that I

have already found him to be mistaken with respect to when and how the money was located in the vehicle, I find that I have serious concerns about the reliability of Corporal McGowan's evidence with respect to the smell of marijuana. I would also note that even though the vehicle was eventually searched, no marijuana was found within the vehicle to support the evidence of smell.

[106] With respect to Corporal McGowan's subjective grounds for arrest, I note that on cross-examination Corporal McGowan had the following exchange:

> Q. …And fresh marijuana, of course, is marijuana that is recently harvested, correct?
>
> A. Recently harvested or in the process of growing. It's the same smell.
>
> Q. Well, it wouldn't be growing in a car?
>
> A. No, that is correct.
>
> Q. So this would be marijuana that was recently harvested?
>
> A. Correct.

[107] This exchange suggests to me, that, quite rightly, Corporal McGowan believed that any smell he detected was indicative of the possible presence of marijuana in the vehicle. This in turn would give rise, potentially, to grounds to arrest for possession of marijuana. It is important to note that possession is not an included offence to the offence of production of marijuana. The B.C. Court of Appeal in *R. v. Powell* (1983), 9 C.C.C. (3d) 442, found that the gravamen of the offence of cultivation is active participation in the growing of the prohibited plants, which does not necessarily require possession; therefore, possession is not an included offence.

[108] I note again that Corporal McGowan arrested Mr. Wen only for production of marijuana and theft of electricity, and not for possession of marijuana. I would also note that Corporal McGowan effected the arrest immediately upon arriving

at the scene. These factors suggest to me that the subjective grounds he employed in arresting Mr. Wen were solely those flowing from Corporal Wyers' direction as conveyed by Constable Pratte. I am not satisfied that Corporal McGowan brought any personal knowledge or observations to bear in making the arrest.

[109] Given the caution with which the court must approach the highly subjective perception of smell, I find that I am not satisfied either with the reliability of the evidence in relation to smell which raises concerns for me in relation to the objective grounds for arrest, nor am I persuaded on the evidence that it formed part of the subjective grounds for the arrest of Mr. Wen. In the result, I conclude that, while the stop of the green Camry was justified based on the common law power to detain for investigation, the arrest of Mr. Wen was not lawful as the police did not, subjectively or objectively, have the requisite reasonable grounds to believe that Mr. Wen had committed the offence of production of marijuana and theft of electricity.

Were the subsequent searches of Mr. Wen's person and of the green Camry lawful?

[110] At this point, I would note again, the Crown's concession that if I find the arrest to be unlawful, I need not consider the lawfulness of the search as the vehicle would not have been available to search without the arrest of Mr. Wen. However, I am of the view that, out of an abundance of caution, one final point should be briefly addressed.

[111] While the police did not have the authority to search Mr. Wen or the vehicle as incident to arrest given my findings that the arrest was not lawful, the police nonetheless did have a limited search power incident to investigative detention.

[112] The case law makes it clear that this limited search power is restricted to protective purposes (R*. v. Johnson,* 2000 BCCA 204, *R. v. Calderon and Stalas* (2004), 188 C.C.C. (3d) 481). In this case, Corporal Hamilton did suggest, on direct examination, that he opened the bag containing the money for safety reasons as it felt suspicious and the individual had just come from a suspected grow operation. However, on cross-examination, he suggested he opened the bag because he was "curious".

[113] In considering the evidence of Corporal Hamilton, I am not persuaded that he had any valid safety purpose to justify searching the vehicle, and in particular, opening the bag. His description of the contents of the bag as feeling like a 'paint palette book' is not consistent with anything which would suggest a safety concern. Furthermore, even if the bag did contain something which could give rise to a safety concern, at the time Corporal Hamilton opened the bag, Mr. Wen was handcuffed and in the back of a police vehicle where he had no access to the contents of the bag. I find that the search of the vehicle and the bag found within the vehicle were not justified under the limited power to search incident to investigative detention.

[114] As a final point, nor could the police rely on the doctrine of plain view to justify the search, since the bag, and not the money contained therein, was all that was visible.

Was the warrant to search the green Camry validly issued and lawfully obtained?

[115] Given my above findings, it is not necessary, in my view, to address this issue in this decision.

3. JIAN XIONG ZHOU & MIN SHAN JIANG: Lawfulness of Arrest

[116] Mr. Zhou and Mr. Jiang were arrested during the course of a search conducted at 16 Sitka Crescent. They argue that their arrest, in the circumstances, was unlawful.

Facts:

[117] At 10:38 a.m. on the 28th of September, 2005, the RCMP attended at 16 Sitka Crescent to execute a search warrant. Entry was gained to the residence when Mr. Zhou responded to a knock at what appears to be the main entry to the residence located on the west side of the building. Corporal McGowan noted a strong smell of marijuana detectable as soon as the door was opened. Corporal Wyers noted a pungent smell of fresh marijuana detectable shortly after entry.

[118] According to Corporal McGowan, Mr. Zhou appeared to have just woken up and was wearing attire which Corporal McGowan referred to as pyjamas, (though they appear to have actually been long johns and a top of some sort). Mr. Zhou was detained immediately upon entry.

[119] Corporal McGowan then proceeded to the master bedroom with Corporal Wyers. Mr. Jiang was located in the master bedroom. Mr. Jiang was advised he was under arrest and was instructed to lay on the floor. He was handcuffed and Chartered from memory. Corporal Wyers felt that Mr. Jiang understood as he was responsive to commands and provided one word answers. Corporal Wyers then took Mr. Jiang into the living room to await transport.

[120] Corporal McGowan proceeded from the master bedroom to clear the rest of the house. Three small trays of marijuana clone plants were found in one of the spare upstairs bedrooms, and a commercial marijuana grow operation was located in the basement. The door leading from the upstairs into the basement was locked and had to be breached to gain entry to the basement.

[121] Corporal McGowan returned to find Mr. Zhou handcuffed and prone on the floor. Corporal McGowan arrested him for production of marijuana and informed him of his rights from memory, but it was apparent to Corporal McGowan that Mr. Zhou did not understand what was being said to him.

Were the arrests of Mr. Zhou and Mr. Jiang lawful?

[122] As noted above, section 495 of the *Criminal Code* provides the statutory authority for the police to arrest an individual whom they have reasonable grounds to believe has committed or is committing a criminal offence.

[123] The test to be applied in assessing the validity of an arrest is set out by the Supreme Court of Canada in *R. v. Storrey*, [1990] 1 S.C.R. 241:

> In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest. (para. 17)

[124] Defence counsel, on behalf of Mr. Zhou and Mr. Jiang, argues that police did not have reasonable and probable grounds to believe that Mr. Zhou and Mr. Jiang were involved in the production of marijuana at 16 Sitka Crescent. This submission is based on the following:

1. The evidence was clear that neither Corporal Wyers nor Corporal McGowan had any prior knowledge regarding any connection between the accused and 16 Sitka Crescent. They did not know how long the two had been in the home or the nature of their connection.

2. There was no marijuana or related paraphernalia located in either of the two rooms Mr. Zhou and Mr. Jiang were located in.

3. The only related material located upstairs in the home were the clone plants located in one of the bedrooms, and neither Mr. Zhou nor Mr. Jiang were located in that room.

4. There was no access from the main floor to the basement where the grow operation was located, and no keys were found on Mr. Zhou or Mr. Jiang to provide access.

5. Mr. Zhou and Mr. Jiang were arrested fairly immediately, before the grow operation was discovered in the basement.

[125] With respect to point 5, defence relies on the reasoning of the B.C. Provincial Court in *R. v. Bui,* 2005 BCPC 210, to argue that neither Mr. Zhou nor Mr. Jiang could be arrested until the marijuana grow operation had actually been discovered:

> On the facts, there was an objective constellation of discernable facts which justified the stop, the detention, the questioning and investigation of those persons. The officers who were executing the search warrant were justified in detaining those persons present in the house. They could do so for two foundations that are very reasonable: (1) to investigate them and to question them with respect to their presence at this place; and (2) to prevent them from, in any way, destroying evidence or interfering with the search. But they were not arrestable until the search disclosed items which provided reasonable and probable grounds that they were parties to the production and cultivation of cannabis marihuana in that premise. A search warrant does not include the power of arrest. (para. 81)

[126] In addressing this point, defence counsel referred, in submissions, to the fact that the arrests were effected before the clone plants and grow operation were actually discovered in the search. My notes of Corporal McGowan's evidence indicate that, while this is indeed the case for Mr. Jiang, it is not the case for Mr. Zhou. In addition, the test requires that the officers had reasonable grounds to believe that an offence had been or was being committed and that Mr. Zhou and Mr. Jiang were implicated in the commission of that offence. The police were not required to confirm that an offence had indeed been committed before they were empowered to arrest, so long as their belief that an offence had been committed was based on reasonable grounds.

[127] However, the real thrust of the defence's argument is based on whether the police had reasonable grounds to believe that Mr. Zhou and Mr. Jiang were implicated in the commission of a criminal offence given the lack of knowledge regarding their connection to the property.

[128] In assessing this issue, the following factors are of significance in my opinion:

1. The police had reasonable grounds to believe that 16 Sitka Crescent was the site of a marijuana grow operation as set out in the Information to Obtain the search warrant.

2. The police noted a strong smell of fresh marijuana upon entering the premises.

[129] In light of my earlier comments regarding the smell of marijuana, it is likely appropriate to make some comments on the evidence of smell in the context of this particular issue. Firstly, there was nothing before me which affected the reliability of the officers' evidence as to smell in this instance, and indeed, the discovery of the grow operation in the basement confirmed the evidence as to smell. Furthermore, smell is only one of several relevant factors comprising the officers' grounds to arrest Mr. Zhou and Mr. Jiang. In *R. v. Bracchi,* 2005 BCCA 461, the B.C. Court of Appeal made it clear that application of the reasonableness test is on the totality of the circumstances and not on individual factors:

> I agree with the Crown that the trial judge applied the legal standard incorrectly. He should have determined whether the circumstances upon which the Crown relied as objective justification for the arrest, considered cumulatively, amounted to reasonable and probable grounds for the arrest. (para. 21)

[130] To continue my list of significant factors:

3. The police had information to suggest that two young Asian males were residing at 16 Sitka Crescent, information confirmed to some extent by the presence of Mr. Zhou and Mr. Jiang in the home.

4. Mr. Jiang was located in the master bedroom which contained a bed, a computer, and personal effects including a letter addressed to Mr. Jiang at 16 Sitka Crescent.

5. Another bedroom in the home showed signs that someone was staying there as it included an unmade bed and personal effects.

6. Mr. Zhou appeared to have just woken up.

7. In one of the bedrooms, on the main floor, the police located 120 marijuana clone plants growing under two four-foot fluorescent light fixtures. The electrical connection to the lights was connected to the electrical diversion in the basement.

[131] These factors, when viewed together, objectively support the belief that 16 Sitka Crescent is the site of a marijuana grow operation, and that Mr. Zhou and Mr. Jiang are more than just casual visitors to the home. There is sufficient evidence to support the belief that they were residing in the home, and as residents it is reasonable to believe that they were aware of and exercising some control over the marijuana grow operation in the basement of the residence.

[132] The only factor which causes me some concern is the question of access to the basement. Without the locked door, I would have no hesitation in finding that the officers, both subjectively and objectively, had the grounds to arrest Mr. Zhou and Mr. Jiang.

[133] When considering the impact of this factor, I am reminded again of the words of Cory J. in *Storrey* indicating that the police “are not required to establish a prima facie case for conviction before making an arrest”. Being mindful of the reduced standard to be met in asserting the lawfulness of an arrest as opposed to establishing the commission of an offence at trial, I come to the conclusion that, while the restricted access to the basement reduces the strength of the

grounds to arrest, it does not, when considered in conjunction with all of the other factors, undermine the grounds to the extent that I would find that the officers did not have reasonable and probable grounds. In particular, I note that the presence of the clone plants and the connection between the lights upstairs and the electrical diversion in the basement provide a sufficient link to support a reasonable belief that anyone with some degree of control over the main floor is connected to the activities in the basement.

[134] I am satisfied on the totality of the evidence that the arrests of both Mr. Zhou and Mr. Jiang were lawful and proper.

4. JIAN XIONG ZHOU, MIN SHAN JIANG, KIU TIN YEUNG, GUANG XIAN ZHU, & WEI MIN ZHAI: Admissibility of Fingerprints and Photos

[135] Defence counsel for the above-noted accused take the position that the fingerprints and photographs taken of all five of these accused were taken before they were charged, and is therefore a breach of section 8 of the *Charter*.

Facts:

[136] Mr. Zhou and Mr. Jiang were arrested on September 28, 2005 at approximately 10:58 and 10:44 a.m. respectively. Mr. Zhou was fingerprinted and photographed between 12:18 and 12:34 p.m. on September 28, 2005. Mr. Jiang was fingerprinted and photographed between 12:35 and 12:50 p.m. on September 28, 2005. The Information setting out the charges against Mr. Zhou and Mr. Jiang was sworn on September 29, 2005.

[137] Mr. Yeung and Mr. Zhu were arrested between 4:55 and 5:30 p.m. on September 22, 2005. Both were photographed shortly after arrival on September 22, 2005. Mr. Yeung was fingerprinted between 11:24 and 11:48 a.m. on September 23, 2005. Mr. Zhu was fingerprinted between 11:47 a.m. and 12:00 p.m. on September 23, 2005. The Information charging Mr. Yeung and Mr. Zhu was sworn between 11:00 a.m. and 12:00 p.m. on September 23, 2005.

[138] Mr. Zhai was arrested between 4:37 and 4:58 p.m. on September 22, 2005. He was fingerprinted and photographed between 11:27 and 11:35 a.m. on September 23, 2005. The Information charging Mr. Zhai was sworn between 11:00 a.m. and 12:00 p.m. on September 23, 2005.

Issues:

(1) Does the *Identification of Criminals Act* occupy the field or does it augment a common law power to fingerprint as a search incident to arrest?

(2) If the *Identification of Criminals Act* occupies the field, should the term “charged” be interpreted broadly or narrowly?

(3) Were the photographs and fingerprints taken in breach of section 7 and 8?

[139] The *Identification of Criminals Act* sets out the following authority with respect to the taking of fingerprints and photographs:

> 2(1) The following persons may be fingerprinted or photographed or subjected to such other measurements, processes and operations having the object of identifying persons as are approved by order of the Governor in Council:
> (a) any person who is in lawful custody charged with or convicted of
> (i) an indictable offence…

[140] In *R.* v. *Beare; R.* v. *Higgins,* [1988] 2 S.C.R. 387, the Supreme Court of Canada considered s. 2(1) of the *Act* and held that it was constitutional. The impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply. The infringement of these rights, however, does not violate the principles of fundamental justice because the process does not unduly invade the rights of the accused.

Does the Act Occupy the Field?

[141] The issue of whether the *Identification of Criminals Act* occupies the field or whether there is a common law power to fingerprint as a search incident to arrest was a source of some debate in the mid to late 1990s. As outlined below, the case law that has developed in British Columbia supports the proposition that the *Act* occupies the field. There does not appear to be an alternative position currently being advanced in other jurisdictions. The reason for this may be related to Mr. Justice Cumming's observation at para. 28 of *R. v. Connors*, [1998] B.C.J. No. 41 (C.A.), that "[t]his problem no doubt arises more frequently in British Columbia than in other provinces because of the practice here of having suggested charges scrutinized by Crown counsel before a formal information is laid."

[142] In *Beare*, the Supreme Court of Canada found that the "great weight of authority in this country is that fingerprinting is justifiable at common law" (para. 36); however, La Forest J. went on to say at paras. 38 and 39:

> I find it unnecessary… to decide definitively whether in the absence of statute, a peace officer would, at common law, have authority to require an accused person in custody on a charge for an indictable offence to be fingerprinted. That is provided for by the impugned measures. But it seems to me the common law experience strongly supports the view that subjecting a person to being fingerprinted in those circumstances does not violate fundamental justice…
>
> The common law experience reveals that the vast majority of judges who have had to consider the matter have not found custodial fingerprinting fundamentally unfair. Indeed, they were prepared to accept the procedure as permissible at common law and as being similar in principle to the authority to physically restrain a person in custody, and to physically search that person.

[143] The leading case on the issue in British Columbia remains *R.* v*. Connors*, cited above. In *Connors*, the B.C. Court of Appeal agreed that the accused had

consented to being fingerprinted and thus there was no *Charter* breach on which to exclude the evidence. Unfortunately, in reaching their conclusion, the Court of Appeal judges concurred in the result but not in their reasons, fueling the confusion which feeds the various arguments advanced by counsel in the case at bar.

[144] In *Connors*, Cumming J.A. considered the impact of La Forest's comments in *Beare* and the existence of the common law power to search incidental to arrest. He held at para. 58:

> Thus, the Identification of Criminals Act may be seen not as displacing, but rather augmenting, the authority which police officers have at common law. While apart from statute police have the authority to fingerprint persons lawfully in their custody, s. 2(2) of the Identification of Criminals Act makes it clear that if the conditions set out in s. 2(1) apply, the police may then use such force as is necessary to obtain the prints of a person who resists, and s. 3 protects the police from liability for using such force lawfully.

[145] Cumming J.A. derived support for this position from *R.* v*. Hayward* (1957), 118 C.C.C. 365 and *R.* v*. Stillman*, [1997] 1 S.C.R. 607, where the Supreme Court of Canada was careful to distinguish the taking of fingerprints on the one hand from the taking of blood samples, hair samples, teeth impression and buccal swabs on the other. Cumming J.A. concluded at para. 62:

> Although Mr. Justice La Forest in *R.* v*. Beare and Higgins* concluded his discussion without definitively deciding on the existence of a common law power to fingerprint as an incident to lawful arrest, the tide of judicial opinion is flowing inexorably in the direction…

[146] Donald J.A., whose decision begins at para. 101 of *Connors*, held that in the context of the case, where the accused had consented to being fingerprinted and thus no unlawful or *Charter* breach arose, it was neither necessary nor appropriate to declare a common law power to take fingerprints incidental to a lawful arrest. He found that to do so would "greatly expand the power of the

state to gather and retain information about individuals and would make redundant the Identification of Criminals Act, R.S.C. 1985, c. I-1 (“the Act”), and its predecessors which have controlled compulsory fingerprinting since the procedure began”. (para. 103) He also expressed concerns that if such a common law power existed there would be no logical reason to restrict it to indictable offences, resulting in a “quantum leap beyond the limited power given by the Act which restricts compulsory fingerprinting” and opening the door to fingerprinting on such minor matters as a warrant for unpaid parking tickets. (para. 104) One can infer from these comments that Donald J.A. held the opinion that the common law power to fingerprint was not in existence at the time of the decision.

[147] Newbury J.A., whose decision begins at para. 116 of *Connors* held at para. 117 that:

> … [A]lthough there may well have been a common law power to take fingerprints as part of the general powers of search at the time of arrest, I read the Identification of Criminals Act as displacing that power insofar as summary conviction offences are concerned. In other words, I read the Act as “occupying the field” and not as augmenting any powers which police officers had at common law.”

[148] *Connors* was considered by the British Columbia Supreme Court the following year in *R. v. Nicholson*, [1999] B.C.J. No. 1330. In *Nicholson*, the defendant had been lawfully arrested at the time of fingerprinting, but not yet charged. Boyle J. referred to Newbury J.A.’s reasons in *Connors* and stated at paras. 11 through 13:

> I am left uncertain as to the breadth of Madam Justice Newbury’s conclusion – whether it is limited to summary conviction offences or extends to those on indictment – and I am not sufficiently presumptuous to make an assumption that she joins either Donald J.A. or Cumming J.A. in her judgment on that question. She expresses caution about deciding the unnecessary.

> For those reasons I cannot say Connors binds this court to either position, that of Mr. Justice Donald or that of Mr. Justice Cumming.
>
> My own conclusion… is that the Act has occupied the field and, therefore, the condition of charge in the Act not having been met, the photo and photo line-up evidence is not admissible. I reached that conclusion by asking what mischief and defect Parliament had sought to cure by passing the Act. What stands out as the answer to that is Parliament's requirement that there be either a charge or a conviction before photographs or fingerprints can be taken. An arrest is not enough.

[149] Boyle J.'s analysis in *Nicholson* was supported by Catliff J. in *R. v. Nguyen*, 2001 BCSC 1869, who quoted the above passage with approval at para. 8. This line of authority was solidified, at least in British Columbia, by subsequent cases including *R. v. Pham*, 2003 BCPC 276, *R. v. Temple,* 2005 BCSC 243, and *R. v. Bui*, 2006 BCPC 47. In *Temple*, Harfyard J. said on this point at para. 5:

> I think Crown counsel rightly concedes that the police do not have a common-law power to take fingerprints or photographs incidental to the lawful arrest of a suspect.

[150] In conclusion, the courts in British Columbia have clearly accepted the *Act* as occupying the field and displacing any common law power to fingerprint that may have previously existed. There does not appear to be any authority expressly to the contrary in other Canadian jurisdictions.

If the Act Occupies the Field, What is the Meaning of the Term "Charged":

[151] In *Connors,* Cummings J. considered the meaning of the term "charged" in the context of the *Act*. He concluded at para. 42 that "[t]he word 'charged' is not a term of art," and at para 43:

> …[A]t the time the respondent provided his fingerprints to Constable Bishop he was in custody and, for the purpose of the investigation the Constable was conducting, was "charged" with an indictable offence within the meaning of the statute.

[152] This position has rejected by his colleagues. Donald J.A. stated at para. 108:

> I am unable to agree with Mr. Justice Cumming's view that "charged" in the Act is broad enough to include the interaction between the arresting officer and the accused prior to Crown approval of charges. In the system that prevails in this Province, I do not think it is possible to stretch the ambit of "charged" to include the state of affairs prior to the determination by Crown counsel as to whether any, and if so what, charges should be laid.

[153] Newbury J.A. stated at para. 117:

> I am in general agreement with the reasons of Mr. Justice Cumming, except for the conclusion expressed at his paragraph 43 that at the time Mr. Connors provided his fingerprints to Constable Bishop he had been "charged" with an indictable offence. On that issue, I agree with the views of Mr. Justice Donald…

[154] In subsequent cases, the term "charged" has been interpreted narrowly, as per Donald J.A. and Newbury J.A (see *Nguyen*, *R. v. Do*, 2002 BCSC 1889, *Pham*, *Temple*, and *Bui*). In *Do*, the BC Supreme Court stated at para. 35:

> One might compare this to the rights under s. 2 of the Identification of Criminals Act. It is fundamental under that section the person be charged. It is not sufficient that there are reasonable and probable grounds to charge him.

[155] In *Bui*, the BC Provincial Court held at para. 48 that:

> … by September, 2003, it was well-established law that a charge had to be laid before a person could be fingerprinted and photographed under the Identification of Criminals Act.

[156] Clearly, the law in BC is that the term "charged" in s. 2(1) of the *Act* should not be interpreted broadly, such that a suspect under arrest for an indictable offence is considered to be "charged" for the purposes of the *Act.* Again, there does not appear to be any opposing authority in other Canadian jurisdictions.

Were the photographs and fingerprints taken in breach of section 7 and 8?

[157] While the law as it stands in B.C. is not binding on me, having reviewed the case law provided by counsel, I am satisfied that the position as adopted in B.C. is the appropriate one in law. In particular, I am persuaded by my view that to recognize a common law power to collect fingerprints and photographs without formal charge would be to cast far too wide a net on the collection of personal information and would no longer be a justifiable limitation on the rights guaranteed by section 7 and 8 of the *Charter*.

[158] In the circumstances, I find that both the fingerprints and photographs of Mr. Zhou and Mr. Jiang were clearly taken before charges were laid and as such constitute a breach of sections 7 and 8.

[159] Similarly, the photographs of Mr. Yeung and Mr. Zhu were clearly taken before charge in breach of sections 7 and 8.

[160] Less clear are the fingerprints of Mr. Yeung and Mr. Zhu, and the photographs and fingerprints of Mr. Zhai. I have before me evidence of the exact times each were taken. Unfortunately, all of those times fall between the hours of 11:00 a.m. and 12:00 p.m., and the evidence indicates that somewhere within that hour the Information charging all three accused was sworn. Thus the evidence is somewhat equivocal as to whether the evidence was taken before, after, or possibly even contemporaneous with the charge being formally laid.

[161] I take the view that as the evidence is incapable of demonstrating that the photographs and fingerprints were taken after charge was laid as required, that there is, on a balance of probabilities, a breach with respect to these matters as well.

5. WEI XIONG WEN, JIAN XIONG ZHOU, MIN SHAN JIANG, KIU TIN YEUNG, GUANG XIAN ZHU, & WEI MIN ZHAI: Section 10(b)

[162] Each of the above-noted accused has alleged a breach of his section 10(b) right to counsel. Should I find that their rights to counsel were indeed breached, there is no evidence which can be said to flow from any breach and therefore be the subject of an application to exclude. Instead, counsel have asked me to consider this issue with the understanding that if I do find a breach, it will be considered in the context of any section 24(2) analysis regarding the admissibility of evidence under other headings in this decision.

The Law:

[163] A number of cases have been filed with respect to section 10(b). I propose to summarize the relevant case law first, and then examine its application to the factual circumstances of each accused.

[164] The starting point for this examination is the Supreme Court of Canada decision in *R. v. Prosper* (1994), 92 C.C.C. (3d) 353, which sets out the two components of the right to counsel:

> Every person detained by the police has the right to retain and instruct counsel without delay and to be informed of that right. This means that every detainee is entitled to an opportunity to retain and instruct counsel without delay, regardless of the time and place of the detention or the fact that the detainee has no money.
>
> The right consists of an informational component and an implementational component. Under the informational component, the duty of the police is to tell the detainee about his or her actual constitutional right, even where the means by which it can be exercised may not seem to be at hand. At the very least, police must inform all detainees that they are entitled to have an opportunity to contact counsel immediately, and that their right to do so is not dependent on their ability to afford a private lawyer. In those jurisdictions which provide some system of free, preliminary legal advice, the police must additionally inform detainees of the existence and availability of these services, as well as the means by which such advice can be accessed.

> Under the implementational component, s. 10(b) requires that the detainee be given an opportunity, or the means, to "retain and instruct counsel without delay". If the detainee chooses not to contact counsel, no breach results. If the legal system fails to provide the detainee with the opportunity to consult counsel without delay for whatever reason – be it lack of facilities, information, willing counsel or some other impediment – breach of s. 10(b) is established. (p. 35-36)

[165] In dealing with the informational component, the critical issue for this case is the language barrier, and whether the accused sufficiently understood what was being said to them. In *R. v. Vanstaceghem* (1987), 36 C.C.C. (3d) 142, the Ontario Court of Appeal addressed a situation in which a French speaking accused with some command of the English language was provided his rights in English. In finding that the accused had not been properly informed of his constitutional rights, Lacourciere J.A. stated:

> The police may not be required to go to the extreme means in order to respect an accused's rights under s. 10 of the Charter. It is necessary, however, in order to comply with the section that an accused be meaningfully informed of the rights. The accused must understand what is being said to him or her and understand what the options are in order that he or she may make a choice in the exercise of the rights guaranteed by the Charter.
>
> It is not sufficient for a police officer upon the arrest or detention of a person to merely recite the rights guaranteed by s. 10 of the Charter. As s. 10(b) stipulates, the accused or detainee must be informed. This means that the accused or detainee must understand what is being said to him or her by the police officer. Otherwise, he or she is not able to make an informed choice with respect to the exercise or waiver of the guaranteed rights.
>
> If the rights are read in English only, and the accused's or detainee's knowledge of the English language does not allow sufficient comprehension of the matter, those are "special circumstances" which alert the officer and oblige him to act reasonably in the circumstances. (p. 6)

[166] The issue of an accused's level of linguistic comprehension is a question of fact. The onus is on the defence to establish a breach, and if the alleged breach is the failure to meet the informational component of the right due to a language barrier, the defence must ensure that there is evidence before the court with respect to the issue of the accused's comprehension or lack thereof. This would not necessarily require that the accused take the stand. Information with respect to the accused's comprehension can be elicited through the evidence of the Crown, but there must be evidence on this point sufficient to enable the Court to make a finding as to the level of comprehension.

[167] With respect to the implementational component of s. 10(b), case law has addressed the issue of counsel of choice, and has stressed the notion that the right to counsel is that of the accused to be exercised as the accused sees fit.

[168] *R. v. Felawka,* [1994] B.C.J. No. 2410 (P.C.) involved an impaired driving investigation in which the accused asked to speak to counsel of his choice. When the number could not be located, he agreed to speak to another counsel. The police officer contacted a Legal Aid lawyer on his behalf. In speaking to her, the accused became concerned that the individual was not a lawyer as she did not provide him with legal advice. The accused insisted on contacting the lawyer of his choice, but was never left alone with a telephone and phone book to do so. In finding that his right to counsel had been breached, Stromberg-Stein Prov. Ct. J. stated:

> The accused was being reasonably diligent in exercising his right to counsel. The accused was in police custody. He was not obliged to accept advice from a lawyer chosen by the police. He was justified in being suspicious. He was entitled to independent legal advice – actual or perceived. The right to counsel is the accused's right to exercise as he sees fit so long as he is reasonably diligent. I agree with defence counsel that the accused's right to counsel was rendered meaningless in this case. (para. 20)

[169] Similarly, in *R. v. Kowalchuck*, [1999] S.J. No. 1 (Q.B.), the accused asked to speak to counsel. The officer contacted the Legal Aid line, spoke to whoever answered and gave the phone to the accused. After speaking to counsel, the accused refused to provide a breath sample. In finding a breach, the Saskatchewan Court of Queen's Bench noted:

> The judicial interpretation of the right of a detained or arrested person to consult counsel, as guaranteed by s. 10(b) of the Charter, as meaning consultation with counsel of the accused's own choice, necessarily implies that an accused is entitled to consult his own legal agent, not legal counsel who might be viewed as the agent of the arresting officer. (para. 16)

[170] From this case law, I conclude two points which are crucial to the section 10(b) issues in this case: firstly, where the police are put on notice that an accused has difficulty understanding as a result of a language barrier, failure to take appropriate steps to ensure that the accused's rights are provided to him or her in a language he or she can fully comprehend will result in a breach of section 10(b); and secondly, inherent in the implementational component of section 10(b) is the freedom to choose to exercise that right as one sees fit. Interference with this freedom, however well-intentioned, will be a breach of section 10(b).

Mr. Wen:

[171] Following his arrest, Mr. Wen was transported to the Whitehorse detachment. Upon arrival, Corporal McGowan contacted the AT&T Language Services and requested a Cantonese interpreter. Through the interpreter, he again advised Mr. Wen of the reasons for his arrest and his rights, from memory. Mr. Wen indicated a desire to call a friend to arrange for counsel. This request was denied as Corporal McGowan was not sure whether the warrants had been executed and he was concerned that Mr. Wen might tip off others. Mr. Wen then requested Legal Aid.

[172] Corporal McGowan arranged for Legal Aid counsel to attend along with an individual by the name of Edward Lee, who is apparently a government employee who Corporal McGowan understood from other investigators to be a suitable Cantonese interpreter. Counsel and Mr. Lee attended at 5:00 p.m., and Mr. Wen was placed in the phone room with the two of them.

[173] With respect to the informational component of Mr. Wen's right to counsel, defence counsel raised a concern about the lack of evidence regarding the AT&T Language Service, such as qualifications and certifications. Defence suggests that it is the obligation of the Crown to provide evidence to the court regarding the quality of interpretation notwithstanding the onus on defence to establish the breach. In making the argument, defence notes that AT&T is very likely located in the United States, and a requirement that the defence call this evidence would provide an unreasonable burden on the defendant.

[174] On the specific facts of this case, and, in particular, the fact that no evidence flows from any alleged breach, it would be unreasonable, in my view, to have expected the Crown to call this evidence. (This finding, based as it is on the facts of this case, ought not to be considered a general pronouncement on this issue.)

[175] The evidence I do have from Corporal McGowan regarding the exchange through the AT&T interpreter indicates that Mr. Wen did understand what was being relayed to him through the interpreter. His answers, requests and responses were appropriate to the exchange. I am satisfied that Corporal McGowan took reasonable steps in all of the circumstances to ensure that Mr. Wen understood the informational component of his section 10(b) rights.

[176] The next issue to address is whether Mr. Wen's right to counsel was breached when Corporal McGowan denied his request to contact a friend to assist with getting counsel. Given the nature of the investigation and the fact the

warrants had not yet been executed, I am satisfied that Corporal McGowan's position was a reasonable one, and therefore, did not constitute a breach.

[177] The final issue is the appropriateness of using Mr. Lee as an interpreter when Mr. Wen was given his opportunity to speak to Legal Aid duty counsel as per his request. While I have some concerns about the situation, there was no evidence before me suggesting the interpretation provided was inadequate. Mr. Lee apparently lives and works in Whitehorse and could have been called by defence to provide evidence with no undue burden being placed on the defendant. Absent some evidence of problems with the interpretation, I find that the onus has not been met, and decline to find a breach of Mr. Wen's right to counsel.

Mr. Zhou and Mr. Jiang:

[178] Most of the facts relating to Mr. Zhou's and Mr. Jiang's arrest have already been referred to earlier in this decision. Additional facts with respect to their right to counsel are set out in the Agreed Statement of Facts #2, filed as exhibit 'o' in these proceedings.

[179] After their arrest, Mr. Zhou and Mr. Jiang were transported to the Whitehorse detachment. Once there, Constable Jeff McGowan (not to be confused with Corporal Jamie McGowan referred to elsewhere in this decision) contacted AT&T Language Services to obtain the services of a Cantonese interpreter. Through the interpreter, both Mr. Zhou and Mr. Jiang were provided the reason for their arrest, their *Charter* rights and were advised that duty counsel would be provided if necessary.

[180] Constable McGowan contacted the Community Law Clinic, a Legal Aid office, and asked for arrangements to be made for duty counsel and an interpreter for Mr. Zhou and Mr. Jiang. This apparently did not happen. Some six and a half hours later, Corporal Wyers discovered that Mr. Zhou and Mr.

Jiang had not had access to counsel. He arranged for Mr. Jiang to speak to duty counsel by telephone without an interpreter. Following that conversation, Corporal Wyers had Mr. Jiang explain to Mr. Zhou in Chinese what duty counsel had told Mr. Jiang.

[181] I am satisfied that Constable McGowan took appropriate steps to deal with any comprehension concerns by using AT&T Language Services to relay the informational component of section 10(b).

[182] The implementational component is much more complex with respect to Mr. Zhou and Mr. Jiang. Firstly, I must ask myself whether there was a breach as a result of arrangements to have legal aid provided for Mr. Zhou and Mr. Jiang. In considering this issue, I find that the lack of evidence regarding Mr. Zhou and Mr. Jiang's exchange with Constable McGowan through the interpreter leaves me with insufficient evidence to conclude that arrangements to bring in Legal Aid duty counsel usurped Mr. Zhou and Mr. Jiang's freedom to choose how to exercise their right. I do not know whether there was a request to contact counsel of choice, a request for Legal Aid duty counsel or whether Constable McGowan took it upon himself to make arrangements. I am not prepared to find a breach on that basis.

[183] Secondly, there is the issue of delay. Section 10(b) confers the right to "retain and instruct counsel without delay". The wording of the section is clear. The close to seven hour delay in accessing counsel is a breach of section 10(b) in my view.

[184] Thirdly, once Mr. Jiang was finally connected to counsel it was without an interpreter. In determining whether this was a breach, I am mindful of the fact that the only evidence I have before me on Mr. Jiang's level of comprehension comes from Corporal Wyers who indicated that he believed Mr. Jiang understood as Mr. Jiang provided one word responses, including "yes" and "okay", to

Corporal Wyers when being advised of his reason for arrest and *Charter* rights. While this is not the best evidence with respect to persuading me Mr. Jiang did, in fact, comprehend, it is not enough for me to conclude that he did not understand. The onus has simply not been met for me to find a breach.

[185] Lastly, there is the issue of having Mr. Jiang translate the advice he received from duty counsel to Mr. Zhou. Of all the concerns raised with respect to the right to counsel in this case, this was perhaps the most shocking. It is absolutely appalling that Corporal Wyers would consider this procedure to be in any way appropriate police practice in facilitating an accused person's right to counsel. It is equally appalling that duty counsel apparently condoned his suggestion.

[186] I find that Mr. Zhou was clearly and unequivocally denied a meaningful opportunity to exercise his right to counsel. He had no opportunity to relay his circumstances to counsel or to ask questions pertinent to his position. He did not receive legal advice for his circumstances. He received Mr. Jiang's legal advice.

[187] I find this procedure adopted by Corporal Wyers to be a flagrant breach of Mr. Zhou's right to counsel. In addition, I find it to be a breach of Mr. Jiang's right to counsel. It is grossly inappropriate, in my view, for the police to put an accused in the position of having to disclose confidential discussions with his or her legal counsel to anyone. Such a violation renders the right to counsel utterly meaningless.

Mr. Yeung:

[188] The facts relating to Mr. Yeung's right to counsel are set out in the Agreed Statement of Facts #2.

[189] During the execution of the search warrant at 22 Tigereye Crescent on September 22, 2005, Mr. Yeung was located in the basement of the residence.

When Mr. Yeung was arrested by Constable Thur, he advised Constable Thur that he speaks little English. Constable Thur informed Mr. Yeung of his *Charter* rights, provided the police warning, and advised Mr. Yeung that a Cantonese interpreter could be made available to assist with translation. Mr. Yeung was transferred to the custody of Constable Fradette, who provided Mr. Yeung with a secondary police caution. Mr. Yeung responded, “Yes, I no speak English sir”.

[190] Mr. Yeung was transported to the Whitehorse detachment where Corporal McGowan advised him that a Cantonese interpreter was coming to the detachment along with Legal Aid duty counsel, and that Mr. Yeung would be given an opportunity to speak in private with them upon arrival. Mr. Yeung met with the interpreter and Legal Aid duty counsel from 6:18 to 6:27 p.m.

[191] In reviewing these facts in light of the case law, I am satisfied that Mr. Yeung indeed has difficulty with the English language and that the police were put on notice of this fact. Accordingly, for the informational component of his right to counsel to be at all meaningful for him, there was an obligation on the police, in my view, to ensure that he was advised of his rights in a language which would enable him to fully understand his rights and options. This, however, was not done, which I find to be a breach of his rights pursuant to section 10(b).

[192] Furthermore, the process set up to facilitate access to counsel for each of the accused, while perhaps well-meant, nonetheless had the effect of providing Mr. Yeung with counsel chosen by the police not by him. This too is in breach of his section 10(b) rights.

Mr. Zhu:

[193] The facts relating to Mr. Zhu’s right to counsel are set out in the Agreed Statement of Facts #2.

[194] Mr. Zhu was located with Mr. Yeung at 22 Tigereye Crescent. He was arrested, Chartered and warned by Sergeant Campbell. There is no indication in the Agreed Statement of Facts #2 as to whether Mr. Zhu indicated that he understood what was being said to him.

[195] Mr. Zhu was transported to the Whitehorse Detachment where he too was advised by Corporal McGowan of the impending attendance of the Cantonese interpreter and Legal Aid duty counsel. He met with the interpreter and Legal Aid duty counsel from 6:10 to 6:17 p.m.

[196] With respect to Mr. Zhu, there is no evidence before me upon which to assess the level of his comprehension of English. As a result, I am left with no basis upon which to find a breach of the informational component of section 10(b), and I decline to do so.

[197] As for the implementational component of section 10(b), Mr. Zhu, like Mr. Yeung, was provided access to counsel chosen by the police. As he was not given the opportunity to choose to exercise his right to counsel as he saw fit, I find that his section 10(b) rights were breached in this instance.

Mr. Zhai:

[198] The facts relating to Mr. Zhai's right to counsel are set out in the Agreed Statement of Facts #2.

[199] During the execution of the search warrant at 208 Falcon Drive on September 22, 2005, Mr. Zhai was located within the residence. He was arrested by Sergeant Walton who provided Mr. Zhai with the police warning and informed him of his *Charter* rights. When asked if he understood, Mr. Zhai said yes.

[200] He was transported to the Whitehorse detachment, where he was advised by Corporal McGowan that a Cantonese interpreter was coming to the detachment together with Legal Aid duty counsel, and that he, Mr. Zhai, would be given an opportunity to speak in private with them once they arrived. Approximately one hour later, Mr. Zhai was afforded that opportunity. He met with the interpreter and Legal Aid duty counsel from 6:02 to 6:08 p.m.

[201] Based on these facts, there is insufficient evidence upon which to conclude that Mr. Zhai did not understand the informational component of the section 10(b) rights provided to him. It would be too great a leap for me to infer a lack of understanding based on the fact that there is evidence before me indicating that others within the group of accused did not have sufficient command of the English language to comprehend their rights. Accordingly, I decline to find a breach of the informational component of Mr. Zhai's section 10(b) rights.

[202] However, as with Mr. Yeung and Mr. Zhu, the procedure of providing Mr. Zhai access to counsel pre-chosen by the police, is a clear violation of the implementational component of his section 10(b) rights, thus I do find a breach in this latter regard.

6. VALIDITY OF SEARCH WARRANT 16 SITKA CRESCENT:

[203] I have before me applications to quash two of the six search warrants issued in relation to the Project Mobile investigation. The first of those relates to the 16 Sitka Crescent location.

The Law:

[204] Before undergoing an examination of the validity of any search warrant, it is important to understand the standard of review to be applied in such instances.

In *R. v. Garafoli* (1990), 60 C.C.C. (3d) 161, the Supreme Court of Canada defined the standard as follows:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[205] This standard of review was affirmed by the Court in *R. v. Araujo*, 2000 SCC 65:

> An approach based on looking for sufficient reliable information in the totality of the circumstances appropriately balances the need for judicial finality and the need to protect prior authorization systems. Again, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge. (para. 54)

[206] In the case at bar, no one has suggested that the Information to Obtain, on its face, provided sufficient grounds for the issuing Justice of the Peace to authorize the warrant. Instead, it is submitted that the information contained within the Information to Obtain has been demonstrated through the evidence on the voir dire to be so unreliable as to be incapable of supporting the warrant, what LeBel J. referred to as a 'subfacial challenge' in *Araujo*. "Subfacial challenges to an affidavit go behind the form of the affidavit to attack the reliability of its content". (para. 50)

[207] In *R. v. Monroe*, [1997] B.C.J. No. 1002, the B.C. Court of Appeal addressed a similar application, noting the following:

> It is not disputed that the informant presented sufficient grounds upon which the justice could properly issue a warrant. That, however, should have been the starting rather than ending point of the inquiry. The judge was then required to assess the evidence placed before the justice, in the light of the evidence brought out at trial, in order to determine whether, after expunging any misleading or erroneous information, sufficient reliable information remained to support the warrant. (para. 15)

[208] In assessing the quality and reliability of evidence on a subfacial challenge, caution must be exercised. As noted by Southin J.A., in *R. v. Dellapenna*, [1995] B.C.J. No. 1526 (C.A.), "[i]n assessing the validity of an information a court must not fall into the error of elevating quibbles into substance". (para. 39)

[209] In addition, it is important to recognize that not all errors or inaccurate information will necessarily invalidate the warrant. In *R. v. Morris,* [1998] N.S.J. No. 492, the Nova Scotia Court of Appeal stated:

> The [Supreme Court of Canada], in my opinion, has decided that presenting false or misleading material before the Justice of the Peace does not automatically vitiate the warrant. The primary focus on review is on whether the issuing justice could properly have concluded that reasonable and probable cause existed. The prior authorization process is protected in other, less inflexible ways than automatic vitiation of the warrant where it is shown that inaccurate and misleading information was presented to obtain it.
>
> This approach was adopted in the wiretap cases, Garafoli, supra, and R. v. Bisson, [1994] 3 S.C.R. 1097; (1995), 94 C.C.C. (3d) 94. For example, in Bisson at p. 1098, the Court stated: …errors in the information presented to the authorizing judge, whether advertent or even fraudulent, are only factors to be considered in deciding to set aside the authorization and do not by themselves lead to automatic vitiation of the…authorization.
>
> The same principle has been adopted by the Court in search warrant cases: R. v. Grant, supra and R. v. Plant, [1993] 3 S.C.R. 281. These cases stress that errors, even fraudulent errors, do not automatically invalidate the warrant.

> This does not mean that errors, particularly deliberate ones, are irrelevant in the review process. While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases just referred to do not foreclose a reviewing judge, in appropriate circumstances, from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves. (paras. 40-43)

[210] The cases make it clear that misleading information may, in effect, be saved if it is corrected in evidence, provided there was no deliberate attempt to mislead, a process referred to as 'amplification'. In *Auraujo*, LeBel J. also urged caution with respect to amplification:

> The danger inherent in amplification is that it might become a means of circumventing a prior authorization requirement. Since prior authorization is fundamental to the protection of everyone's privacy interests (Hunter v. Southam Inc., supra, at p. 160), amplification cannot go so far as to remove the requirement that the police make their case to the issuing judge, thereby turning the authorizing procedure into a sham. On the other hand, to refuse amplification entirely would put form above substance where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made some minor, technical error in the drafting of their affidavit material. (para. 59)

[211] From this I take that the mere presence of misleading or even fraudulent information in an Information to Obtain will not in and of itself invalidate the warrant (except in rare circumstances). If it amounts to a minor, technical error it may be amplified through the evidence. If not, it ought to be excised from the Information to Obtain. Once such information has been excised from the Information to Obtain, if there is sufficient information remaining to support the issuance of the warrant, the warrant will stand.

Issues:

[212] In applying the standard of review to the warrant issued for 16 Sitka Crescent, counsel for the accused suggests three areas of concern to be considered in assessing the reliability of the information contained in the Information to Obtain sworn by Corporal Wyers:

1. Reliance on and interpretation of FLIR readings absent proper training;
2. Whether Yukon Electric was acting as agent for the police when it located the electrical bypass; and
3. Whether other paragraphs in the Information to Obtain are unreliable or misleading.

[213] To these I would add the impact of the constitutional findings previously made in the context of this decision.

Impact of Charter rulings:

[214] Paragraph 9(e)(ii), (iii), and (iv) refer to the arrest of Mr. Wen following the traffic stop of the green Camry. As the arrest has been ruled to be unlawful, information flowing from the arrest must be expunged in my view. Specifically, in subparagraph (ii), the reference to Mr. Wen's arrest should be expunged, and subparagraph (iv) should also be removed. The remaining information with respect to identity and address would appropriately remain, as it flows from the investigative detention.

[215] Paragraph 18 of the Information to Obtain relates primarily to the traffic stop of the green van occupied by Mr. Yeung and Mr. Zhu, a matter discussed at length earlier in this decision.

[216] Sub-paragraphs (b), (c) and (d) refer specifically to the traffic stop of the green van. Sub-paragraphs (d)(i) and (d)(ii) do not refer to the actual traffic stop, but it is the traffic stop which provides the link between the information contained therein and 16 Sitka Crescent. As the traffic stop of the green van has been

found to be in breach of section 9, the information relating to the stop cannot be relied upon to support the warrant for 16 Sitka Crescent.

[217] Subparagraph (a) does not reference the actual traffic stop, but it refers to the green van having been seen pulling out of the driveway at 16 Sitka Crescent. This information is clearly erroneous. As noted earlier, the evidence of Corporal Hamilton and Sergeant Hache conflicted as to whether the green van had ever been on Sitka Crescent, but there was no dispute between them that the green van had never been seen stopped at or near 16 Sitka Crescent.

[218] Considering these factors, I am of the view that paragraph 18 must be expunged in its entirety from the Information to Obtain.

Use of FLIR readings:

[219] A Forward Looking Infra-Red camera or FLIR was used on 16 Sitka Crescent on several occasions by Constable Dunmall. The results of those applications are referred to in paragraphs 11, 12(b), 13, and 14(d), (e) and (f) of Corporal Wyers' Information to Obtain. There are two distinct concerns which arise in terms of the FLIR use: the lack of training and the accuracy of the information provided.

[220] In terms of training, Corporal Wyers testified that he has no formal training in the use of the FLIR. What training he does have comes from being shown how to use it by a forestry officer in the context of a search and rescue effort. He has no knowledge as to what, if any, training the forestry officer had received. Corporal Wyers further testified that he had never looked at the manufacturer's web-site nor has he read the manual for the device. With respect to his experience, he has used the FLIR on four occasions himself. He testified that Constable Dunmall, who conducted the FLIR tests in this instance, had not been formally trained in the use of the FLIR.

[221] Defence suggests that the lack of training renders the information regarding the FLIR readings unreliable and potentially misleading. Crown relies on *R. v. Tessling* (2004), 189 C.C.C. (3d) 129, to argue that the Supreme Court of Canada has ruled that it is proper to use the FLIR, and that training is not relevant given the crude nature of the technology. In *Tessling*, Binnie J. said:

> It seems to me that Abella J.A. put her finger on the key to this case when she observed with respect to FLIR's present utility that "[t]he surface emanations are, on their own, meaningless" (at para. 66). The information obtained via a FLIR image, by itself cannot provide sufficient grounds to obtain a search warrant. This is because, as the Crown acknowledges, the relative crudity of the present technology does not, in itself, permit any inferences about the precise activity giving rise to the heat. (para. 36)

[222] With respect, the Court in *Tessling* was not concerned with issues of training or qualifications regarding FLIR usage. In referring to the "relative crudity" of the instrument, they are, in my view, referring to the limitations on what a FLIR reading can tell us, not on the requirements, if any, necessary to be able to use the device correctly and interpret the results accurately. A relatively crude instrument becomes cruder still in the hands of someone who is not trained to use it properly or to interpret its results appropriately.

[223] Cross-examination of Corporal Wyers highlighted potential impacts on FLIR results which may be caused by differences in construction materials, heating sources, insulation, and layout, all of which common sense would suggest would have an impact on FLIR readings on a dwelling, and would certainly be of importance in selecting appropriate control dwellings for comparison purposes. While Corporal Wyers agreed results might be impacted, he was unable to speak in a meaningful way about the specific impact of any of these issues due to his lack of training and knowledge of the device.

[224] It is one thing for such a device to be used without training for something such as a search and rescue effort where a rudimentary understanding may well

be more than sufficient; it is quite another to use it untrained in a process where accuracy of detail is so very important.

[225] In *R. v. Vu*, 2006 BCPC 77, the B.C. Provincial Court addressed the need for accuracy regarding FLIR usage in applications to obtain search warrants:

> The FLIR is one of several central support pillars of this application to the justice. It has been, at a minimum, dealt with in a sloppy manner. Care is required in the setting out of all information. Perfection is not expected but the absence of significant portions of the material information leaves it difficult for one to evaluate the strength and usefulness of what is left. This is particularly so where the information is provided and comparisons made using words or phrases such as "significant heat signature" and "hotter than others," which are subject to interpretation. No definition of these descriptions is provided. The difference between this house and others is subject to the choice of words Cst. Wiebe makes. We don't have the benefit of a numerical scale or defined standard against which to compare this house and the other chosen comparison houses.
>
> In this situation, Cst. Wiebe had to be careful to set out, in detail, all of his FLIR observations; he did not. The ability of the justice to evaluate that information in the ITO and those descriptions and comparators to which referred, was affected by that. (paras. 28-29)

[226] It should be noted that Cst. Wiebe in the *Vu* case was trained in the use of the FLIR. The case stresses the need for accuracy and full disclosure given the very subjective nature of the interpretation of the instrument. This in turn underscores the need for proper training on the instrument if it is to be used as a basis for seeking a warrant.

[227] The second concern raised with respect to the paragraphs referencing the FLIR readings relates to accuracy. Rather than simply transcribing Constable Dunmall's notes into his Information to Obtain, Corporal Wyers chose to alter her information by changing words, adding words, and leaving items out. In effect, he gives us his subjective interpretation of Constable Dunmall's subjective interpretation. While there are numerous examples of Corporal Wyers altering

Constable Dunmall's notes in the Information to Obtain, it is not my intention to include each and every one. Rather, I will simply highlight several examples of the pattern for the purposes of illustration.

[228] In paragraph 11(a), Corporal Wyers alters Constable Dunmall's note of a "**noticeable** difference between downstairs and upstairs" to read a "**notable** difference". He agreed in cross-examination that notable suggested a greater difference than noticeable, but could not explain his reason for changing the word, beyond suggesting that possibly at the time he thought the two words were the same thing.

[229] In 11(b), Corporal Wyers again alters Dunmall's note of "Downtown (sic) stairs a lot '**brighter**' then upstairs, especially bedroom window" to read "the downstairs showed the **bright white color typical of a more heat loss**". When asked his reasons for changing the note, Corporal Wyers said that is how he interpreted Constable Dunmall's note. As the FLIR registers heat loss on a scale of black to white, black being cool and white being hot, and registers shades of grey in between the two, the use of the word 'white' by Corporal Wyers suggests an extreme loss of heat, when Constable Dunmall's use of the word 'brighter' could have simply meant a lighter shade of grey.

[230] In 11(c), Corporal Wyers refers to "neighbouring **homes**" being used as comparisons when Constable Dunmall refers only to the 'neighbour's **house**".

[231] For each of the references to FLIR usage, Corporal Wyers is careful to note the time the device was used, with the exception of paragraph 12, which just happens to be the only time the FLIR was used on 16 Sitka Crescent during the daytime. In cross-examination, Corporal Wyers agreed that the FLIR should be used late evening or early morning to avoid interference from the sun, and, indeed, he swore under oath to that very fact in paragraph 11. Knowing this, he was unable to explain why he left out the time reference to the one instance

when the FLIR was used during the afternoon. When pressed, he tries to suggest that use of the FLIR during daylight hours is not meaningless, a position he bases on his very limited experience in using the device.

[232] As noted, this pattern of altering Constable Dunmall's notes, including changing words and leaving out details, continues throughout the remainder of the FLIR references, and indeed in other paragraphs in the Information to Obtain. Interestingly, each of these alterations or omissions has the effect of strengthening, at least on paper, the impression that the home is the site of a marijuana grow operation. Corporal Wyers is unable to explain why he made such choices, but asserts that it was not intended to mislead.

[233] When I consider both Corporal Wyers' and Constable Dunmall's lack of training and Corporal Wyers' lack of knowledge and understanding of the FLIR device coupled with the poetic licence Corporal Wyers has taken in relaying the FLIR information in the Information to Obtain, the conclusion is inescapable that the FLIR results are unreliable and potentially misleading. Accordingly, paragraphs 11, 12(b), 13, and 14(d), (e) and (f) are hereby expunged from the Information to Obtain.

Was Yukon Electric acting as agent for the police?

[234] Paragraph 22 of the Information to Obtain indicates that Corporal Wyers was contacted by Craig Steinbach of Yukon Electric who advised him that tests had revealed that there was a by-pass and subsequent theft of electrical power present at 16 Sitka Crescent. Defence submits that Yukon Electric was acting as agent for the police in this instant, and hence the discovery of the by-pass amounts to a breach of section 8.

[235] *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207, makes it clear that it is improper for the police to enter onto someone's property for the purpose of investigating a

criminal offence in finding that a warrantless perimeter search is a violation of section 8 of the *Charter*.

[236] It is accepted that Yukon Electric has a right of entry onto any property it services based on the contractual relationship with its customers. However, it is improper for the police to use Yukon Electric's right of entry as a means to access information they themselves are precluded from accessing, by directing or requesting Yukon Electric to enter onto a property to investigate for them. In *R. v. Novak*, [1994] B.C.J. No. 1017 (B.C.S.C.) Hogarth J. found that "Hydro was knowingly used in this instance as a part of a scheme hatched by Corporal Bruce to circumvent the provisions of Kokesch" (paragraph 90), and accordingly, found a breach of section 8.

[237] In assessing whether Yukon Electric was acting as agent for the police in this instance, I must determine whether the search would have taken place, in the form and in the manner in which it did, but for the involvement of the police. (*R*. v. *Buhay*, 2003 S.C.C. 30, *R*.v. *M.R.M.*, [1998] 3 S.C.R. 393)

[238] Whether in this instance Yukon Electric was acting at the direction of the police is a question of fact. The relevant evidence before me on this issue is as follows:

1. With respect to the investigation into the suspected marijuana grow operation at 22 Tigereye Crescent, the police, namely Constable Buxton-Carr specifically requested that Yukon Electric attend at the residence to check for a by-pass.

2. On September 27, 2005, Corporal Wyers received subscriber information and consumption records for 16 Sitka Crescent. She did not indicate to him that there was anything abnormal in the records.

3. Also on September 27, 2005, Corporal Wyers had a discussion with Craig Steinbach of Yukon Electric in which they discussed the possibility of a power meter bypass (ITO paragraph 14(e)(ii)).

4. Within approximately two and one-half hours after the conversation, Craig Steinbach reported the discovery of the by-pass to Corporal Wyers.

5. Corporal Wyers cannot recall if he requested that Yukon Electric attend at the property to check for a by-pass, although he indicated that it is possible that he did so. He made no notes regarding the conversation.

[239] Crown argues that the defence ought to have called Yukon Electric on this issue, and that failure to do so leaves me in a position of having to speculate. They further argue that even if I find there was a request made to Yukon Electric, a request is not necessarily a direction.

[240] While it might have been helpful to hear from Mr. Steinbach, I am satisfied that there is sufficient evidence before me upon which to make a factual finding. When I consider that the police have specifically requested Yukon Electric to check for a by-pass with respect to at least one of the other properties under investigation, and the extremely short time between the conversation between Mr. Steinbach and Corporal Wyers and the discovery of the bypass, as well as Wyers' concession that he may have made the request that Yukon Electric check for a by-pass, there is a compelling inference to be drawn that Corporal Wyers did indeed make such a request. In the circumstances, I find Corporal Wyers' lack of memory to be a convenient one and not particularly credible.

[241] I find as a fact that, in this instance, Yukon Electric was requested to check for an electrical by-pass at 16 Sitka Crescent. I see little difference in these circumstances between it being phrased as a request or a direction. The end result is the same. Yukon Electric was acting at the behest of the police. The search would not have occurred but for the involvement of the police. Therefore, I conclude that Yukon Electric was acting as agent for the police.

[242] Accordingly, I find the discovery of the electrical by-pass to amount to a warrantless perimeter search contrary to section 8, and will therefore expunge paragraph 22 from the Information to Obtain.

Reliability of the remainder of the Information to Obtain:

[243] Throughout the remainder of the Information to Obtain, Corporal Wyers continues his pattern of editing the notes of other officers and selectively omitting references detracting from his theory of a grow operation. Corporal Wyers was, by and large, unable to provide any satisfactory explanation for this pattern of behaviour. When asked why he had chosen to alter certain things and omit others, his standard response was that he did not know, and in hindsight perhaps he ought to have done something differently, but that it was not his intention to mislead.

[244] Crown made much of Corporal Wyers' presentation as a 'nice guy' throughout the proceedings to urge me to find that he was not intentionally misleading the Justice of the Peace.

[245] While I do not feel that Corporal Wyers set out to mislead the Justice of the Peace in a deliberate and calculated manner, it is clear to me that he was both careless and reckless with respect to his obligations within the prior judicial authorization process. He clearly did not, in the words of Southin J. in R*. v. Dellapenna*, *supra*, say to himself, "Have I got this right? Have I correctly set out what I've done, what I've seen, what I've been told, in a manner that does not give a false impression?" (paragraph 37)

[246] Crown also points to the fact that the police are not required, in making full, fair and frank disclosure, to include every possibly relevant fact in an Information to Obtain (see *R. v. Concepcion*, [1994] B.C.J. No. 1969 (C.A.). While this may be true, it is equally true that selectively excluding only those facts

which detract from the position being advanced is a far cry from full, fair and frank disclosure.

[247] Defence has raised concern about the reliability of a number of the remaining paragraphs. It is my intention to deal with each of those paragraphs, briefly, in turn.

[248] Paragraph 2 is essentially a boiler plate clause indicating the contents of the Information to Obtain are based on information and belief. Such a paragraph is included in virtually every affidavit. While evidence on the voir dire suggested that this clause was not entirely accurate as it relates to some of the paragraphs in the affidavit, I am of the view that once those paragraphs are either expunged or amplified, paragraph 2 is not one which would in any way mislead the authorizing Justice of the Peace, and I decline to expunge it.

[249] In paragraph 4, Corporal Wyers sets out his belief that cultivation requires large amounts of electricity. He agreed, on cross-examination, that both smell and condensation are equally common indicia of a grow operation, but that neither were present at 16 Sitka Crescent. This is another example of Corporal Wyers being somewhat selective in what he includes. I am of the view that this can be corrected through amplification by adding that smell and condensation are also common indicators, but were not noted to be present.

[250] Paragraphs 5, 6, 15 and 19 all relate to information received from informants. There are a number of concerns with respect to these paragraphs, obvious from the cross-examination. It is unnecessary, in my view, to cover these issues in excruciating detail. Suffice it to say that Corporal Wyers included statements in paragraphs 5 and 6 which bolstered the credibility of the informants without there being a basis for such enhancement. In addition, he suggested that all of the information provided by the two informants, set out in paragraphs 15 and 19, had been corroborated by police investigation, which was not, in fact,

the case. Indeed, only two or three of the points had been corroborated to any degree, and then only partially. I conclude that this approach adopted by Corporal Wyers has real potential to mislead the authorizing Justice of the Peace with respect to the reliability of the information provided. Accordingly, I would expunge all four paragraphs from the Information to Obtain.

[251] Paragraphs 7 and 8 refer to a black truck which Constable Dunmall indicated she viewed both at 16 Sitka Crescent and later at 208 Falcon Drive. The importance of these paragraphs, of course, is that they suggest a connection between the two residences, the latter of which has already been determined to house a marijuana grow operation. The difficulty with the paragraphs is that they are drafted to enhance that connection in a way that appears not to be justified on the evidence.

[252] Firstly, Constable Dunmall's notes indicate that she learned from Corporal Thalhofer that the **driver** of the black truck was **involved** in some way in the purchase of Corporal Thalhofer's house at 16 Sitka Crescent. Corporal Wyers inserts this in the Information to Obtain as the **owner** of the black truck being the **purchaser** of 16 Sitka Crescent, which he conceded, on cross-examination, suggested a stronger connection between the two properties than was actually the case. Additional evidence on the voir dire indicated that the purchaser of the property actually drove a red truck.

[253] Secondly, Corporal Wyers stresses Constable Dunmall's certainty that the two black trucks, viewed were one and the same, a degree of certainty which does not appear to be supported on the evidence. One black truck was seen by her at a time when she had no particular reason to take notice of it. The second truck was allegedly seen some time later at 208 Falcon Drive, and yet Constable Dunmall, who made note of several vehicles seen at 208 Falcon Drive, made no note of seeing the black truck, raising questions about the reliability of this observation. The plates of both were noted to be from B.C., but she did not

record the plate number at either sighting, nor is there any indication of some unique characteristic which would confirm the two were one and the same. In the circumstances, her certainty appears to be unfounded.

[254] In my view, this ‘link’ between the two properties as presented is indeed misleading. Accordingly, paragraphs 7(b) and (c) and paragraph 8(a)(i) and (ii) are expunged from the Information to Obtain.

[255] With respect to paragraph 9(a) through (d) (subparagraph (e) was previously been addressed) and paragraph 10, the concern relates primarily to missing information. Firstly, Corporal Wyers, in his assertion that the blinds are always closed, fails to mention that Constable Dunmall only attends at 16 Sitka Crescent on four occasions. Secondly, he fails to mention her observation about viewing an individual return to the home at 11:18 p.m., turn off an upstairs light and turn on the ensuite bathroom light, behaviour consistent with normal use of the property. Thirdly, in paragraph 10, Corporal Wyers includes all four of Constable Dunmall’s observations which support his position (lack of personal effects, etc.), but fails to mention the one contrary item, the installation of a satellite dish. In my view, these can be addressed through amplification, by adding the missing information to ensure the authorizing Justice of the Peace would have a complete picture.

[256] Paragraph 17(a)(i) includes a conclusory statement regarding whether alterations to the lattice did indeed eliminate viewing under the deck which Corporal Wyers was unable to confirm at the voir dire. Accordingly, the phrase “and therefore eliminating any possibility of people seeing what was under the deck from the roadway” will be expunged.

[257] Paragraph 17(a)(iii) is again a conclusory statement regarding the reasons for altering the lattice, but Corporal Wyers, on cross-examination, conceded that there were other reasonable explanations. It too will be expunged.

[258] Paragraph 20 sets out the hydro subscriber information and consumption records. In it, Corporal Wyers compares two readings with the second being five times the first. He indicated it was included to demonstrate an increase in usage. On closer examination, it was learned that the first reading covered only a 5 day period while the second covered a 30 day period, the end result of which is that there is really no difference in the rate of consumption. In addition, Corporal Wyers was in possession of Corporal Thalhofer's consumption records, which do not suggest a significant difference in consumption before and after the sale, but which were not included in the Information to Obtain.

[259] Crown suggests that the paragraph is not actually misleading as subparagraph (a) indicates the account has only been active since July 15, 2005, which makes it clear that the July 20, 2005 reading only covers a 5 day period. With the greatest of respect, I disagree. I certainly did not make that connection when I read the paragraph. Absent explanation, the paragraph is clearly misleading. However, it can in my view, be corrected through amplification by adding the periods to which both readings apply.

Effect on validity of warrant for 16 Sitka Crescent:

[260] Once the aforementioned paragraphs are expunged or amplified, I am of the view that there is insufficient evidence upon which an authorizing justice could conclude that there were reasonable and probable grounds to believe that 16 Sitka Crescent was the site of a marijuana grow operation. What we are left with is little more than some indicators which raise suspicions about whether there is normal usage of the property and some potential links between the property and other drug investigations in B.C. and the Yukon. This is simply not enough to support a warrant. The warrant is hereby quashed. Without the warrant, the search of 16 Sitka Crescent amounts to a warrantless search in breach of section 8 of the Charter.

7. VALIDITY OF SEARCH WARRANT 86 FALCON DRIVE:

[261] The law as set out in the previous section is equally applicable to the application to quash the warrant issued for 86 Falcon Drive.

[262] In reviewing the Information to Obtain with respect to 86 Falcon Drive, I note that there are some similar difficulties with those I found in the 16 Sitka Crescent Information to Obtain, however, my ultimate conclusion, in applying the standard of review I am required to apply, is different.

[263] As for the preceding section, I will address each of the impugned paragraphs in turn.

[264] Paragraphs 5, 6 and 18 relate to informants and their information. These paragraphs suffer from very similar problems as those in the 16 Sitka Crescent Information to Obtain. Firstly, Corporal Wyers has phrased them in such a way as to enhance the credibility of the informants without the basis for doing so. Secondly, he has left out crucial information in relation to Informant A. Specifically, that Informant A's information came from a third party of unknown reliability, and that Constable Giczi, who received the information had no knowledge as to its reliability. Thirdly, Corporal Wyers' idea of corroboration is again different from what the law requires. Accordingly, I am satisfied that each of these paragraphs is potentially misleading and, therefore, should be expunged from the Information to Obtain.

[265] Paragraph 8(b)(i) and paragraph 14 refer to the traffic stop of the green Camry. As a result of my previous ruling, some of the information contained therein will need to be expunged. Reference to the arrest, though not to the stop itself, must be removed from 8(b)(i). Paragraph 14 should be deleted in its entirety, as the only information contained within it that would survive my ruling is already contained in 8(b)(i).

[266] Defence raised some concern about paragraph 11 on the basis that the information contained in paragraph 11 refers to the results of other searches. As neither of those searches is being challenged before me, I can see no reason why the paragraph would be expunged from the Information to Obtain. The same can be said of paragraphs 13 and 19(d)(i).

[267] Paragraph 12 relates information supplied by Constable Buxton-Carr. Of concern, Corporal Wyers, in relaying this information, neglected to include the fact that Constable Buxton-Carr had noted open windows, which, in his opinion, were inconsistent with the existence of a marijuana grow operation. In my view the preferred course in addressing this concern would be to amplify the paragraph to include the missing information.

[268] Paragraph 20 refers to Corporal Wyers' use of the FLIR device at 86 Falcon Drive. As I have already discussed, at length, my concerns with respect to the use of the FLIR in this investigation, I need not repeat them here. Paragraph 20 will be expunged from the Information to Obtain.

Effect on validity of warrant for 86 Falcon Drive:

[269] Once these paragraphs are expunged or amplified as necessary, there are a number of factors left within the Information to Obtain, which, in my view are sufficient to support the warrant. These include the following:

1. Indicia of use of the premises inconsistent with normal occupancy and consistent with a marijuana grow operation (bearing in mind that there is also indicia to the contrary, such as the open windows viewed by Buxton-Carr and by Wyers);

2. Actual vehicles (the green Camry) and similar vehicles (the grey Kia Sorrento and the green Voyager van) connected to other known grow operations seen at 86 Falcon Drive;

3. Humming sounds believed to be fans heard coming from lower level of 86 Falcon Drive; and

4. Consumption records from Yukon Electric for 86 Falcon Drive demonstrating very high electrical usage.

[270] To repeat, the standard of review to be applied is not whether I would have granted the warrant based on this information, but whether there remains "evidence that might reasonably be believed on the basis of which the authorization could have issued". I am satisfied that the above-enumerated information does provide a basis upon which the authorization could have issued, and decline to quash the warrant for 86 Falcon Drive.

8. EXCLUSION OF EVIDENCE: SECTION 24(2):

[271] Having completed my rulings with respect to the allegations of breaches under the *Charter*, what remains is the issue of exclusion pursuant to section 24(2).

[272] Evidence that is obtained in a manner that infringes the *Charter* will only be excluded at trial if its admission would bring the administration of justice into disrepute (section 24(2)). In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court of Canada established three factors which must be balanced when determining whether the admission of evidence would bring the administration of justice into disrepute:

1. Trial fairness;
2. The seriousness of the *Charter* violation; and
3. The possibility that the exclusion of the evidence would bring the administration of justice into greater disrepute than admitting it.

Trial Fairness:

[273] When trial fairness is considered, it is necessary to classify evidence as conscriptive or non-conscriptive (*R. v. Stillman*, [1997] 1 S.C.R. 607 at paragraph 74).

[274] Evidence is non-conscriptive “if the accused was not compelled to participate in the creation or discovery of the evidence” (*Stillman*, *supra* at paragraph 75). Its admission will rarely render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.

[275] Evidence is conscriptive if it involved the accused being “compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples” (*Stillman, supra* at paragraph 80). Conscriptive evidence includes “derivative evidence”: real evidence discovered as a result of conscriptive evidence (*Stillman, supra* at paragraph 99).

[276] The admission of conscriptive or derivative evidence will, as a general rule, render a trial unfair unless the Crown can show on a balance of probabilities that the evidence would have been obtained, even absent the conscription of the accused, from an independent source, or inevitably, through normal, constitutionally valid investigation procedures (*Stillman, supra* at paragraph 102). If the conscriptive evidence would not have been discovered in the absence of the unlawful conscription of the accused, its admission would generally tend to render the trial unfair and the other *Collins* factors need not be considered (*Stillman, supra* at paragraph 118). If the evidence would have been discovered through other means it will not render the trial unfair and the court must proceed to consider the remaining two factors (*Stillman, supra* at paragraph 116).

Seriousness of the Breach:

[277] In assessing the seriousness of the breach the court must take into consideration the totality of the circumstances. Generally, the court will consider the following factors in determining the gravity of the breach:

1. Was the violation inadvertent or committed in good faith or was it willful, deliberate and flagrant;

2. Was the violation serious or merely technical in nature;

3. Was the violation motivated by a situation of urgency or necessity; and

4. Were there other investigative means available to the police which would not infringe the Charter (*R. v. Silveira,* [1995] S.C.J. No. 38 at paragraph 147).

Effect of Exclusion:

[278] The effect of exclusion of evidence generally relates to the seriousness of the offence and the importance of the evidence to the Crown's case. The more serious the offence, the greater the likelihood that the administration of justice will be brought into disrepute through the exclusion of evidence. Similarly, exclusion of evidence which is essential to the prosecution of an offence because of a trivial Charter breach will likely bring the administration of justice into disrepute (*Collins* at p. 16). If, however, the evidence was obtained through flagrant disregard for constitutional procedures the court will be more likely to exclude the evidence so as not to condone the conduct of the police (*Collins* at page 17).

Application to Charter rulings:

1. Traffic stop of the green van:

[279] The traffic stop of the green van occupied by Mr. Yeung and Mr. Zhu by Corporal Hamilton resulted in identification evidence, statements, and the motor vehicle registration. Of these, the identification evidence and the statements made by Mr. Yeung and Mr. Zhu are clearly conscriptive evidence and as such ought to be exluded.

[280] The motor vehicle registration, on the other hand, while conscripted in the sense that the accused were compelled to provide it, was nonetheless discoverable through normal police investigative procedures, procedures which would not have required the participation of either Mr. Yeung or Mr. Zhu. Corporal Hamilton need only have run the license plate to obtain the same information.

[281] While I have some concerns about the seriousness of the breach in light of Corporal Hamilton's lack of understanding of the limits of his authority as a police officer, the stop itself was minimally intrusive. When I weigh the seriousness of the offences before me as against the nature of the breach, I am satisfied that it is appropriate to admit the motor vehicle registration into evidence.

2. Traffic stop of the green Camry:

[282] With respect to the traffic stop of the green Camry occupied by Mr. Wen, I reiterate the Crown's concession that should I find the arrest of Mr. Wen to be unlawful, I need not consider the search as the vehicle would not otherwise have been available to the police to search. This concession clearly also concedes the admissibility question under section 24(2). Any and all evidence flowing from the unlawful arrest of Mr. Wen is hereby excluded.

3. Fingerprints and photographs:

[283] Having found that the fingerprints and photographs taken of Mr. Zhou, Mr. Jiang, Mr. Yeung, Mr. Zhu and Mr. Zhai were unlawfully taken, I must now determine the question of admissibility. Curiously, this was perhaps the most difficult of the four issues to decide with respect to section 24(2), given the differences in the state of the law as between B.C. and Yukon.

[284] In *Connors, supra*, Cumming J.A. found that the accused's fingerprints were lawfully taken and so held that there was no basis to exclude them. Donald J.A., however, gave some thought to the matter at paras. 113 and 114 where he stated:

> If the correct view is that the fingerprinting was unlawful and therefore unreasonable (*Hunter* v. *Southam Inc*., [1984] 2 S.C.R. 145 at 160-161), because it was not done strictly according to the Act, then the inquiry turns to s. 24(2) of the Charter. I acknowledge that deference must be given to trial judges in the exercise of their discretion whether to exclude evidence under s. 24(2). However, I am respectfully of the opinion that it was plainly wrong to exclude this evidence. This was conscriptive evidence, but only in the most technical sense because it was ultimately compellable under the statute. The fairness of the trial would not have been affected by its admission, notwithstanding that the evidence emanated from the accused. The good faith of the officer was not successfully impugned….
>
> For the reasons I have stated, if this was a Charter breach, it was not a serious one. Mr. Connors could have been legally compelled to provide his prints at a later and less convenient time. As for the reputation of justice, I think that with such a trivial breach of the Charter right thinking and reasonably informed persons would have little hesitation in saying that the evidence should be admitted.

[285] BC Courts have had less tolerance for this type of breach with the passage of time. In *Nguyen*, *supra*, Catliff J. acknowledged that the fingerprinting and photographing had occurred only months after the decision in *Connors,* which as noted in *Nicholson, supra*, was not clear as to the existence of a common law power to fingerprint. He was unable to find that there was any act of bad faith on the part of the police, who were continuing their regular practice. Therefore, he concluded that it would bring the administration of justice into disrepute not to admit evidence on that basis that, although conscriptive, was ultimately compellable.

[286] In *Temple*, *supra*, defence counsel argued that while bad faith had not been shown, there was an absence of good faith because the mistake made by the police was unreasonable. Secondly, the charge was not laid for more than a

month after the accused was fingerprinted and photographed. Finally, the defence argued that it was an aggravating factor that the police could have obtained the accused's photograph by lawful means, but chose not to do so. Harfyard J., for the BC Supreme Court, adopted the reasoning of Donald J.A. and Catliff J. in finding that trial fairness would not be affected by admitting the photograph. However, the Court went on to hold that the error, while inadvertent, was unreasonable, and the lawful availability of the evidence aggravated the seriousness of the breach. After considering that the offence of trafficking cocaine was serious, but that the evidence was not important to the Crown's case, Harfyard J. excluded the evidence.

[287] Finally, in *Bui*, *supra,* Buller Bennett Prov. Ct. J. dealt with an application to exclude fingerprints and photographs under s. 24(2) briefly at para. 48:

> The evidence shows that this was a serious breach of Section 8 of the Charter as by September, 2003, it was well-established law that a charge had be laid before a person could be fingerprinted and photographed under the Identification of Criminals Act. This disregard for the law is a clear indication of bad faith on the part of the Port Moody Police Department. This was a serious breach of the accused's right to privacy after bring unlawfully arrested. The fingerprints and photographs are vital identification evidence for the Crown's case. Neither of the accused can be identified in court without reference to the photographs. Notwithstanding the importance of the evidence to the Crown's case, given the facts of this case, the admission of the fingerprints and photographs would bring the administration of justice into disrepute.

[288] This line of cases suggests that B.C. courts have struggled to balance the relatively minor intrusion occasioned by fingerprinting in breach of s. 8, with the need for police officers to respect the requirements of the *Charter*. Clearly the passage of time since the law became clear in B.C. has led to a greater likelihood to exclude so as not to condone the failure of the police to adjust their practice to accord with now well-established law.

[289] Were we in B.C., there seems little doubt that the breach in question would result in exclusion of the evidence. However, we are not in B.C. and, to my knowledge, this has not previously been an issue before the Yukon courts. What then is the effect of a law that has been clearly established in another jurisdiction on expectations with respect to police practice in this jurisdiction? In considering this question, I note that this court is not bound by the decisions which have developed in B.C. on this particular question. If I am not bound, how then can I expect the police to have adjusted their practice to accord with the law in B.C.?

[290] In my view, having now adopted the line of reasoning from the B.C. courts, we are now in much the same position as B.C. was back when *Connor, supra* was decided as set out in the reasoning of Donald J. in *Connor, supra* with respect to this issue.

[291] Were the issue of the admissibility of the photographs and fingerprints the sole issue before me, I would be comfortable adopting the reasoning of Donald J. in finding the evidence to be admissible notwithstanding the breach. However, this is not an isolated issue before me. In addition to the section 8 breach with respect to the taking of photographs and fingerprints, I have also found an unlawful stop in breach of section 9, an unlawful arrest, numerous breaches of section 10(b) and an invalid search warrant. As a result, I must ask myself what, if any, affect this multiplicity of breaches has on the question of the exclusion of the fingerprints and photos.

[292] In *R*. v. *Bohn*, 145 C.C.C. (3d) 320 at paragraph 45, it is noted that:

> The s. 10(b) breach was serious because, in conjunction with the s. 8 breach it is demonstrative of the inattention of the police to the rights of the appellant. To use the words of Dickson C.J.C. in *Strachan*, [1998] 2 S.C.R. 908], at p. 1007, it was “a part of a larger pattern of disregard for Charter rights”.

[293] Many of the breaches before me are serious ones, others less so, but the totality of breaches clearly creates a picture of a general lack of respect for the individual rights enshrined in the *Charter*. Adopting the reasoning in *Bohn*, I conclude that the multiplicity of breaches in this case does amount to "a larger pattern of disregard for Charter rights".

[294] In my view, such a pattern of behaviour cannot be condoned by this court. In consequence of the multiplicity of breaches in this case, I come to the determination that the fingerprints and photographs, while resulting from a relatively minor breach, must nonetheless be excluded.

4. 16 Sitka Crescent search:

[295] Having quashed the warrant in relation to 16 Sitka Crescent, I must now consider the issue of admissibility of the evidence seized as a result of the now warrantless search.

[296] In applying the *Collins* criteria, I note, on the first branch of the test, that the evidence is non-conscriptive thus its admission would automatically render the trial process unfair.

[297] Turning to the second branch, however, I note that the breach in this instance is an extremely serious one. In *Silveira, supra*, the Supreme Court of Canada held that a warrantless entry into a dwelling house was a serious *Charter* violation. The Court held at paragraph 148:

> It is hard to imagine a more serious infringement of an individual's right to privacy. The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the state in a home is the ultimate invasion of privacy. It is the denial of one of the fundamental rights of individuals living in a free and democratic society.

[298] When I consider the third branch of the *Collins* test, it is important to recognize that the inevitable quashing of the warrant was largely a result of the extreme carelessness with which Corporal Wyers drafted the Information to Obtain. Given this fact, the comments of Southin J. in *Dellapenna, supra,* are equally applicable in this instance:

> If we are concerned here with the respect in which law-abiding citizens hold the administration of justice then, relying upon my own observations, I am of the opinion that there are at least two things that are occasionally done by the few peace officers who are not upright, which the law-abiding citizen thoroughly disapproves of: one is physically mistreating persons in custody and the other is not telling the truth upon oath, whether from dishonesty or gross carelessness. If I am right in that observation, then to admit this evidence would bring the administration of justice into disrepute among those who know the facts. (paragraph 54)

[299] In addressing the admissibility of the evidence flowing from the search of 16 Sitka Crescent, I have also considered the number of breaches arising in this case, and I echo my above comments regarding my concerns about this multiplicity of breaches.

[300] It is my final determination, in this decision, that any and all evidence flowing from the warrantless search of 16 Sitka Crescent must be excluded.

Ruddy T.C.J.