

CANADA / JUDGMENT

R. v. Abdelkader

2025 BCSC 139

COURT

Supreme Court of British Columbia

DECIDED

24 January 2025

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2025 BCSC 139 R. v. Abdelkader

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Abdelkader,

2025 BCSC 139

Date: 20250124

Docket: 51975

Registry: Vernon

Rex

v.

Nabil Mahmoud Abdelkader

Corrected Judgment: The cover page of the judgment was corrected on February 6, 2025

Before: The Honourable Justice Shergill

Oral Ruling on Voir Dire #1

Stage 1 - Section 24(2) Application

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Place and Dates of Trial:

Vernon, B.C.

October 7-11, 2024

October 28-31, 2024 and

December 4-6, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 24, 2025

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I. Overview

- [1] Mr. Abdelkader is charged with two counts of possession of a controlled substance contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 ["CDSA"]. The offences allegedly occurred on May 2, 2020, in Vernon, British Columbia. The charges stem from the seizure and search of a Jeep vehicle owned by Mr. Abdelkader.

- [2] Before me is an application by the Defence brought under s. 24 of the Canadian Charter of Rights and Freedoms[1] for an order excluding evidence obtained through searches of the Vehicle. The Defence alleges the police violated the Accused's s. 7 and s. 8 Charter rights by failing to have a warrant or lawful reason to search his Vehicle; seizing his property without lawful authority and refusing to return it as required; and committing an abuse of process by engaging in conduct that risks undermining the integrity of the justice system.
- [3] The Vehicle was seized by the police in May 2020, in the course of an investigation into a violent hit and run incident which occurred on March 24, 2020. The driver of the Vehicle struck a bicyclist, then two of the Jeep's occupants got out and physically assaulted the bicyclist before returning to the Vehicle and driving away. Neither the driver nor the passengers were ever identified by police.
- [4] The Vehicle remained in police custody until the fall of 2020. On October 13, 2020, the police conducted a search of the Vehicle without a search warrant. Through their search, the police located a concealed aftermarket compartment in the Vehicle. Contained in the Compartment were trafficking-level quantities of methamphetamine and cocaine. Mr. Abdelkader was subsequently arrested and charged based on what was found in the October Search.
- [5] The central issue in this first phase of the s. 24(2) voir dire, is whether the police violated Mr. Abdelkader's rights under s. 7 or s. 8 of the Charter. The answer to this question turns in large part on whether Mr. Abdelkader retained any privacy interests in the hidden Compartment or its contents.

II. Alleged Breaches

- [6] The Defence alleges that the police breached Mr. Abdelkader's Charter rights in the following ways:
1. The police failed to comply with s. 490(5) of the Criminal Code, R.S.C. 1985, c. C-46, beginning on May 8, 2020, by not returning Mr. Abdelkader's belongings once they were no longer necessary for the investigation. This failure amounted to a breach of s. 8 of the Charter.
 2. The police conducted a search of the Vehicle on June 24, 2020, for purposes and items outside the parameters of any warrant. This likely followed on the heels of other searches unconnected to the warrants obtained. These searches violated s. 8 of the Charter.
 3. The police failed to comply with s. 490(6) by failing to return Mr. Abdelkader's personal belongings between August 3, 2020, and October 21, 2020. This breached s. 8 of the Charter.
 4. The police failed to comply with s. 490(6) by failing to return the Vehicle to Mr. Abdelkader from at least August 21, 2020 onwards. This constituted a breach of s. 8 of the Charter.

5. On October 13, 2020, the police conducted a warrantless search of the Vehicle and the hidden Compartment without lawful authority, violating s. 8 of the Charter.
6. The police failed to comply with the requirements of s. 490 regarding exhibits obtained throughout the investigation, amounting to a pattern of noncompliance and a breach of s. 8 of the Charter.
7. The police and the Civil Forfeiture Office acted in concert to misuse statutory powers to prevent Mr. Abdelkader from reclaiming his vehicle. This conduct offended society's sense of fair play and decency and violated s. 7 of the Charter.

(the alleged "Breaches")

- [7] Breaches 1-6 relate to the Accused's s. 8 Charter rights. I will consider these alleged breaches under the s. 8 analysis, organized into the following three broad categories: the June Search and other earlier searches (Breach 2); the October Search (Breach 5); and failure to comply with s. 490 of the Criminal Code (Breaches 1, 3, 4, and 6).
- [8] Breach 7 concerns an allegation that the police's cumulative conduct and involvement with the Civil Forfeiture Office ("CFO") amounted to an abuse of process. I will consider this allegation under the s. 7 Charter analysis.
- [9] As a general comment, the Crown and Defence advanced extensive arguments in support of their respective positions. Those arguments took three days to complete and spanned more than 200 pages of written submissions, with reference to more than 100 authorities.
- [10] It is not possible within the scope of these Reasons for me to address every argument the parties advanced, nor is it necessary to do so. Suffice it to say that I have considered the parties' respective positions in their entirety in arriving at these Reasons.

III. Findings of Fact

A. Admissions

- [11] I begin with a summary of the facts in this case which have been admitted pursuant to s. 655 of the Criminal Code.
- [12] Mr. Abdelkader purchased the Vehicle, a white 2018 Jeep Grand Cherokee, on September 26, 2019, from a Vernon car dealership, pursuant to a Motor Vehicle Purchase Agreement. On the same day, Mr. Abdelkader entered into a conditional sales contract (the "Conditional Sales Contract"), with the Canadian Imperial Bank of Commerce ("CIBC" or the "Bank"). CIBC provided financing for the Vehicle.
- [13] On October 18, 2019, CIBC registered a lien against the Jeep, listing CIBC as the "secured party" and Mr. Abdelkader as the "base debtor" (the "CIBC Lien"). The CIBC lien had an expiry date of October 18, 2025.
- [14] Mr. Abdelkader made all payments required under the Conditional Sales Contract.

- [15] From September 26, 2019, to November 12, 2020, Mr. Abdelkader was listed on the Owner's Certificate of Insurance and Vehicle Licenses ("Owner's Certificate") as the registered owner of the Jeep. CIBC became the registered owner on November 12, 2020.
- [16] On March 24, 2020, the Jeep struck a cyclist[2] while he was riding his bicycle in a parking lot in Vernon, B.C. (the "Hit and Run"). The cyclist was further assaulted by two individuals who exited the Vehicle while the driver remained inside (the "Assault"). The cyclist suffered injuries as a result of the Hit and Run and the Assault (which are collectively referred to as the "Incident").
- [17] Members of the Royal Canadian Mounted Police's Vernon North Okanagan detachment ("Vernon RCMP") began an assault with a weapon investigation into the Incident (the "Hit and Run Investigation"). The occupants of the Jeep during the assault on the cyclist could not be identified to the satisfaction of the police.
- [18] On May 2, 2020, the RCMP seized the Jeep from Mr. Abdelkader's garage at his residence in Vernon, pursuant to a search warrant authorized in relation to the Hit and Run Investigation.
- [19] On July 22, 2020, the Director of the CFO accepted a referral for civil forfeiture from the Vernon RCMP in relation to the Jeep.
- [20] The CFO sent a Notice of Intent to Commence Proceedings, dated July 22, 2020, to Cst. Cory Hoard of the Vernon RCMP.
- [21] The CFO sent a letter to CIBC and D+H Partnership dated July 28, 2020, providing notice of a civil forfeiture action, and requesting information pursuant to ss. 18(1) and (2) of the Personal Property Security Act, R.S.B.C. 1996, c. 359 [PPSA].
- [22] On August 10, 2020, the CFO filed a Notice of Civil Claim - Civil Forfeiture (In Rem) ("NOCC") in the BC Supreme Court Victoria Registry, File No. S-202583 (the "Civil Forfeiture Action"). The CFO listed itself as the plaintiff and named "The Owners and all Others interested in the Vehicle, in Particular, Nabil Abdelkader" as the Defendants.
- [23] On August 10, 2020, the CFO registered a PPSA Security Agreement against the Jeep, listing CFO as the "Secured Party" and Mr. Abdelkader as the "Base Debtor" (the "CFO Lien").
- [24] In September 2020, legal counsel for the CFO sent a letter to Jason Gold, Legal Escalation Manager at CIBC (the "September 15 Letter"), indicating that the CFO was agreeable to CIBC repossessing the Jeep on the following undertakings:
- a) that CIBC will not return possession of the Jeep to Mr. Abdelkader or any of his family members, agents, assigns, or nominees; and
 - b) that CIBC would not pay any surplus realized on the sale of the vehicle to Mr. Abdelkader or any of his family members, agents, assigns, or nominees, and would instead pay "notice of any such surplus" into court to the credit of the Civil Forfeiture Action.

(the "Undertaking")

- [25] On September 15, 2020, CIBC entered into an Undertaking with respect to the Jeep, on the terms outlined in the September 15 Letter. The Undertaking was signed by Sonia Russo, Assistant General Manager at CIBC.
- [26] On October 2, 2020, Mr. Abdelkader's legal counsel, Stanley Tessmer, filed a Notice of Application seeking return of the Jeep under s. 490(9) of the Criminal Code.
- [27] On October 7, 2020, Mr. Tessmer filed a Response to Civil Claim on behalf of Mr. Abdelkader (the "RTCC").
- [28] On October 13, 2020, the Vernon RCMP conducted a search and dismantling of the Jeep (the "October Search") and located a concealed aftermarket compartment. The Compartment contained the following controlled substances in vacuum sealed bags: 4.009 kg of methamphetamine and 113.90 gm of cocaine.[3]
- [29] The CFO Lien was discharged on November 9, 2020.
- [30] On January 22, 2021, the Jeep was sold for \$90,700.
- [31] At some point prior to April 27, 2021, CIBC forwarded \$3,207.68 to the CFO. This money represented the surplus sale proceeds from sale of the Jeep following payout of CIBC's loan and expenses (the "Sale Proceeds").
- [32] Mr. Abdelkader was arrested by the Vernon RCMP on January 11, 2022, in relation to police investigation file no. 20-18630.

B. Additional Facts

- [33] I make the following additional findings of fact.

1. Drug Unit's Involvement in the Investigation

- [34] The Vernon RCMP began the Hit and Run Investigation on March 24, 2020, after receiving a 911 call from civilian witnesses. Constable Plamondon and Constable Iqbal of the general duty watch ("Watch Unit") were initially assigned to this matter.
- [35] As part of the initial investigation, police officers obtained CCTV video footage of the Incident. The CCTV footage shows the Jeep striking the cyclist, Mr. Brignall. While the driver remains at the steering wheel, two men exit the Jeep and physically assault Mr. Brignall. The men then re-enter the Jeep, which immediately leaves the area. Neither Mr. Brignall nor the police could identify the occupants of the vehicle, or the driver (collectively, the "Suspects").
- [36] The police issued a media release on March 25, 2020.

- [37] On March 30, 2020, Constable Iqbal obtained video footage which revealed the Jeep's license plate. Shortly thereafter, the Vernon RCMP identified Mr. Abdelkader as the registered owner of the Jeep. On April 14, 2020, Constable Iqbal emailed members of the Vernon RCMP detachment, asking if anyone could identify the suspects depicted in the photos and video taken from around the scene of the Hit and Run. The email identified Mr. Abdelkader as the registered owner of the Jeep, and noted that the police had not been able to locate the Vehicle, and that the Jeep had not been reported as stolen.
- [38] At the time, Sgt. Evans was in charge of the Targeted Policing Unit of the Vernon RCMP (the "Drug Unit"), which was responsible for drug trafficking investigations in the Vernon area. Constable Hoard was the only other investigator in the Drug Unit, and he reported to Sgt. Evans.
- [39] Sgt. Evans recognized Mr. Abdelkader's name, as Mr. Abdelkader was on the Provincial Tactical Enforcement Priority ("PTEP") target list as a suspected drug trafficker. However, Mr. Abdelkader had no criminal record and had never been arrested by the police. Sgt. Evans immediately decided to take over the Investigation from the General Unit. Sgt. Evans testified that he wanted to assume conduct of the Investigation even though it was "typically" outside of the mandate of the Drug Unit, solely because of the involvement of Mr. Abdelkader's vehicle.
- [40] Sgt. Evans and Constable Hoard began investigating Mr. Abdelkader on April 14, 2020, even though they had not yet formally taken over conduct of the Investigation from the Watch Unit. This included conducting surveillance of Mr. Abdelkader and his residence, and communicating with the Asset Forfeiture Unit ("AFU") at the RCMP.
- [41] The AFU acts as the liaison between the RCMP and the CFO.
- [42] Sgt. Evans testified that he contacted the AFU "to determine if this case would qualify for civil forfeiture if we are not able to secure criminal charges". In his email query to the AFU, Sgt. Evans wrote that they suspected that the driver of the Vehicle was its registered owner ("RO") and PTEP target - in other words, Mr. Abdelkader.
- [43] Cst. Sean Tutt of the AFU replied to Sgt. Evans' email on April 15, 2020, writing: "[i]f you have determined that the R.O. was involved, it would cover a lot of questions I would have". Sgt. Evans testified that he understood this response to mean that if the owner of the vehicle was not operating the vehicle at the time of the Incident, this could provide a defence to the owner to resist forfeiture.
- [44] The Drug Unit formally assumed control of the Investigation from the Watch Unit, on the afternoon of April 15, 2020.

2. Search Warrants

- [45] Three judicial authorizations were sought and obtained by Cst. Hoard during the Hit and Run Investigation:

- a) A Tracking Warrant for the Jeep and related Assistance Order dated April 24, 2020 (the "Tracking Warrant").
- b) A Search Warrant for Mr. Abdelkader's residence dated May 2, 2020, for the listed items, including the Jeep, its key fob, specific clothing items, and vehicle data from the vehicle's infotainment system including "location data" (the "Search Warrant"); and
- c) A Warrant for the forensic examination of the Jeep, dated May 6, 2020 (the "Forensic Search Warrant").

(collectively the "Warrants")

[46] The Jeep was located at Mr. Abdelkader's residence through information obtained from the Tracking Warrant.

[47] While still waiting for a search warrant, Sgt. Evans conducted surveillance at Mr. Abdelkader's residence on May 2, 2017. He saw Mr. Abdelkader leave the area in a different vehicle, drive past where Sgt. Evans was posted, turn around, and then slowly drive past Sgt. Evans' location again.

[48] The Search Warrant was issued late in the afternoon of May 2nd. Item 2 of the Search Warrant authorized a search for the following "things and data from within the Jeep for March 24 and 25, 2020":

- a. location data;
- b. paired or linked cellular phones;
- c. call and text logs;
- d. text message content.

[49] Sgt. Evans, Cst. Hoard and two other officers attended Mr. Abdelkader's home at approximately 17:30 on May 2, 2020, to execute the Search Warrant. Mr. Abdelkader escorted Cst. Hoard to the garage, where the Jeep was located.

[50] Sgt Evans opened the car door and began his search of the Vehicle, observing the keys in the driver's side door handle. He noted the car was clean and tidy.

[51] A tow truck arrived and transported the Jeep to the RCMP's secure parking lot (the "Secure Bay"). Sgt. Evans and Constable Hoard searched the Jeep on May 4 and May 7, 2020.

[52] The May 4, 2020, search was conducted by Sgt. Evans and Cst. Hoard pursuant to the Search Warrant. The search was comprehensive. It occurred in the Secure Bay over a period of several hours. During this time, the officers took photographs of the vehicle, searched under the hood, and looked for the clothing items. The police did not locate the clothing listed on the Search Warrant.

- [53] On May 6, 2020, Cst. Hoard applied for the Forensic Search Warrant so that they could search for fingerprint and biological samples from the Jeep. Cpl. Marginson executed this warrant on May 7, 2020. Sgt. Evans and Cst. Hoard searched the vehicle that same day, and removed its infotainment system from the dashboard. Sgt. Evans agreed that at this juncture, they had completed executing the May 4, 2020 Search Warrant and May 6, 2020 Forensic Warrant.
- [54] On May 7, 2020, the RCMP obtained a detention order for the Jeep under s. 490(1)(b) of the Criminal Code, for a period of three months from the date of seizure (expiring on August 3, 2020).
- [55] Sgt. Evans agreed that by May 8, 2020, the police had exhausted their search of the Jeep and nothing of evidentiary value had been obtained.
- [56] On May 13, 2020, Cst. Hoard filed a Report to Justice regarding the biological samples retrieved from the vehicle. This report went unsigned by a Justice. Even though the police did not obtain a further detention order - or, according to Cst. Hoard's testimony, believe it was necessary to continue to hold onto the samples - police did not take any steps to return the samples to Mr. Abdelkader.
- [57] On June 24, 2020, Cst. Hoard turned on the Jeep and obtained the Vehicle's mileage.

3. Referral to CFO

- [58] The RCMP formally concluded the Hit and Run Investigation of the Jeep on July 20, 2020. Sgt. Evans and Cst. Hoard testified that by this date, the RCMP had completed all its investigative steps and were unable to identify any of the occupants of the Jeep.
- [59] As a result, the Vernon RCMP did not recommend any charges to the Crown in relation to the Incident. Instead, they formally referred the Jeep to the CFO on July 21, 2020. The CFO accepted the referral the following day.
- [60] Despite this, the Jeep remained in the Secure Bay (and under the control of the Vernon RCMP) until October 20, 2020.

4. Consent to Search the Jeep

- [61] In late September 2020, CIBC hired Teranet, a property repossession company, to obtain the vehicle from the Vernon RCMP. Teranet hired a subcontractor, the Integrated Recovery Solutions Corporation ("IRSC"), to perform this service on its behalf.
- [62] On September 23, 2020, a representative from Teranet, Sumaira Khalid, contacted Cst. Hoard to arrange to pick up the Jeep.
- [63] On October 1, 2020, Cst. Hoard asked to hold onto the Jeep until after they had conducted an x-ray examination of it "for public safety reasons". Ms. Khalid provided the contact information for IRSC and Cst. Hoard indicated that he would connect with them.

[64] Meanwhile, Mr. Abdelkader, through counsel, filed an application pursuant to s. 490(6) of the Criminal Code on October 2, 2024. The RCMP received verbal notice of this application on October 2, 2020. Formal notice was faxed to the RCMP on October 5, 2020.

[65] On October 6, 2020, Sgt. Evans emailed Phil Tawtel, an executive director with CFO, to seek advice about who owned the Jeep, to obtain contact information for the representative responsible for obtaining the Vehicle from the RCMP, and to outline a plan for conducting a further search of the Jeep. In this email, Sgt. Evans advised that "New Counsel for the owner of the Jeep has filed a Notice of Application under 490(6) for return pursuant to 490(9)". He explained that the purpose of conducting a further search of the Jeep was to secure evidence against Mr. Abdelkader:

We have a plan to arrange for CIBC to take possession of the vehicle following a search assisted by X-ray at border as we suspect there is a hidden compartment in the vehicle. I'm trying to ensure we are on solid ground in executing the search of the vehicle that is no longer the property of Nabil Abdelkader in an effort to secure evidence for charges against him. There is insufficient evidence to obtain a warrant for such search.

[66] This email makes no reference to public safety concerns. Sgt. Evans testified that, at the time of sending it, he suspected there was something inside the vehicle but did not have authority to seek a warrant. He said he was aware privacy interests were at play and that, in sending the email, he sought to clarify who owned the Jeep so that he could get consent to search it.

[67] On October 7, 2020, Sgt. Evans spoke to Jacqueline Yaremko, a representative of IRSC (the "Bailiff"). Ms. Yaremko provide consent for a search of the Vehicle "to ensure there is no risk to public or liability to our company". In cross examination, Ms. Yaremko agreed that she felt she was not in a position to say "no" to the officers' request to search the Jeep. She said it was her understanding that the search would be limited to an X-ray scan of the vehicle.

[68] In her contemporaneous notes, the Bailiff summarized her conversation with Sgt. Evans:

RCMP member just called me to discuss this unit. The vehicle was used in a crime, but they were unable to find sufficient evidence to make the charges stick. Not drug related. They do know that the offender is a well-known, large-scale drug trafficker and we really want to be able to charge him. At this point they have no grounds to hold the unit, would still like to have the unit brought down to the border to have it x-rayed for possible compartments containing drugs and/or weapons. We could pick up the 24 unit now but he says it may be a liability if there are those items in the unit when it is publicly sold at auction.

[69] Sgt. Evans sent a follow up email to Ms. Yaremko, which notes in part that:

- We have a suspicion that the vehicle may have a hidden compartment which are typically used to store items related to criminal offences - firearms, drugs, cash;

- We wish to transport the vehicle to the Lower Mainland to execute an X-ray scan of vehicle at the Canada/US border in an effort to locate any such compartment - this transport will be completed in an enclosed vehicle trailer;
- If a compartment is located we intend to enlist assistance from persons with expertise in same and with as little as possible damage being done to vehicle search the compartment for evidence of any offence;
- Physical custody of the vehicle has not officially changed hands as it is securely stored at no cost to your company as we take steps to ensure the vehicle does not pose any public risk prior to it being sold.

[70] Sgt. Evans also told Ms. Yaremko that he believed she had a "right to custody of the vehicle through your contract for repossession and sale and as such I am seeking your permission to transport the vehicle to the Lower Mainland to conduct the X-Ray scan and possible search as described above to ensure no public risk or potential liability to your company through the public sale of the same. This process will be completed at no cost to your company and we will turn over physical possession in the Lower Mainland when complete".

[71] Sgt. Evans testified at the voir dire hearing that he believed Ms. Yaremko's consent provided him with the legal authority to search the vehicle. He adopted his testimony from the preliminary inquiry as follows:

Well, I -- I need -- I need somebody's consent. We didn't have grounds to apply for a judicial authorization. We were operating based purely on suspicion of -- of the -- that potential, so without grounds to apply for an authorization, I believed I needed to seek authorization from the person who has control over the vehicle, and I believed at the time that the bailiff company would be that -- that said person, because they were contracted to come take possession of it and take it to auction for sale.

[72] Despite being in touch with Ms. Russo and knowing she was the direct representative of CIBC, Sgt. Evans never informed her about the police's intention to search the Jeep. Rather, the Vernon RCMP relied on the Bailiff's consent, despite Sgt. Evans conceding that this meant "moving down the chain" from CIBC and that he had no concept of what the contractual relationship was between these entities.

[73] At some point, Sgt. Evans learned that x-ray of the vehicle has limits and could miss a hidden compartment.

[74] On October 7, 2020, Sgt. Evans contacted Cpl. Fletcher for assistance in locating a possible hidden compartment in the Jeep. Cpl Fletcher had expertise in secret compartments but was based in the Lower Mainland. They arranged for Cpl. Fletcher to travel to Vernon on October 13, 2020.

- [75] Cpl. Fletcher asked Sgt. Evans whether the RCMP had obtained a warrant for the search. Sgt. Evans responded by suggesting that the Bailiff had consented to the search and requested it herself. This statement was inaccurate. As Ms. Yaremko confirmed, she never requested a search of the Vehicle. While Sgt. Evans denied using the word "behest", I am satisfied that he used that or a similar word to convey this information to Cpl. Fletcher.
- [76] On October 9, 2020, Mr. Larson, a Director for the CFO, responded to Sgt. Evans' inquiry into who lawfully owned the vehicle. Mr. Larson told Sgt. Evans that "the property belongs to the bank and they have claimed a right of possession as a result of his breaching the lease agreement". Furthermore, Mr. Larson stated, "if they have agreed to allow you to search it, then I don't foresee any problem".
- [77] Based on this response, Sgt. Evans concluded that the Bank had repossessed the Jeep and now owned it.
- [78] On October 13, 2020, Sgt. Evans spoke with Ms. Yaremko about returning Mr. Abdelkader's personal belongings, which were found inside the vehicle (the "Personal Effects"). They agreed that Sgt. Evans would return the Personal Effects directly to Mr. Abdelkader.
- [79] Cpl. Fletcher commenced his search of the Jeep on October 13, 2020, shortly after Sgt. Evans' phone call with Ms. Yaremko about the Personal Effects.

5. October Search

- [80] Sgt. Evans testified to how the search of the Jeep unfolded and to how Cpl. Fletcher pointed out the indicia of the Compartment. Sgt. Evans observed Cpl. Fletcher conduct the search. Cpl. Fletcher also used the opportunity to share his knowledge and skills with the officers present. Sgt. Evans also testified to the ultimate finding of the drugs inside the Compartment.
- [81] The officers agreed that when they conducted the October Search, there was no urgency or imminent concern for the vehicle or themselves.
- [82] Cpl. Fletcher started his search at the rear of the vehicle. He got on the ground under the Vehicle. He looked around and "immediately" saw signs of what he believed to be indicia of a hidden compartment. He then walked around to the passenger side of the Jeep and opened the rear door and dropped the seat back. He saw after market carpeting in the area where he believed the hidden compartment was located.
- [83] Cpl Fletcher testified that he then told Sgt. Evans and Cst. Hoard what he had discovered. They expressed disbelief and told him that multiple people had already searched the Jeep under the Search Warrant. In cross-examination, Sgt. Evans denied that they were surprised or that they said they had done any searches for a secret Compartment prior to Cpl Fletcher's search.

- [84] Cpl. Fletcher continued with his search. He took steps to reveal the exterior of the Compartment. He found wiring which indicated that the Compartment could be opened electronically, but he could not figure out how to open it. Cpl. Fletcher eventually used a "snake" camera to look inside.
- [85] Before Cpl. Fletcher opened up the Compartment neither Sgt. Evans nor Cst. Hoard knew what the Compartment contained. However, Sgt. Evans testified that he believed Mr. Abdelkader likely owned anything that was inside the Compartment. They planned to handle anything they found carefully and see if they could obtain fingerprints.
- [86] At Sgt. Evans' direction, Cpl. Fletcher dismantled part of the Jeep to access the Compartment. At this point, Sgt. Evans reached out to Ms. Yaremko to update her and discuss what to do with any items the RCMP found in the Vehicle.
- [87] Inside the Compartment, the police located four vacuum sealed bags of narcotics, weighing approximately four kilograms, as well as a package of cocaine wrapped in an opaque paper towel and a white box (collectively, the "Hidden Possessions"). The police removed the Compartment and the Hidden Possessions from the Jeep. They did not obtain a warrant to do so.
- [88] After removing the Compartment, Cpl. Fletcher determined that, short of dismantling the Vehicle, the only way to access the Compartment would have been through the application of a particular sequence of buttons on the driver's side control panel.
- [89] Sgt. Evans contacted Cpl. Marginson from the RCMP's Forensic Identification Section for advice about exhibit processing as it pertained to the gathering of fingerprints. Sgt. Evans testified that Cpl. Marginson advised he remove the drugs from the plastic bags and submit the bags for fingerprinting.
- [90] Cpl. Marginson ultimately identified some of the fingerprints and a palm print on the drug bags as belonging to Mr. Abdelkader.

6. Return of the Jeep and Personal Effects

- [91] On October 20, 2020, the RCMP provided the Jeep to IRSC after removing the Compartment and the Hidden Possessions, and partially repairing the Vehicle. According to the Bailiff and Ms. Russo, this was when the actual repossession of the vehicle occurred, and the Bailiff first conducted her assessment of the vehicle.
- [92] Sgt. Evans testified that there were two areas of damage to the vehicle following the October Search: 1) the removal of the infotainment system; and 2) the removal of the Compartment, which left a void in the Jeep.

- [93] Ms. Russo testified that BC is a "seize or sue" jurisdiction - meaning that at any point prior to a seizure, a creditor can decide whether they wish to seize the property or commence an action against the debtor. Ms. Russo agreed that while the bank indicated a desire to repossess the Vehicle in September 2020, prior to October 20, 2020, all the Bank had was a security interest in the Jeep.
- [94] Ms. Russo testified that Mr. Abdelkader remained the registered owner of the Jeep until November 12, 2020. Until then, he kept the vehicle insured and continued making payments on the CIBC loan, despite the fact that the police had seized the Jeep. She also agreed that CIBC never gave Mr. Abdelkader formal notice of its intention to seize the Vehicle and sell it.
- [95] On October 20, 2020, Sgt. Evans and Cst. Hoard attended at Mr. Abdelkader's home to return the personal items found inside the Jeep to Mr. Abdelkader. These items included license plates, insurance documents, first aid kits, survival blankets, packages of Kleenex, a plastic bag containing other items of a personal nature, various receipts and spare change (the "Personal Effects").
- [96] Sgt. Evans testified to the following reasons for going to the Accused's home:
- a) to return the Personal Effects;
 - b) to serve Mr. Abdelkader with a ticket under the Motor Vehicle Act for the Incident, as he was the registered owner of the vehicle;^[4] and
 - c) to advise Mr. Abdelkader that they had discovered the drugs, in an effort to prevent any risk to public safety once the vehicle went to auction.
- [97] Sgt. Evans testified that public safety concerns also motivated his decision to tell Mr. Abdelkader's lawyer about the discovery of the drugs, even though this was a step he would not take in most investigations. He cited the same public safety concerns as the RCMP's motivation to issue a further media release, alerting people beyond Mr. Abdelkader that the drugs had been discovered.

7. Subsequent Events

- [98] On November 16, 2020, the police obtained an impression warrant (the "Impression Warrant") to permit them to obtain the Accused's fingerprints, which they collected on November 27, 2020.
- [99] On March 11, 2021, and December 7, 2021, Ms. Russo provided her consent for the continued detention of items seized from the Jeep.
- [100] Mr. Abdelkader was charged on January 22, 2022.

IV. Section 8 Violation

- [101] Section 8 of the Charter provides:

8. Everyone has the right to be secure against unreasonable search or seizure.

[102] In *R. v. Jones*, 2017 SCC 60 ("Jones SCC") at para. 11, the Court noted that a s. 8 analysis is done in two stages. In the first stage, the court ascertains whether the claimant had a reasonable expectation of privacy in the thing or place that is the subject of the search or seizure. In the second stage, the court determines the reasonableness of the search.

[103] A s. 8 right is only engaged if the claimant has a reasonable expectation of privacy in the place or item inspected or seized by the state: *R. v. Cole*, 2012 SCC 53 at paras. 34 and 36.

[104] Not all investigative techniques that are colloquially described as "searches" are considered searches for constitutional purposes: *R. v. Evans*, [1996] 1 S.C.R. 8 at paras. 3-4 at paras. 10-11, 1996 CanLII 248. Only examinations by the state which "constitute an intrusion upon some reasonable privacy interest of individuals" fall under the definition of a "search" under s. 8: *Evans* at para. 11.

[105] Once s. 8 of the Charter is engaged, the court must then determine whether the search or seizure was reasonable. A search or seizure is only reasonable where: (1) it is authorized by law; (2) the law itself is reasonable; and (3) the search or seizure was carried out reasonably: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278, 1987 CanLII 84; see also *R. v. Campbell*, 2024 SCC 42 at para. 81.

A. June Search

[106] The Defence argues that when Cst. Hoard started the Jeep on June 24, 2020, and obtained the Vehicle's mileage, this action constituted a search of the Vehicle which was not authorized by the Search Warrant. As a result, the police breached Mr. Abdelkader's section 8 Charter rights.

[107] The Crown does not dispute that Mr. Abdelkader had a reasonable expectation of privacy interest in the Jeep and its contents at the time of the June Search. However, the Crown submits that Constable Hoard's actions on June 24, 2020, do not constitute a search, nor was obtaining the vehicle's mileage outside of the scope of the Search Warrant.

[108] Invasions of privacy do not necessarily end when property has been seized, even if the seizure is lawful. This is because the item "will likely be examined and further searches conducted": *R. v. Craig*, 2016 BCCA 154 at para. 180.

[109] To the Crown's first point, Counsel likens the search for mileage as akin to looking at a vehicle and noting its colour. Counsel submits that, just as the police would not need a search warrant for that activity, they did not need a warrant to determine the Vehicle's mileage. I disagree. The colour of a vehicle (including in most instances the colour of the upholstery inside it) is plainly obvious to anyone in close proximity to the Vehicle. The mileage is not. It is only ascertainable by someone that has a key to the vehicle. To determine the mileage, the officer was required to unlock the Vehicle, enter it, and start the ignition. I consider those steps to be indicative of the officer conducting a search of the

Vehicle.

- [110] I also do not accede to the Crown's argument that obtaining the Vehicle's mileage fell within the scope of the Search Warrant. First, the Search Warrant makes no reference to mileage. Second, the suggestion that mileage falls under the category of "location data", is not supported by the evidence.
- [111] Cst. Hoard testified that he believed the mileage constituted part of the "location data" referenced at item 2.a. of the Search Warrant. However, when asked why he was trying to obtain the mileage, he explained that a Department of Justice lawyer had requested the information because they wished to know the value of the Vehicle "in case a surety was obtained". This response undermines any suggestion that Cst. Hoard obtained the mileage to ascertain matters related to "location" specifically, or the Hit and Run Investigation generally.
- [112] Section 8 of the Charter requires police to ensure a search is "no more intrusive than is reasonably necessary to achieve its objectives": *R. v. Vu*, 2013 SCC 60 at para. 22.
- [113] In this case, the objectives of the search were ostensibly to obtain information that could aid in identifying the occupants of the Vehicle so as to advance the Hit and Run Investigation. It is difficult to see how discerning the value of the Vehicle could advance these objectives.
- [114] I also reject the Crown's argument that mileage "has no informational value to it that can trigger any known privacy interest".[5] Mileage could assist in corroborating or refuting a theory or evidence about the Vehicle's use. But even if I was to find that there is no reasonable expectation of privacy in a vehicle's mileage, the accused's privacy interests were triggered when the police entered the Vehicle to obtain information that was not listed in the search warrant.
- [115] Cst. Hoard was clearly aware of the details of the Search Warrant and the specific items authorized under it. It can reasonably be inferred that Cst. Hoard knew that he lacked authority to search the vehicle but proceeded to do so anyways: *R. v. Badu*, 2022 ABCA 267 at para. 27.
- [116] I am satisfied that in conducting a search on June 24, 2020, Constable Hoard breached the Accused's s. 8 Charter rights.

B. Other Searches

- [117] The Defence submits that it is likely that the police conducted searches of the Jeep prior to October 13, 2020, for evidence of drug trafficking. Such searches were not permitted by the Warrants and amount to a breach of s. 8 of the Charter. The Defence relies on the following evidence in support:

- a) The admission by the officers in the Drug Unit that they were only involved in the Investigation because of their interest in Mr. Abdelkader as a drug trafficking suspect.
 - b) Photographic evidence of the May 4, 2020, search which indicates the police were looking in the trunk of the Jeep and under the wheel well. Given the tidy and neat nature of the Vehicle, it is illogical to argue that the police were searching in these locations for clothing items in aid of the Hit and Run Investigation.
 - c) According to Cst. Hoard, the May 4, 2020, search of the Vehicle took approximately four hours. This amount of time is unreasonable, since the police had already located the keys and were not interested in the infotainment system that day.
 - d) Cpl. Fletcher's testimony that, when he reported to the other officers on October 13, 2020, that he saw signs indicative of a hidden compartment in the Jeep, they expressed disbelief and stated that multiple people had searched the Vehicle to that point. This implies that other police officers had been searching for the hidden compartment but had missed it.
- [118] While the above together leads to a strong suggestion that the police may have searched the Jeep for the secret compartment or for drugs prior to October 2020, a strong suggestion is not enough to find that a breach of the Accused's s. 8 Charter rights were breached.
- [119] Further, I do not accept that all of the above facts are in fact, concerning. First, if the clothing was in fact inside the Jeep, it would be logical to assume that it had been hidden, as it could potentially provide a link to the Hit and Run. On that basis, it would make sense for the police to search spaces where the clothing items could be hidden, such as the trunk or wheel well.
- [120] As noted by the court in *R. v. Fedan*, 2016 BCCA 26: "[p]rior judicial authorization to search a specific location for specific things generally includes "a reasonable examination of anything at that location within which the specified things might be found specific prior authorization to search anything at that location is not required": at para. 74, citing *Vu*, at para. 23.
- [121] Second, Cpl. Fletcher was not asked which officer expressed the disbelief and told him that the Jeep had been searched previously. Several officers were present at the time that Cpl. Fletcher conducted the search, including Sgt. Evans who denied that he made those comments, and Cpl. Hoard, who was never asked the question. In conclusion, while the evidence suggests that police may have searched the Vehicle for a hidden compartment prior to October 13, 2020, a "suggestion" (even a strong one) is not enough to ground a finding that Mr. Abdelkader's s. 8 Charter rights were breached. A more substantive evidentiary foundation is required. Such evidence is lacking in relation to this alleged breach.

C. October Search

[122] Mr. Abdelkader challenges the constitutionality of the October Search on the grounds that his reasonable expectation of privacy in the Jeep and the Hidden Possessions was violated when police searched the Jeep without a warrant and absent his consent.

[123] A warrant is almost always a prerequisite for a valid search or seizure. Without a warrant, the search or seizure is presumptively unconstitutional: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 161, 1984 CanLII 33.

[124] There is no dispute that police conducted the October Search without a search warrant and did not obtain Mr. Abdelkader's consent. However, the Crown submits that the search was reasonable, and that the Defence has failed to establish a violation of Mr. Abdelkader's s. 8 Charter rights for the following reasons:

- a) Mr. Abdelkader does not have standing to challenge the October Search; and
- b) Even if the Accused has standing, the search was conducted reasonably. To that point, the police did not need a search warrant because:
 - i. The police had consent to search the vehicle from the only party that had an interest in the Vehicle;
 - ii. The Compartment was in plain view; and/or
 - iii. The search was conducted for public safety reasons.

[125] Before I turn to the question of standing, I wish to briefly refer to the Supreme Court of Canada's decision in *R. v. Campbell*, 2024 SCC 42. *Campbell* was released on December 6, 2024, which was the last day of oral arguments on this voir dire. The parties were aware of *Campbell*, but did not ask to make further submissions on the impact of the decision to their respective positions. *Campbell* provides useful guidance on the question of standing under s. 8 and insight into the circumstances that might justify warrantless searches. Thus, I am bound to consider it in coming to my decision on this voir dire, along with the other authorities counsel provided.

1. Standing

[126] The Crown admits Mr. Abdelkader initially had a reasonable expectation of privacy in relation to the Jeep and its contents. However, they argue that he lost standing over both after August 10, 2020. This is the date that the CFO filed its Notice of Civil Claim. The Crown argues that Mr. Abdelkader cannot challenge the reasonableness of any search or seizure after that date.

[127] The Defence submits that Mr. Abdelkader maintained standing in relation to the Jeep and its contents throughout the relevant time period.

- [128] An expectation of privacy will attract Charter protection if reasonable and informed people in the position of the claimant would expect privacy: *R. v. Patrick*, 2009 SCC 17 at paras. 14-15; *Cole* at para. 35; *Spencer* at para. 18; *Jones* SCC at para. 13.
- [129] A reasonable expectation of privacy is determined based on the totality of the circumstances: *R. v. Edwards*, [1996] 1 S.C.R. 128 at paras. 31, 45, 1996 CanLII 255. In considering the totality of circumstances, the Court in *R. v. Marakah*, 2017 SCC 59 at para. 11, endorsed four "lines of inquiry" to guide the analysis. These were articulated in *Cole* at para. 40 and recently endorsed in *Campbell* at para. 39. They are summarized as follows:
1. What was the subject matter of the alleged search?
 2. Did the claimant have a direct interest in the subject matter?
 3. Did the claimant have a subjective expectation of privacy in the subject matter?
 4. If so, was the claimant's subjective expectation of privacy objectively reasonable?
- [130] The claimant will only have standing to assert their s. 8 rights if the Court finds the claimant's subjective expectation of privacy was objectively reasonable under the answer to the fourth line of inquiry: *Marakah* at para. 12.
- [131] The privacy analysis must be approached in a content neutral manner. As held in *R. v. Patrick*, 2009 SCC 17:
- [132] . The issue ought to be framed in terms of the privacy of the area or thing being searched and the potential impact of the search on the person being searched, not the nature or identity of the concealed items... The issue is not whether the appellant had a legitimate privacy interest in the concealment of drug paraphernalia, but whether people generally have a privacy interest in the concealed contents of an opaque and sealed "bag of information" The focus is on "the person, place or thing searched and the purpose for which the search is undertaken"
- [132] Approaching the analysis as though the claimant is innocent ensures that all people are guaranteed a reasonable expectation of privacy: *Spencer*, at para. 36; *R. v. Wong*, [1990] 3 S.C.R. 36 at 50, 1990 CanLII 56; *Marakah*, at paras. 48-50, *Campbell* at para. 52.
- [133] The different categories of privacy interests protected under s. 8 include: territorial privacy, personal privacy, and informational privacy: *R. v. Tessling*, 2004 SCC 67 at para. 20.
- [134] Privacy of the person protects bodily integrity. It includes the right not to be touched or to have one's body explored to disclose objects or things a person wishes to conceal: *Tessling*, at para. 21.

[135] Informational privacy protects the right to shield information about oneself and one's activities from the state: Tessling at para. 23. The collection of one's fingerprints may engage informational privacy: *R. v. Dore*, (2002), 166 C.C.C. (3d) 225, 2002 CanLII 45006 (Ont. C.A.) at paras. 43, 53.

[136] Territorial privacy pertains to physical places where individuals may have a reasonable expectation of privacy. It has been held to extend to private vehicles: Tessling at para. 22. While territorial privacy protects a particular space as it relates to an individual, it is important to remain focused on the core purpose of s. 8 of the Charter, which "protects people not places": Tessling at para. 22.

[137] In *Edwards* at para. 45, the Court held that where the claimant advances a territorial privacy claim, the following non-exhaustive list of factors should be considered as part of the "totality of the circumstances":

- (i) presence at the time of the search;
- (ii) possession or control of the property or place searched;
- (iii) ownership of the property or place;
- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objectively reasonableness of the expectation.

[138] Factors (vi) and (vii) parallel the second and third lines of inquiry in *Marakah*.

[139] In *Campbell* at para. 53, the Court incorporated the *Edwards* factors into a broader analysis for determining whether a claimant's subjective expectation of privacy in the subject matter of a search is objectively reasonable under the fourth line of inquiry from *Marakah*. As part of that determination, the Court listed the following non-exhaustive list of factors that should be considered:

- (i) whether the information would tend to reveal intimate or biographical details of the lifestyle and personal choices of the individual subject to the alleged search;
- (ii) the place where the alleged search took place;
- (iii) whether the subject matter of the alleged search was in public view;
- (iv) whether the subject matter had been abandoned;
- (v) whether the information was already in the hands of third parties, and if so, whether it was subject to an obligation of confidentiality;
- (vi) whether the police technique was intrusive in relation to the privacy interest;

- (vii) whether the individual was present at the time of the alleged search;
- (viii) the possession, control, ownership, and historical use of the property or place said to have been searched; and
- (ix) the ability to regulate access to the place of the search, including the right to admit or exclude others from the place.
- (Plant, at p. 293; Tessling, at para. 32; Edwards, at para. 45).

[140] Factors (i) to (v) of Edwards appear as paragraphs (viii) and (ix) in Campbell.

[141] Two privacy interests are at issue in this case: (a) territorial privacy in relation to the Jeep, the Compartment, and the Hidden Possessions; and (b) informational privacy in relation to the fingerprints found on the Hidden Possessions.

[142] Before I address whether Mr. Abdelkader had standing in relation to the October Search, it is important to distinguish between the Jeep itself, the Personal Effects and fingerprints that were located in the visible parts of the Jeep, and the Hidden Possessions and fingerprints located on items in the Compartment. While all of these objects raise privacy interests, the focus of the unreasonable search analysis is on the Hidden Possessions and the fingerprints located on them. In contrast, the Jeep, Personal Effects, and fingerprints, are all implicated in the "unreasonable seizure" argument which addresses events after August 10th. I address Mr. Abdelkader's standing in relation to the Jeep later in these Reasons for Judgment, under the seizure analysis.

a) Subject Matter of the Search

[143] I turn to the first line of inquiry, which relates to the subject matter of the October Search.

[144] The Court in Marakah provided the following useful guidance in determining the subject matter of a search:

[15] The subject matter of a search must be defined functionally, not in terms of physical acts, physical space, or modalities of transmission. As Doherty J.A. stated in *R. v. Ward*, 2012 ONCA 660, 112 O.R. (3d) 321, at para. 65, a court identifying the subject matter of a search must not do so "narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action". In *Spencer*, at para. 26, Cromwell J. endorsed these words and added that courts should take "a broad and functional approach to the question, examining the connection between the police investigative technique and the privacy interest at stake" and should look at "not only the nature of the precise information sought, but also at the nature of the information that it reveals". The court's task, as Doherty J.A. put it in *Ward*, is to determine "what the police were really after" (para. 67).

- [145] To understand what the police were "really after" it is important to consider what the police were not after. Although the October Search was of the Jeep, it was not about the Jeep. The October Search was for personal belongings of Mr. Abdelkader that the police believed were hidden in the Jeep.
- [146] Prior to October 2020, the Vernon RCMP had already extensively searched the Jeep. Despite their efforts, they were unable to locate any evidence related to the Hit and Run Investigation. The police concluded the Investigation on July 20, 2020, without recommending any charges.
- [147] Despite this, the police continued to maintain possession of the Jeep, even after referring the matter to the CFO. They did so because they suspected that Mr. Abdelkader had hidden drugs or other materials in the Vehicle that would proffer them with evidence of his involvement in the drug trade. This lead to the October Search months later. I conclude that what the police were really after in the October Search was evidence that would implicate Mr. Abdelkader in the drug trade. In functional terms, the police were after any personal belongings of Mr. Abdelkader that were hidden in the Jeep, and any fingerprints that could be located on them.

b) Interest in the Subject Matter

- [148] The accused may rely on the Crown's theory of the case to establish his direct interest in the subject matter of the search: Jones SCC at para. 15. In Jones, the Court considered whether the accused had a direct interest in impugned text messages. Because the Crown theorized that the texts belonged to the accused, the Court held that he could rely on that framing without actually establishing whether the messages did in fact belong to him.
- [149] Similar to Jones SCC, the Crown's theory in this case supports a finding that Mr. Abdelkader has a direct interest in the subject matter of the search. The Crown theorizes that Mr. Abdelkader owned the contents of the Vehicle, including the items that were contained in the hidden Compartment. Relying on this theory, I find Mr. Abdelkader has a direct interest in this subject matter.

c) Subjective Expectation

- [150] In Campbell at para. 45, the majority affirmed the following well-established principles relating to the subjective expectation of privacy:
- a) The threshold for establishing a subjective expectation of privacy is "not a high hurdle": Marakah, at para. 22.
 - b) The "modest" evidentiary foundation reflects how "s. 8's normative import transcends an individual claimant's subjective expectations": Jones SCC, at para. 21.
 - c) A subjective expectation of privacy does not require direct evidence from the accused. Rather, it can be presumed or inferred from the circumstances: Jones SCC, at para. 21.

- [151] I have no difficulty inferring that Mr. Abdelkader had a subjective expectation of privacy in the subject matter of the search.
- [152] The manner in which material or information is kept can support a subjective expectation of privacy. In *Jones*, the fact that Mr. Jones and his co-accused used third party names to avoid association with the impugned text Messages was held to support the finding that they intended their communications to remain private and had a subjective expectation that they would remain so: *Jones SCC*, at para. 34.
- [153] In this case, the Crown's theory is that Mr. Abdelkader installed the Compartment to conceal drugs or other items which could connect him to the drug trade. The very fact that the items and fingerprints were found in a hidden after market compartment indicates that Mr. Abdelkader intended the contents of the Compartment and any personal information disclosing his identity to remain private.
- [154] The Crown further theorizes that, after the Vehicle was seized, Mr. Abdelkader made numerous efforts to have it returned so that he could continue to conceal the items from the state. This also supports a finding that Mr. Abdelkader held a subjective expectation of privacy in the subject matter of the search.
- [155] In coming to this conclusion, I reject the arguments advanced by the Crown that Mr. Abdelkader's subjective expectation is "attenuated" by the fact that the object of the search was a motor vehicle, and the existence of the Conditional Sales Contract. Neither of those circumstances diminish the subjective expectation of privacy in this case. While the operation of vehicles is a highly regulated activity, the police did not stop and search the Jeep while it was on the road. In relation to the Conditional Sales Contract, there is nothing in that document that speaks to a reduced expectation of privacy from state intrusion.

d) Objective Reasonableness

- [156] I turn now to whether Mr. Abdelkader's subjective expectation of privacy in the contents of the Jeep and his fingerprints, was reasonably held.
- [157] When considering this line of inquiry, "courts must employ an approach that is both normative and content-neutral": *Campbell*, at paras. 47-52. The Court explained the normative approach as follows:
- [48] Whether there is a reasonable expectation of privacy "is not a purely factual inquiry"; the inquiry "is normative rather than simply descriptive" (*Spencer*, at para. 18; see also *Tessling*, at para. 42). Although the inquiry must be sensitive to the factual context, it is inevitably laden with value judgments about the sort of free and democratic society that reasonable and informed Canadians expect to live in, based on concerns about the long-term consequences of tolerating state intrusion into individual privacy (*Spencer*, at para. 18; *Patrick*, at para. 27; *Bykovets*, at para. 52; see also *H. Stewart*, "Normative Foundations for Reasonable Expectations of Privacy" (2011), 54 S.C.L.R. (2d) 335, at pp. 342-47; *S. Penney, V. Rondinelli and J. Stribopoulos*, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶3.38).

- [158] In other words, the reasonableness analysis demands a "broad, functional approach" focused on the "potential" of the search to reveal personal or biographical information, while remaining mindful that the "fruits of the search cannot be used to justify an unreasonable privacy violation": Campbell, at paras. 49-50.
- [159] The question for the court "is not whether the claimant broke the law, but rather whether the police exceeded the limits of the state's authority": Campbell at para. 52, citing R. v. Reeves, 2018 SCC 56, at para. 2. Simply because a person was engaged in criminal activity at the time of the search or seizure, does not mean that they deserve lesser privacy protection under s. 8: Campbell, at para. 50. The legal or illegal nature of the items sought does not determine the existence of a reasonable expectation of privacy: Campbell, at para. 52.
- [160] I begin with the fingerprints.
- [161] Fingerprints contain information about a person that is not normally available without their consent: Dore, at para. 64. As noted by the Court in Dore:
- [163] In my view, anything associated with one's body, especially where it is not something that is otherwise normally accessible, is of a personal and confidential nature and is the type of information that people expect to be able to control and keep private in the ordinary course. The fact that one's fingerprints may tell nothing about the person other than his or her identity hardly makes the information impersonal.
- [162] In my view, the nature of the informational privacy interest raised with fingerprints supports a finding that Mr. Abdelkader's subjective expectation that they would remain private, was reasonably held.
- [163] In coming to this conclusion, I reject the Crown's suggestion that fingerprints do not provide much personal information on their own.
- [164] Fingerprints contain unique characteristics which can be used to link them to a specific individual. In this case, Mr. Abdelkader's fingerprints were located on the Hidden Possessions, which were concealed inside the Compartment. The fingerprints linked Mr. Abdelkader to the Hidden Possessions and revealed aspects of his lifestyle and personal activities and choices.
- [165] As noted by the Court in Dore, the suggestion that fingerprints are not inherently incriminating "adds nothing to the debate on whether a person has a privacy interest in his or her fingerprint information": at para 55. When considered in combination with other available information, fingerprints can provide a great deal of private information about a person. It was objectively reasonable for Mr. Abdelkader to expect his fingerprints would remain private.
- [166] I come to a similar conclusion about the Compartment, the Hidden Possessions and the fingerprints found on them.

- [167] Based on the Crown's theory and the evidence, Mr. Abdelkader had historic use of the Jeep and the Compartment.
- [168] It is incontrovertible that Mr. Abdelkader was not present at the time of the October Search and did not have possession of the Jeep on that date. However, I agree with the Defence that these facts do not terminate his privacy interest. Physical possession or presence is not a prerequisite to maintaining a reasonable expectation of privacy: *R. v. A.M.*, 2008 SCC 19, at para. 48
- [169] Just as leaving a backpack unattended in a gymnasium does not extinguish a privacy interest (*A.M.*, at para. 48), neither does leaving items in a sealed and hidden compartment.
- [170] Similarly, a loss of control does not necessarily mean a person has lost privacy interests: *Marakah* at para. 38. Control is "not an absolute indicator of a reasonable expectation of privacy": *Marakah* at para. 38.
- [171] Further, while Mr. Abdelkader ultimately lost control of the Compartment, the Hidden Possessions and fingerprints, this was not voluntary. Involuntary loss of control can occur when a person is in police custody, or if the subject matter is stolen by a third party: *Reeves*, at para. 38, citing *Marakah* at para. 38; *R. v. Law*, 2002 SCC 10 at para. 18.
- [172] To that end, I dismiss the notion that Mr. Abdelkader voluntarily discarded the Hidden Possessions by keeping them in a vehicle that was driven in public. First, the Compartment was hidden from public view. Indeed, the Cpl. Fletcher only saw indicia of it when he inspected the undercarriage of the Jeep. Even then, he had to take further steps to expose the Compartment. Second, the Hidden Possessions were concealed inside the locked Compartment and not easily accessible. Third, the Jeep was not in operation when it was seized - rather, it was in Mr. Abdelkader's garage. Fourth, the Vehicle only left the garage when police seized it.
- [173] This brings this case in line with the circumstances in *Reeves*, where the accused was in police custody and restrained by court order from accessing the house when the computer was seized. Mr. Abdelkader lost control by virtue of the actions of the police and the CFO, and not through any voluntary relinquishment.
- [174] I turn now to Mr. Abdelkader's ability to regulate access, including the right to admit or exclude others from the Compartment. Following the Jeep's seizure, Mr. Abdelkader continued to have the ability to regulate access to the Compartment and the Hidden Possessions within it. This is evidenced by the elaborate system that had been designed to hide the Compartment and prevent entry.
- [175] I turn to consider ownership of the property or place. In this case, there can be no serious dispute about the ownership of the Hidden Possessions. Indeed, central to the Crown's theory in this case is that the materials in the Compartment belonged to Mr. Abdelkader.

- [176] Aside from Mr. Abdelkader, the only other party that could legitimately assert an ownership interest in the personal items is CIBC. However, the Conditional Sales Contract with CIBC only applied to the Jeep. It did not apply to any of Mr. Abdelkader's personal possessions contained in the Jeep, whether or not they were hidden. Consistent with this, Ms. Russo did not claim any proprietary interest in the contents of the Vehicle. The Bailiff and police also recognized Mr. Abdelkader's interest in the items contained in the Jeep, when they returned the personal property to Mr. Abdelkader rather than to CIBC.
- [177] It was also objectively reasonable for Mr. Abdelkader to assert a privacy interest in his fingerprints. If that had not been the case, the police would have found it unnecessary to seek the Forensic Search Warrant to obtain his fingerprints during the Hit and Run Investigation, or to obtain the Impression Warrant after they had searched the Compartment and located the Hidden Possessions.
- [178] Even if I was to find that Mr. Abdelkader does not have ownership interests in the Compartment or the Hidden Possessions, this does not diminish his reasonable expectation of privacy. It is well established that a person may retain a reasonable expectation of privacy in an item owned by someone else. See for example, *R. v. Buhay*, 2003 SCC 30, a person had a reasonable expectation of privacy in a bus depot locker where he had stored and locked belongings; and *R. v. Cole*, 2012 SCC 53, where an employee had a reasonable expectation of privacy in the data he stored on his work computer.
- [179] The Crown's argument that no privacy can reasonably be expected in the contents of an illegal hidden compartment is not supported by the law. First, this argument is not content neutral. The legality of the Compartment or the Hidden Possessions does not diminish Mr. Abdelkader's expectation of privacy in the place or its contents. Second, while the police may seize a vehicle without a warrant if they believe on reasonable grounds that it contains an after-market compartment, they need a warrant to conduct a search of that vehicle or its contents: *Armoured Vehicle and After-Market Compartment Control Act*, S.B.C. 2010 c. 8, [AMC Act], s. 10(2).
- [180] I also reject the argument that the civil forfeiture proceedings and CIBC's attempts to repossess the Jeep extinguished Mr. Abdelkader's privacy interests. These have no impact on the question of standing in relation to the October Search. As noted earlier, what the police were really after in the October Search were personal possessions of Mr. Abdelkader that may have been hidden in the Jeep, and any fingerprints that could be located on them. The civil forfeiture action related solely to the vehicle and its proceeds, not its contents. CIBC also never claimed any interest in Mr. Abdelkader's personal possessions, and had no knowledge that the Compartment even existed.

- [181] Even if I was to find that Mr. Abdelkader did not own the Jeep at the time of the October Search, he still retained a privacy interest in his personal belongings. This is not dissimilar to a situation where a passenger in a taxicab retains their reasonable expectation of privacy of their possessions that are kept in the taxi: see for example *R. v. Aikman*, 2019 BCCA 312 at para. 64; and *R. v. Whiskeyjack*, 2018 BCSC 1985 at paras. 18, 20, 34, 35, 59, 60.
- [182] I turn finally to the technique the police used to locate and gain access to the Compartment. The majority of the Supreme Court of Canada affirmed in *Campbell* that the "intrusiveness of the police technique in relation to the privacy interest at issue can be important in assessing whether a claimant's subjective expectation of privacy is objectively reasonable": *Campbell* at para. 62, citing *Tessling*, at paras. 32 and 50 and *R. v. Plant*, [1993] 3 S.C.R. 281 at p. 295, 1993 CanLII 70.
- [183] Intrusiveness is considered separately from the question of whether the police acted lawfully, which the court should consider under the "unreasonable" analysis at the second stage of the s. 8 inquiry: *Campbell*, at para. 62.
- [184] I find that the police technique in this case was intrusive. With the assistance of the CFO, the police held onto the Vehicle for many months after concluding their Hit and Run Investigation, until they could figure out a way to conduct a detailed examination to locate a hidden compartment in which they suspected the Accused had hidden contraband. They continued to hold the Vehicle even though they knew that the Accused was making efforts to have it returned to him. Furthermore, the police knew that they did not have grounds to obtain a valid search warrant to locate the Compartment or search its interior. As Sgt. Evans testified, the RCMP did not even bother seeking judicial authorization for the October Search because they knew their efforts would be rejected. Instead, the police sought to sidestep the need for a warrant by obtaining the consent of the Bailiff, who could not bind Mr. Abdelkader. When the police were unable to open the locked Compartment, they dismantled the Jeep to gain access to the Compartment and Mr. Abdelkader's Hidden Possessions.
- [185] I conclude that the police employed intrusive techniques to conduct the search in this case. In doing so, they intruded into Mr. Abdelkader's private space - a locked compartment in which a reasonable person would ordinarily expect the utmost privacy. This further supports my finding that Mr. Abdelkader's subjective expectation of privacy was objectively reasonable.
- e) Conclusion
- [186] Considering the totality of the circumstances, I conclude that Mr. Abdelkader retained a reasonable expectation of privacy on both informational and territorial grounds, in the Hidden Possessions and fingerprints found inside the Compartment.
- [187] Consequently, Mr. Abdelkader has standing to challenge the validity of the October Search.

2. Reasonableness of Search

[188] I turn now to determining whether the October Search was reasonable despite being conducted without a valid warrant.

[189] Warrantless searches are presumptively unreasonable. As such, the burden is on the Crown to establish reasonableness on a balance of probabilities: Campbell at para. 81.

[190] As noted earlier, to be reasonable, a search must be authorized by a reasonable law and conducted in a reasonable manner.

[191] The Crown argues that the police were justified in conducting the search without a warrant by application of one of the following doctrines: waiver; plain view; or public safety. The Defence submits that none of those doctrines apply in this case. Consequently, the October Search was unreasonable.

a) Validity of Consent

[192] Valid consent acts as a waiver of the claimant's s. 8 rights. Where it has been provided, there is no search or seizure within the meaning of the Charter: Reeves, at para. 13.

[193] In R. v. Wills, 1992 CanLII 2780 (O.N.C.A.) at para. 69, the Court held that for the waiver doctrine to apply, the Crown must establish the following on a balance of probabilities:

- a) there was a consent, express or implied;
- b) the giver of the consent had the authority to give the consent in question;
- c) the consent was voluntary in the sense that that word is used in Goldman, supra, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- d) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- e) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
- f) the giver of the consent was aware of the potential consequences of giving the consent.

[194] Where there are multiple rights holders, consent must be sought from each of them. Waiver by one rights holder does not obviate the need to obtain waiver from the other rights holders: Reeves, at para. 52. To that end, there is no such thing in Canadian law as third-party waiver: Reeves, at para. 52.

- [195] There is no dispute that: at all material times, Mr. Abdelkader was the registered owner of the Vehicle; Mr. Abdelkader purchased the Vehicle under a Conditional Sales Contract with CIBC and through financing from the CIBC; CIBC held a lien registered against the Vehicle; the police did not obtain Mr. Abdelkader's consent for the October Search; and the police obtained consent for the October Search from the Bailiff hired by IRSC, which was subcontracted by Teranet, which in turn was hired by CIBC.
- [196] The Defence argues that only Mr. Abdelkader's privacy interests were engaged by the October Search. As such, even if consent from the Bailiff was sufficient for CIBC's purposes (which the Defence argues it was not), the police were still required to obtain Mr. Abdelkader's consent before conducting the October Search.
- [197] Relying on *R. v. Clarke*, 2017 BCCA 453, the Crown submits that the Bailiff's consent provided the necessary authority for the RCMP to conduct the October Search.
- [198] In *Clarke*, police entered and searched a residence with the consent of the tenant but without the consent of the appellant, who co-owned the home and resided there intermittently. The Court of Appeal characterized the privacy interests in the residence as "overlapping" and "co-mingled": *Clarke* at paras. 44, 55. The Court held that the tenant could provide lawful authority for police to enter the common spaces in the residence, but her consent did not provide the authority to search property that belonged "exclusively" to the appellant: *Clarke* at para. 56.
- [199] In *Reeves*, the Supreme Court of Canada considered *Clarke* but declined to determine whether a resident in shared accommodations has the right to permit police to enter common areas of the home without the consent of others living there: at para. 25.
- [200] Even if the Supreme Court of Canada had conclusively adopted the approach from *Clarke*, the facts before me can be distinguished. Neither the Compartment specifically nor the Jeep as a whole was a "shared" or "common" space. Mr. Abdelkader had exclusive rights to use the Vehicle. The Bank's interest flowed directly from Mr. Abdelkader's ownership and loan. The Bank was not an "intermittent" user of the Compartment. In fact, CIBC had no knowledge of the Compartment and disavowed any interest in it.
- [201] Furthermore, the Bailiff's consent is invalid under the *Wills* criteria. In circumstances where the state purports to have obtained consent from one party to waive Charter rights on behalf of somebody else, I find that the court should apply this criteria strictly.
- [202] The Bailiff's consent fails to meet the *Wills* criteria in the following ways:
- a) The Bailiff did not have authority to give consent. The police did not ask the Bank if they could obtain consent from the Bailiff and there is no indication that CIBC gave that authority voluntarily.
 - b) Even if the Bailiff had authority, consent was not fully voluntary. Rather, it was at the request and urging of the police.

- c) The Bailiff was not aware of the nature of the search. She thought she was providing consent for an x-ray, not a dismantling of the Jeep that would cause damage to the chattel.
- d) Ms. Yaremko testified that she did not think she could say "no" to the police. This suggests she may not have known she had a right to refuse.
- e) The Bailiff did not know the full consequences of giving consent.

[203] I agree with the Defence that, absent a search warrant, the police needed to obtain consent from Mr. Abdelkader to have legal authority to conduct the October Search. As noted elsewhere, it was Mr. Abdelkader's privacy interests that were engaged by the October Search, and not the Bank's. Even if the Bank also had privacy or proprietary interests in the secret Compartment or its contents, which I find the Bank did not, this does not remove the need to obtain consent from Mr. Abdelkader.

[204] Given that Mr. Abdelkader did not consent to the search and the Bank had no authority to waive consent on Mr. Abdelkader's behalf, I conclude the waiver doctrine does not validate the October Search.

b) Plain View Doctrine

[205] The plain view doctrine provides that "where, during the course of executing a legal warrant, an officer locates anything he or she reasonably believes is evidence of the commission of a crime, the officer has the power to seize it": *R. v. Gill*, 2019 BCCA 260, at para. 24.

[206] The doctrine is based on the principle that "a person can have no reasonable expectation of privacy in an item in plain view to officers where the officers have a right to be present and are carrying out their lawful duties": *Gill*, at para. 32.

[207] In *Gill*, the Court confirmed the following four criteria which must be met by the Crown to successfully invoke the plain view doctrine:

- a. the police had lawful prior justification to be at the place where the evidence was found;
- b. the police discovered the evidence inadvertently while exercising a lawful police power or performing a lawful police duty;
- c. the evidence was in plain view in the sense that it was detected through the unaided use of the officer's senses; and
- d. it was immediately apparent to the officer that the evidence was probably connected to criminal activity.

(*Gill* at para. 33, citing *R. v. Asp*, 2008 BCSC 794, *aff'd* on other grounds, 2011 BCCA 433)

- [208] With respect to the first element, I agree with the Defence that the police did not have lawful justification to be inside the Jeep when they discovered the Compartment and the Hidden Possessions. As noted previously, the police concluded their Hit and Run Investigation several months prior to the October Search. Any search warrants they had obtained in relation to the Hit and Run Investigation had long expired.
- [209] There is also no basis to conclude that the discovery of the evidence was inadvertent and occurred during the exercise of a lawful police power.
- [210] In Gill, the Court explained what is meant by "inadvertent":
- [52] I accept that for the plain view doctrine to apply, the discovery of the item by the officer must be "inadvertent" in the sense that it is not discovered by unauthorized search, but rather, because it is in the open when the police are lawfully in the place where it is visible, and lawfully exercising police duties.
- [211] There was nothing inadvertent about the discovery of the Compartment or the Hidden Possessions. The sole purpose of the October Search was to locate the Compartment and seize the items contained in it; the Compartment itself was not in the open, but rather hidden from plain view.
- [212] In coming to this conclusion, I find that the facts of this case are distinguishable from Gill, where an unsealed envelope fell from the accused during a struggle with the police when they were executing his arrest warrant. There was no struggle involving the Jeep; the Compartment did not fall out of the Jeep; and the Hidden Possessions did not fall out of the Compartment.
- [213] Rather, the facts are closer in analogy to those in *R. v. Clarke*, 2017 BCCA 453. In that case, the court found that firearms located in a garage, that were covered by other items and a tarp, were not in plain view: *Clarke* at para. 69.
- [214] It is difficult to see how items kept in a hidden and locked Compartment were in plain view, when the firearms in *Clarke* which were only hidden underneath a tarp, were not.
- [215] On the third element, the Crown argues that the hidden Compartment was built into the Jeep and "plainly visible to the unaided eye"[6]. Consequently, Mr. Abdelkader had no right to privacy in relation to the Compartment or its contents.
- [216] There is an important limitation to the application of the plain view doctrine - "it is a seizure power limited to items that are visible, and is not a power to conduct an exploratory search to find evidence of other crimes": *Gill* at para. 37.
- [217] The search in this case was exploratory and geared solely to finding evidence of a crime unrelated to the original crime for which the Vehicle had been seized.

[218] I disagree with the Crown's interpretation of the words "plain view". In Gill at para. 40, the Court cited the following passage from *The Law of Search and Seizure in Canada* [7] which explained what is meant by "plain view":

"Plain view" occurs when items fall into the view of an officer who has a right to be in the position he is in to have the view he has had; and such items have been held to be subject to seizure.

When an officer finds such evidence -- contraband, stolen property or crime evidence -- unexpectedly in the course of his duties, in circumstances where it is at once obvious and visible without positive action on the officer's part to make it observable, he has the right to seize it. It may arise in circumstances in which the officer is already lawfully in the premises (under valid warrant, hot pursuit of a fugitive, emergency, etc.) and in the course of these duties he comes across seizable items in plain view, or, it may arise in circumstances where there has been no entry onto premises, but the seizable items present themselves to his view (e.g., in the rear of a pick-up truck parked on a public street).

[219] The circumstances of this case differ greatly from the above. It is obvious from Cst. Hoard and Sgt. Evans's evidence that the Compartment was very well concealed. Indeed, despite several inspections of the Jeep for the clothing items, which lasted in one case for several hours, the police were unable to even detect the existence of the Compartment, until Cpl. Fletcher was brought in.

[220] Cpl. Fletcher was a specially trained officer who had expertise in locating hidden after market compartments. Yet even with his enhanced skills, Cpl. Fletcher did not find the secret Compartment in plain view. His inspection of the underside of the Jeep indicated that a hidden compartment had been installed after market - but it was not until he performed the complete search and dismantled the vehicle that he was able to confirm his theory and expose the secret compartment. The fact that the Compartment was detected through the unaided use of Cpl Fletcher's senses in a matter of minutes is mitigated by the fact that Cpl. Fletcher brought to the inspection decades of specialized expertise that a regular police officer did not have.

[221] The fourth element of the Asp criteria requires that it be "immediately apparent" to the officer that the evidence was probably connected to criminal activity. At para. 42 of Gill, the Court adopted the approach used in *R. v. Spindloe*, 2001 SKCA 58 at para. 42. It went on to elaborate that "immediately apparent" means "it is apparent without further investigations": at para. 59.

[222] To the extent that it applies to the Hidden Possessions, and the drugs in particular, the immediacy requirement is met. However, insofar as the discovery of the Compartment is concerned, it was not apparent without further investigation that an illegal after-market compartment was installed in the Jeep.

[223] I conclude that the plain view doctrine does not apply in this case.

c) Public Safety Search

[224] The Crown argues that the police were entitled to conduct the October Search for public safety reasons. The Defence says that the criteria for a valid public safety search are not met on the facts of this case.

[225] The Crown and the Defence disagree on the applicable standard for a public safety search to be justified. The Defence relies on *R. v. MacDonald*, 2014 SCC 3, for the principle that the police must have "reasonable grounds" for their belief that there is an imminent risk to public safety. The Crown submits that *MacDonald* has narrow application, and relies on subsequent decisions in *R. v. Stairs*, 2022 SCC 11, *R. v. Buakasa*, 2023 ONCA 383 and *R. v. Dhillon*, 2023 BCCA 38, to argue that the appropriate standard to apply to this case is "reasonable suspicion".

[226] For the following reasons, I conclude that the appropriate standard in this case is reasonable grounds.

i. The applicable test

[227] Public safety searches can occur in a variety of circumstances - incident to arrest, during lawful detention, or on a standalone basis. The October Search was a warrantless, standalone search.

[228] In *R. v. MacDonald*, 2014 SCC 3, the Court discussed the principles that apply to standalone safety searches. In *MacDonald*, police noticed an object in the accused's hand when he answered the door to his residence. The officer asked about the object, then pushed the door open, leading to an altercation and the discovery of a firearm. The majority of the Supreme Court of Canada held that the officer's action was a "search" for the purposes of section 8, but it was not unreasonable.

[229] Relying on *R. v. Mann*, 2004 SCC 52 and *R. v. Tse*, 2012 SCC 16, the majority in *MacDonald* acknowledged the high privacy interests at stake in a warrantless search when the accused is not detained or arrested. Given these interests, it held that such a search will only be authorized by law "if the officer believes on reasonable grounds that his or her safety is at stake and, as a result, it is necessary to conduct a search": at para. 41.

[230] In *R. v. Stairs*, 2022 SCC 11, the Court held that the "reasonable suspicion" standard should apply where there is a warrantless search of a home incident to arrest, rather than the lower "some reasonable basis" standard, or the higher "reasonable and probable grounds" standard: *Stairs* at paras. 64, 67, 68.

[231] In adopting the reasonable suspicion standard, the Court in *Stairs* distinguished from *MacDonald*, where the Court found "reasonable belief in imminent harm" was required. The fact that Mr. MacDonald was not under arrest, and so had a stronger expectation of privacy, was a key distinction that justified a higher standard in that case: at para. 76.

- [232] Similar to *Stairs*, *Dhillon* did not involve a standalone safety search. A key issue was whether the authorities imposed a legal requirement of "an imminent threat" in order to justify a protective safety search incident to investigative detention: *Dhillon*, at paras. 38-40. It concluded that (a) *MacDonald* does not modify *Mann* by incorporating an imminent threat requirement for safety searches incident to investigative detention; and (b) the law does not require an imminent threat for such a search to be lawful: *Dhillon* at paras. 94-95.
- [233] The Court concluded that "*MacDonald* is properly viewed as an application of the *Mann* test in the particular context of a warrantless search of a private residence" where there is an increased expectation of privacy: *Dhillon* at para. 98.
- [234] In *Buakasa* the appellant was stopped by the police for speeding. During a conversation with another police officer, the arresting officer learned that it was "very likely" that there was a weapon in the vehicle. The officer searched the vehicle and discovered a loaded gun and ammunition. At trial, the appellant argued that the search violated his s. 8 rights.
- [235] On appeal, the Ontario Court of Appeal commented that there was confusion generated by *MacDonald* and subsequent Supreme Court of Canada jurisprudence: *Buakasa* at paras. 39-42. The Court declined to resolve the debate about whether there exist two different standards - one for searches incident to detention and arrest (such as in *Mann*), and one for free-standing safety searches (such as in *MacDonald*): *Buakasa* at paras. 39 and 45.
- [236] Ultimately, the Ontario Court of Appeal ruled that regardless of which standard applies for a safety search, that standard was met: *Buakasa* at para. 45.
- [237] In *Campbell*, the police seized a cellphone incident to the arrest of a known drug dealer, Mr. Gammie. Minutes later, the cellphone lit up with text messages that police believed referred to an in-progress drug transaction. Police replied to the messages by impersonating Mr. Gammie. When Mr. Campbell attended Mr. Gammie's residence later that day, he was found in possession of heroin laced with fentanyl and arrested: *Campbell*, at paras. 1-4.
- [238] Mr. Campbell applied to exclude the text message on the grounds that they were obtained through violation of his s. 8 rights. A majority of the Supreme Court of Canada upheld the trial judge's finding that "the situation required immediate police action because it involved an impatient drug dealer who expected to sell his drugs imminently": *Campbell* at para. 121.
- [239] Part of the Court's analysis in *Campbell* centered on the meaning of the phrase "exigent circumstances" within the context of s. 11(7) of the CDSA, which authorizes a warrantless search where the conditions for a warrant exist but "exigent circumstances" make it "impracticable" to obtain one: *Campbell*, at para. 111.

- [240] One broad principle taken from the majority decision in Campbell, is that the police must have reasonable and probable grounds to believe that exigent circumstances exist to justify a warrantless standalone search under s. 11(7) of the CDSA. A reasonable suspicion of exigence is not enough.
- [241] I turn then to what test should apply in this case.
- [242] The above cases suggest that determining which standard to apply is a very fact specific exercise, and turns on whether the search occurs incident to arrest, during lawful detention, or on a standalone basis. I agree that the appropriate standard depends on which privacy interest is at stake, that privacy interest depends on the location of the search, and whether the search occurs incident to arrest, during lawful detention, or on a standalone basis.
- [243] For searches incident to arrest or investigative detention, the police only need to have a reasonable suspicion of a public safety concern; there is no requirement for an immediate risk to public safety: Stairs and Dhillon. The authority to conduct a search incident to arrest flows directly from the fact of the lawful arrest itself, provided there is sufficient proximity between the search and the arrest: Stairs at paras. 67, 76. In Dhillon, our Court of Appeal found incorporating an imminent threat requirement for searches incident to investigative detention would be similarly inappropriate and "likely to create confusion": Dhillon at paras. 94-101.
- [244] I agree with the Defence that the situation with standalone safety searches is very different. Such searches represent a greater intrusion on privacy rights and thus demand a higher threshold in order to be justified. The heightened standard for standalone searches indicated in MacDonald reflects the absence of lawful authority that would otherwise be present for an arrest or a detention, during which the police presumably have justification for being present at the location of the search.[8]
- [245] Consequently, the police must have reasonable grounds to believe harm is imminent, in order to justify a warrantless, standalone search that occurs in a private residence, or another similar space where the accused has a heightened expectation of privacy.
- [246] The Crown submits that an expectation of privacy is greatly reduced in vehicles. Counsel relies on the following authorities: R. v. Belnavis, [1997] 3 S.C.R. 341, 1997 CanLII 320; R. v. Belcourt, 2012 BCSC 229; HMTQ v. Billings, 2004 BCSC 392; R. v. Greer, 2020 ONCA 795; and R. v. Fedan, 2016 BCCA 26.[9] However, I find all of the authorities relied on by the Crown to be distinguishable on their facts:
- a) Belnavis was decided before Jones SCC and it is likely that the outcome would be different today because ownership over the garbage bags could be inferred from the theory of the Crown.

- b) Belcourt is also pre-Jones, and is inconsistent with the Court of Appeal's reasoning in *R. v. Dreyer*, 2008 BCCA 89 where the Court held at para. 15 that the accused did have a reasonable expectation of privacy in the contents of his crumpled brown bag.
 - c) Billings concerned an accused who had stolen the vehicle from the victim, whom he killed. Here, there is no suggestion of theft. Mr. Abdelkader was the rightful owner of the Jeep under the conditional sales Contract. The bank was a creditor who had an unrealized security interest at the time of the search.
 - d) Greer also involved a vehicle that was not owned by the accused.
 - e) Fedan was a territorial privacy case where the Court found that the seizure was lawful, and therefore attracted a reduced expectation of privacy. Here, the October Search engaged both territorial and informational privacy interests. Further, in the case before me, the seizure was no longer lawful as the Investigation under which the vehicle had been seized had ended long before the October Search.
- [247] Regarding searches conducted after a seizure has ceased to be lawful *Dore* is instructive. At para. 37 of *Dore*, the Court noted that, when legal justification for the seizure ceases to exist, then ongoing seizure is no longer reasonable, justifiable, or constitutional.
- [248] Similarly, in *Law*, the Court held that the limited purpose for which the item is obtained must be considered: at para. 22. The state should be discouraged from "circumventing" warrants by seizing property for one purpose, allowing police to search it, then permitting them to use the results of that search for another purpose: at para. 23.
- [249] In this case, the precondition for the lawful seizure and ongoing detention of the Jeep was no longer present.
- [250] The Defence concedes that motorists have a reduced expectation of privacy when operating a vehicle on a public road. This is because driving is a regulated activity where it is essential for the state to have reasonable surveillance and supervision of vehicles and their drivers: *Belnavis* at para. 39; *Billings* at paras. 43-44.
- [251] However, the privacy interest in a vehicle located on private property is fundamentally different from a vehicle operating on a public road. As noted by the Court in *R. v. McColman*, 2021 ONCA 382 at para. 62, "[t]he fact that driving is a regulated activity must be balanced against the heightened liberty interest at one's own private property." Similarly, in *Belnavis*, Cory J wrote for the majority, "The high expectation of privacy attaching to the home may well extend to an attached garage, but it should not extend to the car within when it leaves the premises": at para. 39.
- [252] The vehicle in this case was not seized on a public road. Rather, the Jeep was seized from a private garage located at the accused's residence.

- [253] The circumstances in this case bring the privacy interests in the Jeep and materials contained within it, at the highest end of the spectrum - akin to the privacy expectations that one has in their own home: *Belnavis* at para. 39; *R. v. Helary*, 2012 SKPC 15 at para. 99; *R. v. Carson*, 2020 SKQB 191 at para. 43.
- [254] Society views a garage as an extension of one's home. It is a place where one often keeps their personal belongings, including their personal vehicle - which for many is also their costliest and most prized possession aside from the home. It is reasonable to expect that just as in the private home, one will be free from unwarranted government intrusion.
- [255] The October Search was a standalone search - the accused was neither under arrest nor detained at the time.
- [256] To that end, the only cited cases that involved a standalone search are *MacDonald*, *Buakasa*, and *Campbell*. Of those, only *Buakasa* involved a vehicle. However, as will be discussed later, the circumstances of the search in *Buakasa* are quite different than in the case at bar, such that *Buakasa* is only of limited use.
- [257] Consequently, I find that the standard articulated in *MacDonald* applies to the standalone search in this case. The *MacDonald* case can be distilled to the following principles:
- a) The common law duty of the police to protect life and safety may justify a warrantless safety search in circumstances where the police officer believes on reasonable grounds that there is an "imminent threat to the safety of the public or the police": *R. v. MacDonald*, 2014 SCC 3 at paras. 40-41.
 - b) However, this search must occur in circumstances of "objectively verifiable necessity" and what are deemed to be "exigent" circumstances: *MacDonald* at paras. 32, 41.
 - c) The power to conduct a safety search is not "unbridled". The search must be conducted in a manner that reflects its purpose, namely, to do what is "reasonably necessary" to allay the apprehended threat: *MacDonald* at para. 41 and 43.
 - d) A vague concern for safety will not suffice to justify a warrantless search. The officer must act on "reasonable and specific inferences drawn from the known facts of the situation": *MacDonald* at para. 41, citing *Mann* at para. 41.

[258] I turn now to consider the circumstances of this case.

ii. Analysis

- [259] I find that the police fell far short of the reasonable grounds standard. However, even if I was to find that the reasonable suspicion standard applies, it would not be met in this case.
- [260] Sgt. Evans and Cst. Hoard gave inconsistent testimony on the issue of public safety. This casts doubt on whether public safety was truly the underlying motive for the warrantless search.

- [261] Sgt. Evans testified that he suspected there was something concerning inside the Jeep: (1) in April 2020, when Mr. Abdelkader appeared to be "surveillance conscious"; (2) When Mr. Smith, Mr. Abdelkader's lawyer, contacted the police to inquire about retrieving the Vehicle on May 8, 2020; (3) When Mr. Smith made efforts to unseal the ITO on May 21, 2020; and (4) When the police received a s. 490 application for the return of the vehicle on October 5, 2020, from Mr. Tessmer, another lawyer who represented Mr. Abdelkader.
- [262] According to Cst. Hoard, his concerns related to a belief that there was a firearm or contraband hidden in the Jeep. If the Jeep went to auction, he believed there was a "significant" threat to any potential new owner that could put them in jeopardy. His concerns and suspicions were fueled by similar considerations as Sgt. Evans: (1) the attempts by Mr. Abdelkader's legal counsel to get the vehicle back; (2) that Mr. Abdelkader was a PTEP target and had an association with a person known to police in relation to drug trafficking; (3) that this was a high value vehicle; and (4) that Mr. Abdelkader demonstrated an awareness of police surveillance.
- [263] However, Cst. Hoard testified that his suspicion regarding the vehicle did not arise until October 2, 2020, when he received a fax about Mr. Tessmer's s. 490 application. This claim is inconsistent with Sgt. Evans' testimony and actions, particularly since Sgt. Evans had already requested an x-ray of the vehicle on October 1, 2020.
- [264] Cst. Hoard tried to address this inconsistency by pointing to the impending public auction of the Vehicle, even though he had no previous experience with this process. Additionally, his contemporaneous notes and the ITOs he authored do not mention this motivation.
- [265] Mere speculation that some item might endanger the public will not justify a warrantless search. There must be sufficient "evidentiary support to transform speculative concerns to an objective basis for the search": *R. v. Jones*, 2013 BCCA 345 ("*Jones BCCA*") at para. 33.
- [266] In *R. v. Silveira*, [1995] 2 S.C.R. 297, 1995 CanLII 89, the court observed that while many serious crimes involve firearms, the tendency to link drugs to the possibility of firearms should not be used as a way of avoiding a search warrant every time police think firearms may be involved.
- [267] The lack of reasonable basis for the officers' suspicions is evident. Three of four reasons Sgt. Evans gave for suspecting a secret compartment or the presence of contraband related to Mr. Abdelkader's exercise of his legal rights. This is not a reasonable conclusion to draw on those facts.
- [268] We live in a society that places a premium on the right to counsel, and the presumption of innocence. That is why the exercise of the right to counsel can never be taken as an indicator of guilt. Yet that is exactly what the police officer did in this case. The officer says that his suspicions were aroused precisely because Mr. Abdelkader retained a lawyer to seek return of his Jeep through legal means.

- [269] In *R. v. Chehil*, 2013 SCC 49 at para. 31, the Court emphasized that characteristics which broadly apply to innocent people are insufficient to ground reasonable suspicion. The same principle applies to factors that are ambiguous when it comes to innocence or guilt, or that may "go both ways": *Chehil*, at para. 31.
- [270] The idea that a person might want an expensive vehicle back quickly is not unusual. Vehicles - even expensive ones - serve the function of providing transport to and from places. It is entirely expected that the owner of the vehicle would want it returned.
- [271] Sgt. Evans' also admitted that he had no idea what was in the compartment, even after it had been discovered. It was equally possible that the compartment had nothing inside, or non-dangerous items such as cash.
- [272] It is unreasonable for the police to undertake a warrantless search or seizure without some notion of their legal authority. As Doherty J.A. emphasized in *R. v. Santana*, 2020 ONCA 365, "the purpose relied on to justify the search at trial must have been the actual reason the police conducted the search", not "after-the-fact justifications": at para. 28.
- [273] I find that the public safety concerns raised at trial are after the fact justification for what was clearly an unlawful search. The police officers expended energy and resources to obtain consent from the Bailiff because they viewed it as necessary to authorize the October Search. If the public safety concerns were genuine, no consent would have been needed. Insofar as public safety entered their minds at all, I find that it was a concern manufactured to get the consent from the Bailiff, because the police knew they did not have a reasonable basis to conduct a warrantless search.
- [274] There is no indication in the communications between the police or with the CFO that they viewed public safety as the reason for the October Search. Rather, it is clear from the internal communications that the actual reason the police conducted the search was to try to secure evidence to charge Mr. Abdelkader.
- [275] As noted at para. 66, Sgt. Evans admitted that when he inquired about the lawful owner of the Jeep, he did so because he knew Mr. Abdelkader may have still had privacy interests in the Vehicle[10]. It is difficult to understand why, if the public safety concerns were genuine, Mr. Abdelkader's legal ownership would have mattered.
- [276] I conclude that the RCMP did not have reasonable grounds or even reasonable suspicion to believe there was a threat to public safety.
- [277] Even if I found that the officers had reasonable grounds to believe or reasonable suspicion of a threat to public safety, there is a notable absence of exigent circumstances that made a warrantless search "reasonably necessary". To be justified as exigent, the circumstances must be such that obtaining a warrant "would seriously undermine the objective of police action - whether it be preserving evidence, officer safety or public safety": *R. v. Paterson*, 2017 SCC 15 at para. 36. A risk that is not urgent or requiring immediate action will not render the warrant process impracticable.

- [278] In *R. v. Hogan*, 2023 BCSC 733, the police responded to a 911 call where the complainant advised the officers that there was a firearm in a cabinet. Riley J. (as he then was) found that the safety threat was not so imminent as to make it impracticable for the officers to "retreat" and obtain a warrant. *Hogan*, at para. 98. Similar reasoning applies in this case.
- [279] The search for the secret compartment occurred when the vehicle was in the Secure Bay. The officers confirmed that at the time, there was no risk or concern for safety. There was no reason why the police could not take the time to get a search warrant, other than the fact that police knew they would not be granted one. Sgt. Evans admitted this when he emailed Mr. Tawtel on October 6 and stated that "There is insufficient evidence to obtain a warrant for such search".
- [280] As courts have emphasized, the warrant process exists to prevent the type of overreach that occurred in his case.
- [281] If Sgt. Evans had exigent safety concerns, he would never have offered to return the vehicle to Ms. Yaremko on October 7, 2020, without first conducting a search. Further, if public safety was a valid motivation, the police would have commenced the search in September, when they first found out the car was going to the auction. The lack of immediacy undermines the public safety reasons.
- [282] The Crown also points to the "imminent" arrival of the Bailiff to justify the October Search. To the contrary, the Jeep had not been repossessed at the time of the October Search, nor was the Bailiff's arrival imminent.
- [283] Temporally speaking, the only development that was proximate to the search was Mr. Tessmer's filing of the s. 490 application.
- [284] The Crown further argues that the October Search was valid because it met the test for whether state action that prima facie infringes on individual liberty falls within an officer's power at common law: *MacDonald* at para. 34.
- [285] It is unclear from the Crown's submissions whether the Crown is arguing that this Court should recognize a new police search power or if they are arguing that the police acted under an already-recognized police power to conduct a warrantless standalone search when there is a concern for public safety, as in *MacDonald*.
- [286] Assuming it is the former, I turn to consider the Waterfield test, which has been used to recognize or expand ancillary police powers at common law: see *Dedman v. The Queen* [1985] 2 S.C.R. 2, 1985 CanLII 41; *Mann*. However, the Court has emphasized the importance of reading the Waterfield test narrowly and with sensitivity, so as not to unduly widen police powers: *MacDonald* at paras. 38-39.

- [287] The Waterfield test first asks "whether the action falls within the general scope of a police duty imposed by statute or recognized at common law": MacDonald at para. 35. It then asks "whether the action constitutes a justifiable exercise of powers associated with the duty": MacDonald at para. 36.
- [288] The Crown argues that the first stage of the Waterfield test is met, as the police action here falls within the general scope of a duty imposed by a statute or recognized at common law. The Crown has not articulated which police duty is engaged. However, assuming that it is a general duty to conduct a public safety search to protect the public from imminent harm, that duty is well established.
- [289] This brings me to the second aspect of Waterfield which presents a greater challenge for the Crown. In order for an infringement to be justifiable, police action must be reasonably necessary for carrying out the particular duty in light of all the circumstances. The Court lists three factors to consider in MacDonald at para. 39, citing Mann and Dedman:
- 1) the importance of the performance of the duty to the public good;
 - 2) the necessity of the interference with individual liberty for the performance of the duty; and
 - 3) the extent of the interference with individual liberty.
- [290] The Crown also argues that these criteria are met. However, the Crown has not clearly identified the mode or scope of the common law police power they assert. Assuming the assertion is that police should have a power to conduct a warrantless search of a vehicle whenever it is about to be towed and police are suspicious that contraband is present -- regardless of whether that suspicion is objectively reasonable--then such a power is not supported.
- [291] Even accepting that police have a general duty to conduct a safety search to protect the public from harm, the Crown's argument fails. As explained in depth above, there were significant inconsistencies in the officers' testimony, which have led me to conclude that the public safety justification here was far fetched and after-the-fact. This fails to provide the basis for recognizing a broad police power to search vehicles in similar standalone, warrantless searches as in the public good.
- [292] Further, such a proposed power would risk authorizing invasive searches in circumstances where the threshold for privacy intrusion is unjustifiably low. In addition to that, the towing of a vehicle does not, on its own, create exigent circumstances or an imminent threat justifying a deviation from established privacy protections. Expanding common law police powers to allow for such searches would blur the lines between investigative and safety-based searches.

[293] In my view, such a proposed expansion of police power is not reasonably necessary and would leave officers with unfettered discretion to conduct safety searches without any objective grounds. Any decision to expand police powers in this way is best left to the legislators.

d) Section 489(2) Considerations

[294] The Crown also sought to justify the October Search by relying on s. 489(2) of the Criminal Code.

[295] Section 489 is a self-contained provision which is separate from the plain view doctrine. This provision does not require the police to meet all of the requirements of the plain view doctrine: *R. v. Bottineau*, 2011 ONCA 194, at para. 77, leave to appeal to SCC ref'd, 34491 (19 January 2012); *R. v. Frieburg*, 2018 MCBA 40, at para. 67, leave to appeal to SCC ref'd, 35490 (14 November 2013); *R. v. R.M.J.T.*, 2014 MBCA 36 at paras 33-34.

[296] The specific provisions of s. 489 are set out under the discussion on seizure. For the present purpose, it is only necessary to know that s. 489(2) empowers police to seize evidence they reasonably believe to be inculpatory, provided that they are "lawfully present in a place pursuant to a warrant or otherwise in the execution of duties."

[297] I conclude that the police are not able to rely on s. 489(2) to justify the October Search.

[298] First, the police were not in lawful execution of their duties when they conducted the October Search. As discussed elsewhere in these Reasons, the police were in breach of s. 490(5) of the Criminal Code, which required them to return the Jeep once they determined that it was no longer required for the Hit and Run Investigation. Consequently, at the time of the October Search, the police were in unlawful possession of the Jeep.

[299] Second, s. 489(2) provides authority for a warrantless seizure but not a warrantless search: *Clarke* at para. 69.

[300] The police cannot rely on s. 489 to justify the warrantless search here. In order to authorize a search of a vehicle for a secret compartment, the police were required to obtain a warrant based on reasonable and probable grounds, or show that they met the test for a warrantless standalone safety search.

[301] Further, it is clear from the wording of s. 489(2) that this provision does not apply to investigation of provincial offences: *Long Lake Forest Products Inc. v. Workplace Safety and Insurance Board*, 71 W.C.B. (2d) 345, 2006 CanLII 34441 (Ont. S.C.) at para. 43. Subsections (a), (b), and (c), all use the phrase "of an offence against this or any other Act of Parliament". An "Act of Parliament" refers to a federal statute. In contrast, the AMC Act is provincial.

[302] I conclude that s. 489(2) does not provide the police with legal justification for the October Search.

3. Conclusion

- [303] After having regard to all the circumstances, I find the October Search was not authorized by law, and was not carried out reasonably.
- [304] Despite the Crown's assertion, the police did not have authority to conduct the October Search under the doctrines of consent, plain view, or public safety.
- [305] Further, I find that the police did not have lawful authority to search the vehicle for a secret compartment and hidden contraband, when the car was ostensibly seized for the Hit and Run Investigation, and where the original purpose for the seizure, the Hit and Run Investigation, had run its course.
- [306] All of the above circumstances lead me to conclude that the October Search was unreasonable and a violation of Mr. Abdelkader's s. 8 Charter rights.

D. Seizure

- [307] A search warrant specifies the items that police are permitted to search for when carrying out the warrant. When the police seize something that falls outside the terms of the search warrant, or the item is seized without a warrant, it is considered a warrantless seizure. Just as with a warrantless search, the Crown bears the burden of establishing that the seizure is otherwise authorized by law.
- [308] The authority to seize items without a warrant or which are not specified in a warrant, comes from ss. 489(1) and (2) of the Criminal Code. Under s. 489(2), police may seize items without a warrant if they are lawfully present at the location of the search, and they have reasonable grounds to believe the object is connected to an offence. This provision stipulates as follows:

Seizure of things not specified

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

- (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
- (b) has been used in the commission of an offence against this or any other Act of Parliament;
or
- (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

Seizure without warrant

- (2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
- (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
- (b) has been used in the commission of an offence against this or any other Act of Parliament; or
- (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[emphasis added]

[309] The items seized by the police that are at issue in this case are the Jeep, the Hidden Possessions, the Personal Effects, and the fingerprints (collectively the "Seized Items").

[310] The Accused submits that police violated his right to be free from unreasonable seizure under s. 8 when they seized and held the Seized Items. His Counsel argues that the police did not comply with s. 489(2), as they were not lawfully present in the Jeep when they searched the Compartment. Further, by the continuing to hold onto the seized items (including the Personal Items and the Jeep) when the police no longer had need for them, they failed to comply with ss. 490(5) and (6) of the Criminal Code.

[311] The Crown argues that the Accused does not have standing to challenge the seizure. If he is found to have standing, the Crown submits that the police complied with ss. 489(2) or s. 490, but if they did not, their actions do not amount to a breach of s. 8 of the Charter.

[312] Before I address the question of standing, it is useful to consider the relevant statutory provisions.

1. Section 490 of the Criminal Code

[313] Sections 489, 489.1(1), and 490 of the Criminal Code all relate to the seizure of items by the police and their return.

[314] I have already set out the relevant provisions of s. 489(1) and (2), which authorize seizure without a warrant in certain specified circumstances.

- [315] Section 489.1 deals with the restitution of property that has been seized with or without a warrant. Pursuant to s. 489.1(1)(a) a peace officer must return the seized item to the person lawfully entitled to it, as soon as practicable, where the officer is satisfied that (i) there is no dispute about who is lawfully entitled to its possession the property; and (ii) continued detention of the item is no longer required for an investigation or court proceeding. In such case, the officer must obtain a receipt for the returned item and make a report to a justice.
- [316] Section 489.1(1)(b) deals with situations where the requirements of ss. 489.1(a)(i) and (ii) are not met. In such cases, the officer is required as soon as practicable to (i) bring the thing to the justice or (ii) report to the justice that the officer has seized the thing and is detaining it. The justice must then deal with the item in accordance with s. 490(1).
- [317] Failure of a peace officer to file a report under s. 489.1(1) means that the property seized is not subject to judicial supervision during the investigation: *R. v., Garcia-Machado*, 2015 ONCA 569 at para. 16.
- [318] In *Garcia-Machado* the Court held that the officer's failure to file a timely report as required by s. 489.1(1) rendered the continued detention of a seized item unreasonable and therefore violated s. 8: *Garcia-Machado* at paras. 44-45.
- [319] The Court in *Craig* reached a similar conclusion, as follows:
- [181] The Charter protects against unreasonable search or seizure. In my view, a seizure does not end with the picking up of things. The requirement for a return to a justice is the ongoing judicial supervision of things seized--both under a warrant, pursuant to a warrantless search, and pursuant to a common law search: *Backhouse*. This is the only public record of what was in fact seized, whether the items were named in the warrant, whether they were seized as found in plain view, and what was seized outside of a warrant. As noted, there can be a significant invasion of privacy after the picking up of the items--including DNA testing, forensic testing, copying and other examinations. Thus, the privacy interests are continuing.
- [182] I agree with the approach taken by the Ontario Court of Appeal in *Garcia-Machado* and *Butters* that the failure to strictly comply with the statutory provisions of the Criminal Code will result in a Charter breach where the accused had an ongoing residual privacy interest and rendered the continuing detention unreasonable. I also agree that the circumstances are best left for an analysis under s. 24(2) of the Charter.
- [320] Section 489.1(1) has been characterized as a "gateway" to s. 490: *Garcia-Machado*, at para. 15.
- [321] Section 490 provides a scheme for dealing with property seized in connection with a crime: *R. v. Raponi*, 2004 SCC 50 at para. 28.

- [322] Section 490 serves two purposes. First, it obliges a justice to supervise the detention of anything seized under s. 489.1, where that item has been brought before a justice or a report made to a justice in respect of it. Second, it sets out "an elaborate scheme to facilitate the return of items seized to their lawful owners: Garcia-Machado at para. 15, quoting *R. v. Backhouse*, 195 O.A.C. 80, 2005 CanLII 4937 (Ont. C.A.) at para. 112.
- [323] Section 490 is lengthy, and it is not necessary to reproduce the entire provision here. Below is a concise overview of some of the key provisions as summarized by the Court in Garcia-Machado, and which I adopt:
- [18] Under s. 490(1), the justice to whom a report is made under s. 489.1(1)(b) is required to order the return of the property to the lawful owner or a person lawfully entitled to possession of [page742] the item unless the justice is satisfied that detention of the item is required "for the purposes of any investigation or a preliminary inquiry, trial or other proceeding". In that case, the justice may order the item detained for up to three months.
- [19] Under s. 490(2) and (3), if the justice is satisfied that, "having regard to the nature of the investigation", the detention of the item for a further period is warranted, the justice may extend the detention for successive periods, but not for more than a year in total. Importantly, notice of each application to the justice for further detention must be given to the person from whom the thing detained was seized.
- [20] Section 490(3) requires an order from a judge of a superior court¹ to detain the item for more than a year, unless proceedings have been instituted in which the thing detained may be required.
- [21] Section 490(4) provides that if the accused is ordered to stand trial, the justice is required to forward anything detained to the clerk of the court.
- [22] Section 490(7) and (8) permit the person from whom the item has been seized to apply for the return of the item seized after the expiry of the detention period or, in the case of hardship, before the expiry of the detention period.
- [23] Section 490(10) permits a person (other than the person from whom the item was seized) who claims to be the lawful owner or a person lawfully entitled to possession of the thing seized to apply for an order to return the thing.
- [24] Section 490(13) permits the Attorney General, the prosecutor, the peace officer, or other person having custody of a document to make and retain a copy of the document before bringing it before a justice or returning it to a person.
- [324] Sections 490(5) and (6) provide as follows:

Where continued detention no longer required

- (5) Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized, the prosecutor, or the peace officer or other person having custody of the thing seized, determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4), the prosecutor, peace officer or other person shall apply to
- (a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered its detention under subsection (3), or
- (b) a justice, in any other case,

who shall, after affording the person from whom the thing was seized or the person who claims to be the lawful owner thereof or person entitled to its possession, if known, an opportunity to establish that he is lawfully entitled to the possession thereof, make an order in respect of the property under subsection (9).

Idem

- (6) Where the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required, the prosecutor, peace officer or other person shall apply to a judge or justice referred to in paragraph (5)(a) or (b) in the circumstances set out in that paragraph, for an order in respect of the property under subsection (9) or (9.1).

[325] I turn now to the matter of standing.

2. Standing

[326] The Crown concedes that Mr. Abdelkader had a reasonable expectation of privacy in relation to the Jeep and its contents prior to August 10, 2020.

[327] I have already concluded that the Accused has standing to challenge the search for Hidden Possessions, the Compartment, and fingerprints contained in the Jeep. For the same reasons, I find that he has standing to challenge the reasonableness of the seizure of these items, as well as the Personal Effects.

[328] After considering the circumstances of this case, and the applicable law, I also find that Mr. Abdelkader has standing in relation to the ongoing seizure of the Jeep after August 10, 2020. My reasons are as follows.

[329] For the purposes of the s. 490 argument, the subject matter of the seizure is the Vehicle and its contents, including any fingerprints that could be located on them. I have no difficulty in finding that Mr. Abdelkader had a direct interest in the Jeep after August 10, 2020. Mr. Abdelkader remained the registered owner of the Vehicle until November 12, 2020.

- [330] I also find that Mr. Abdelkader continued to retain a subjective expectation of privacy in the Vehicle, after August 10. As noted earlier, the threshold for demonstrating a subjective expectation of privacy is low.
- [331] The seizure of the Jeep was ongoing. As held in *Garcia-Machado*, "an individual retains a residual, post-taking reasonable expectation of privacy in items lawfully seized and that Charter protection continues while the state detains items it has taken": at para. 45.
- [332] I infer that after the Vehicle was seized from his residence, Mr. Abdelkader continued to retain a subjective expectation of privacy in the Jeep, as evidenced by his repeated efforts to regain possession of it through his legal counsel: see paras. 26, 27, 64 of these reasons. Mr. Abdelkader demonstrated a clear intent to assert control over the Vehicle and maintain his privacy interest.
- [333] Mr. Abdelkader's subjective expectation of privacy can also be inferred from the surrounding circumstances. The Jeep was seized from Mr. Abdelkader's private garage. It can be inferred that Mr. Abdelkader expected the police would inspect the outside and inside of the Vehicle for evidence directly related to the Hit and Run and then return the Vehicle to him when the Hit and Run Investigation was complete. It can also be inferred that Mr. Abdelkader expected that the police would confine their actions to the stated objectives of the Hit and Run Investigation. There is no basis to believe that Mr. Abdelkader would have expected the police to continue to hold the Vehicle after the Hit and Run Investigation had concluded.
- [334] Mr. Abdelkader was not present or able to regulate access after the Jeep was seized. However, he was the historical user of the Jeep, and there is no evidence that he gave up use voluntarily.
- [335] I turn next to the question of whether Mr. Abdelkader's subjective expectation of privacy was objectively reasonable. The question of ownership is relevant at this stage. The evidence is clear that at all material times, Mr. Abdelkader had legal, equitable, and proprietary rights in the Jeep, as supported by the facts at paras. 12, 14, 15, 94, 96 and 194 of these reasons.
- [336] As demonstrated above, Mr. Abdelkader maintained an active and substantive legal interest in the vehicle throughout, reinforcing both his subjective expectations and the objective reasonableness of his expectation that he retained privacy and property interests in the Jeep.
- [337] Just because a bank finances a purchase, does not mean that the debtor has lost their proprietary interest in the item. The lender's security interest does not supplant the beneficial ownership which lies with the individual making payments towards the financing of the purchase.

- [338] I agree with the Defence that from a normative perspective, allowing standing to hinge on financing arrangements would unjustly penalize those persons of lesser economic means. It is common for people to finance large purchases such as vehicles. Indeed, a large number of Canadians do this, many of whom do not have the financial means to purchase a vehicle outright. Financed ownership is a legitimate means to access essential property, such as a vehicle. Vehicles provide mobility, and the ability to perform important activities of daily living, such as accessing healthcare, employment, education, and purchasing food and other necessities. Privacy rights should not be conditional on socioeconomic privilege.
- [339] In *R. v. Latimer*, 2020 BCSC 488 Justice Ker noted that privacy protections under the Charter must be flexible and responsive to the realities of modern life: at para. 161.
- [340] In my view, even if Mr. Abdelkader was in default of the Conditional Sale Contract, he continued to retain proprietary rights in relation to the Jeep. Ms. Russo acknowledged this during her testimony on behalf of the Bank, explaining that even though the Bank had a legal interest in the Jeep, CIBC could not sell the vehicle while Mr. Abdelkader remained on title.
- [341] Even if there is doubt about Mr. Abdelkader's standing as an "owner," he continued to have legal protections under s. 490 of the Criminal Code as the person from whom the vehicle was seized.
- [342] Section 490 provides specific protections to individuals whose property has been seized, ensuring that they have the ability to challenge the ongoing detention of their property: See s. 6(1) and 13(1) of the Civil Forfeiture Act, S.B.C. 2005, c. 29; *British Columbia (Director of Civil Forfeiture) v. Kazan*, 2013 BCSC 388 at paras. 17-20.
- [343] The Crown's reliance on the civil forfeiture proceedings also does not diminish Mr. Abdelkader's privacy interest in the Jeep. Simply because an asset gets referred to the CFO, does not mean that the person claiming ownership will not be able to retrieve it. At best, the forfeiture proceeding merely added another lien to the vehicle, similar to the first lien held by CIBC. Just as the CIBC lien did not extinguish Mr. Abdelkader's privacy interest, neither did the forfeiture lien. This is reflected in the Civil Forfeiture Act.
- [344] I also reject the argument that Mr. Abdelkader lost his privacy interest once the bank signed the Undertaking on September 15, 2020. Despite the Undertaking, the bank's repossession occurred on October 20, 2020. I find it difficult to understand how the Undertaking could retroactively negate Mr. Abdelkader's privacy interest prior to October 20.
- [345] I also reject any effort on the part of the Crown to rely on events after October 20, 2020, to interpret the privacy interest that existed prior to that date. Privacy interests must be analyzed prospectively based on the circumstances at the relevant time.

[346] The burden is on the Crown to show that Mr. Abdelkader lost standing in relation to the Jeep, after August 10, 2020. The Crown has failed to meet this burden.

[347] I conclude that Mr. Abdelkader has standing to challenge the reasonableness of the seizure of the Vehicle beyond August 10, 2020, as well as the seizure of the fingerprints, Personal Effects, and Hidden Possessions.

3. Reasonableness of Seizure

[348] The Defence alleges that police failed to comply with s. 490(5) beginning on May 8, 2020, by not returning Mr. Abdelkader's Personal Effects.

[349] Sgt. Evans testified that by May 8, 2020, police had exhausted their search of the Jeep and nothing of evidentiary value had been obtained.

[350] The Crown argues that Mr. Abdelkader should not be permitted to raise this argument now as it is novel. In particular, the Crown submits that the police officers were never examined on whether Mr. Abdelkader asked for these items back and whether they would have returned them on his request.

[351] The Crown's position largely misses the point. Section 490(5) places an ongoing positive obligation on the police to assess the need for further detention of each seized item. They are not permitted to wait until the Accused asks for its return.

[352] Nevertheless, there is some merit to the Crown's objection. It is conceivable that the police may have had some need for the Personal Effects until the Hit and Run Investigation concluded on July 20, 2020. As such, I am not prepared to find a breach commencing on May 8, 2020.

[353] However, there are sufficient grounds for finding that the police's failure to arrange to return these items promptly after July 20, 2020, was unreasonable.

[354] As noted above, the obligation to initiate return of the seized item is triggered under s. 490(5) when the item is no longer needed for the purpose for which it was seized.

[355] There is no dispute as to who the lawful owner of those Personal Effects was. As such, I find that the police had a positive obligation to promptly arrange to return the Personal Effects to their rightful owner after July 20, 2020. Instead, they held onto the Personal Effects for three further months, without any legal justification.

[356] I find that this breached Mr. Abdelkader's s. 8 rights. This breach is compounded when one considers that the police also took no steps to return the Personal Effects when the three-month detention period expired.

[357] This brings me to the allegation that the police also violated s. 490(6) by failing to return the Personal Effects between August 3, 2020, and October 21, 2020.

- [358] As summarized above, where the three-month detention period has expired and no charges have been laid, s. 490(6) requires the police to apply either for an order for return of the thing seized or for its forfeiture to the Crown, or for an order for further detention of the thing seized. The police failed to do this.
- [359] It is evident from Cst. Hoard's July 8, 2020, email to Cst. Tutt from the AFU that the police were well aware of the August 3 deadline. Yet no reasonable justification has been provided for the failure to comply with s. 490(6).
- [360] Consequently, I find that the police unjustifiably breached this provision.
- [361] The Accused says that from at least August 21, 2020, onwards, the police breached s. 490(6) by failing to return the Jeep to Mr. Abdelkader. The August 21 date relates to the expiry of the 30-day period following the issuance of a Notice of Intent under s. 23.1 of the Civil Forfeiture Act (now s. 73).
- [362] Where civil forfeiture proceedings are contemplated, Section 23.1 of the Civil Forfeiture Act permits the continued detention of the impugned asset by a public body for 30 days. After that period, the CFO must obtain an interim preservation order to authorize the continuing hold on the Jeep. Such an order was never obtained.
- [363] Despite the Hit and Run Investigation concluding on July 20, the s. 490(1) detention period expiring on August 3, the CFO related detention period expiring on August 21, and the absence of a preservation order, the police did not take any steps to return the Jeep to Mr. Abdelkader.
- [364] The Crown explains that the police may have misunderstood the effect of s. 23.1 of the Civil Forfeiture Act due in part to the language of the version of the provision that was in force at the time. In 2020, s. 23.1(5) of the Civil Forfeiture Act read as follows:
- Subsection (4)(b) does not apply if proceedings are commenced under section 3 in relation to the personal property and the court makes an order under section 8 transferring possession of the personal property to the director or another person.
- [365] A new version of the Civil Forfeiture Act came into force in 2024. The provision governing notice of intent to commence proceedings is now found at s. 73, which states:
- (5) Subsection (4) (b) does not apply if proceedings are commenced under section 3 in relation to the personal property and the court makes an order under section 9 [interim preservation order] transferring possession of the personal property to the director or another person.

- [366] First, "ignorance of the law on the part of the police cannot be used to justify their actions so that evidence improperly obtained can be made admissible": *Cape Breton (Regional Municipality) v. Nova Scotia*, 2024 NSSC 88 at para. 32.
- [367] As the majority held in *R. v. Le*, 2019 SCC 34 at para. 149: "[w]hile police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is." (citing *Grant*, at para. 133)
- [368] Second, regardless of the wording of the provision and any confusion the police may have had about their obligations, it is evident from the email communications that the police had no intention of returning the Jeep to Mr. Abdelkader. They were determined to deprive him of it, and in my view, the CFO proceeding simply gave them cover to continue to do so.
- [369] The Crown's reliance on *R. v. Sim*, (June 28, 2024), Vancouver, 261102, (B.C.P.C.), to justify this conduct, is misplaced. One of the accused's submissions in *Sim* was that the failure to obtain an extension for the detention order under s. 490(3) of certain non-civil forfeiture items, namely a stolen rifle, ammunition, and two magazines, constituted a breach of his s. 8 Charter rights. The Court found there was no "residual privacy interest in illegally possessed stolen guns or controlled substances": at para. 79.
- [370] The circumstances of this case are markedly different. There is no suggestion that the Jeep was illegally possessed or stolen by Mr. Abdelkader. To the contrary, he had lawfully purchased it and had a valid Owner's Certificate. To the extent that the Jeep was alleged to be a weapon used in the hit and run offence, the manner in which it was used did not turn it into an illegal weapon. If that was the case, then the Jeep would never have been turned over to the Bank or been permitted to be sold at auction.
- [371] To the extent that the Jeep contained contraband or an illegal Compartment - those things were not known to the police until they conducted the October Search. Prior to that, the police merely speculated about the existence of a hidden compartment and contraband within the Jeep. Such speculation is insufficient to justify a violation of s. 490(6).
- [372] I also reject the Crown's reliance on s. 490(12), which provides for a further 30-day detention of the property after an order has been made to return it. According to the Crown, even if the police had proceeded expeditiously under s. 490(6), an order to return the Jeep to Mr. Abdelkader was not a foregone conclusion. Further, if the Court ordered the return on August 21, 2020, the earliest the Jeep could be released to Mr. Abdelkader was September 21, 2020, by operation of s. 490(12). By September 15, the Bank had already decided to repossess the Vehicle and entered into an Undertaking with the CFO.
- [373] Section 490(12) only comes into play after the police have taken steps under s. 490(5) or (6). While this provision may be relevant at the second stage of the Charter voir dire during a s. 24(2) argument, it is premature to consider the degree of impact of a violation of s. 8 rights at this stage of the analysis: *Craig* at para. 182.

[374] Further, even if s. 490(12) is relevant at this stage of the analysis, the position of the Crown is speculative. During his testimony, it became apparent that Cst. Hoard did not have a working knowledge of the s. 490 regime, and it is doubtful that he would have invoked s. 490(12). Further, the police took a very selective approach to which portions of the statute they adhered to. When they released the vehicle to the IRSC on October 20, 2020, it was done without compliance with s. 490. Nor did the police invoke s. 490 when they returned Mr. Abdelkader's Personal Effects to him after the October Search.

[375] Sgt. Evan and Cst. Hoard offered four justifications for delaying the return of the Jeep, none of which are persuasive.

- a) First, they suggested that the vehicle was required between May 8 and July 20, 2020, for the purposes of criminal forfeiture. However, this is not credible. Their own experience was that, since the introduction of civil forfeiture in BC, they never had a case where the vehicle was criminally forfeited. In keeping with that knowledge, their contemporaneous emails confirmed their desire to pursue civil forfeiture as criminal forfeiture was unlikely. Indeed, even after the drugs were discovered in the Jeep there is no indication that the officers even considered whether to have the Jeep criminally forfeited.
- b) Second, the police's stated intention of holding the vehicle for civil forfeiture purposes was inconsistent with the requirements of the Criminal Code and the statutory scheme of s. 490. Civil forfeiture is not an investigative "tool" and cannot justify the ongoing detention of property under the Criminal Code.
- c) Third, Sgt. Evans' claim that the vehicle was being held for the CFO due to storage costs is not supported by the evidence. Email correspondence from the CFO shows that they were unaware of the Jeep's location as late as September 2020. Further, even if this was true, this does not change the fact that the vehicle remained in police custody.
- d) Fourth, Sgt. Evans claimed that there would inevitably be logistical delays in returning the vehicle to Mr. Abdelkader. This presumes that the police would have returned the Jeep to the Accused, and if they did so, it would be through s. 490. There is no evidence to support either. The police handed over the Jeep to the Bailiff without adhering to s. 490's return provisions. The supposed logistical delays also did not interfere with the police's ability to return the Personal Effects to Mr. Abdelkader.

[376] In conclusion, by failing to comply with s. 490(6) in relation to return of the Jeep and the Personal Effects, I find that the police ignored the procedural safeguards that s. 490(6) provides to protect individuals' property rights. The police's actions led to a lack of judicial oversight of their prolonged seizure. The failure to comply with this obligation constituted a violation of s. 490(6), and in turn, s. 8 of the Charter.

- [377] The final alleged breach of Mr. Abdelkader's seizure rights (alleged Breach 6) asserts that the police failed to comply with the requirements of s. 490 regarding exhibits obtained throughout the investigation, amounting to a pattern of noncompliance and a breach of s. 8 of the Charter.
- [378] The first aspect of this alleged breach relates to the police's failure to obtain judicial authorization to further detain biological samples taken from the Vehicle on May 7, 2020. Under the Forensic Warrant, the police were required to report to the Court "as soon as practicable, but within a period not exceeding seven days after the execution of the warrant". To that end, the police filed a Report to Justice (Form 5.2) which is undated and was never signed by a Justice. Cst. Hoard (the Exhibits officer) testified that he was aware that the document needed to be signed for the ongoing detention to be valid; however, he said he believed the biological samples did not need to be detained. As such, he did not submit the Report to Justice for signature. No further detention order was sought in relation to them, and they were never returned to Mr. Abdelkader.
- [379] The Crown submits that no breach has occurred as the necessary paperwork was filed. Again, the Crown's position misses the point. The police were required to either get judicial authorization for the ongoing detention of the biological samples or return them to Mr. Abdelkader. They did neither. This amounts to a breach of Mr. Abdelkader's s. 8 rights.
- [380] The second aspect of this alleged breach relates to packaging found with the drugs located during the October 13, 2020 search. Even though it was the police's theory throughout that these items belonged to Mr. Abdelkader (and CIBC never had any knowledge or control over them), the police never sought Mr. Abdelkader's consent to retain these items, nor did they obtain approval from the Court under s. 490 to retain these items. Rather, between October 13, 2020 and January 11, 2022 (the date charges were approved in this matter), the police obtained CIBC's consent under s. 490(3.1) of the Criminal Code to retain the packaging found with the drugs located during the October 13, 2020 search.
- [381] The Crown asserts that the baggies and the box in which the drugs were found were illegal and it was not lawful for the applicant to possess them. This suggestion is preposterous. Plastic baggies and cardboard boxes are generic items routinely found in a majority of Canadian homes. There is nothing illegal about them, and placing an illegal item in them does not make them illegal.
- [382] The concern in relation to these items is that Mr. Abdelkader's fingerprints were found on them. I have already noted the significant privacy interest in one's fingerprints. The police were indeed aware that they needed legal authorization to continue to possess them - that is why they sought CIBC's consent. The problem is that they sought consent from the wrong party. It was Mr. Abdelkader's fingerprints and privacy interests that were at stake - not Ms. Russo's. Ms. Russo had no authority to provide consent on behalf of Mr. Abdelkader for the police to continue to hold onto those items.

[383] I conclude that the police failed to obtain judicial authorization to further detain biological samples taken on May 7, 2020, from the Vehicle, or return them to Mr. Abdelkader. In so doing, they violated Mr. Abdelkader's s. 8 rights. They also violated his s. 8 rights when they failed to obtain valid consent from Mr. Abdelkader or a court order, for the continued retention of the baggies and box found in the Compartment during the October Search.

V. Section 7 Violation

[384] The Defence alleges that the police and the CFO engaged in serious misconduct by misusing statutory powers and colluding to prevent Mr. Abdelkader from reclaiming his Jeep. Consequently, they allege that Mr. Abdelkader's s. 7 Charter rights were breached.

[385] Section 7 of the Charter provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[386] Although there is no specific right against abuse of process within the Charter, the doctrine of abuse of process is one aspect of protections afforded by s. 7: *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 at para. 73. The Court explained the connection between abuse of process and s. 7 in *O'Connor*, stating that it would be a violation of the principles of fundamental justice to deprive somebody of liberty on the basis of an abuse of process:

[63] This Court has repeatedly recognized that human dignity is at the heart of the Charter. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the Charter and to request a just and appropriate remedy from a court of competent jurisdiction.

[387] The abuse of process doctrine dissociates the courts from unacceptable conduct of investigatory and prosecutorial agencies in a variety of contexts where the conduct may offend the community's sense of fair play and decency: *R. v. Johnston*, 2021 BCCA 34 at para. 365.

[388] As explained by the Court in *R. v. Mack*, [1988] 2 S.C.R. 903 at 938-939, 1988 CanLII 24, we live in a system in which convictions are not to be obtained at any price. The ends do not justify the means:

- [389] An abuse of process refers to state conduct that "egregious and seriously compromises trial fairness and/or the integrity of the justice system": *R. v. Brunelle*, 2024 SCC 3, at para. 27, citing *R. v. Anderson*, 2014 SCC 41.
- [390] There are two categories of abuse of process. State conduct that compromises the fairness of the accused's trial falls into the main category. The residual category covers conduct that does not pose a threat to trial fairness, but nevertheless risks undermining the integrity of the judicial process or justice system: *Brunelle* at para. 27; *R. v. Babos*, 2014 SCC 16 at para. 31, *O'Connor* at para. 73.
- [391] The residual category protects the integrity of the judicial process from state conduct that amounts to an affront to the community's basic sense of decency and fair play: *Babos*, at para. 44, as cited in *R. v. Bacon*, 2020 BCCA 140 at para. 62.
- [392] Abusive state conduct falling under the residual category may take the form of an accumulation of incidents which, though not individually abusive, reach the threshold when considered cumulatively: *Brunelle*, at para. 69.
- [393] The Defence relies on the residual category and alleges that the cumulative conduct of the police in this case amounted to an abuse of process such that the accused's s. 7 rights were violated.

1. Preliminary Issue

- [394] Before I consider whether police conduct amounted to an abuse of power, I wish to address a preliminary objection raised by the Crown. The Crown submits that where an applicant complains of conduct which may give rise to a specific infringement, such as the s. 8 violations alleged in this case, the application should not resort to pleading the more open language of s. 7: see *R. v. Généreux*, [1992] 1 S.C.R. 259 at 310, 1992 CanLII 117. I agree with this general proposition but do not consider this concern to arise in the case at bar.
- [395] While there is some overlap between the arguments advanced under s. 8 and s. 7, the allegations under s. 7 raise concerns of abusive misconduct rising above the breach of the substantive legal right. The focus is not on distinct breaches of the accused's rights, as much as on the cumulative impact of the police conduct, and the motivation behind the police actions. As such, I find it is appropriate to consider the abuse of process arguments under s. 7, rather than subsume those under s. 8.
- [396] I agree with the Defence that the police actions constitute an abuse of process. There is significant and extremely concerning evidence that Sgt. Evans and Cst. Hoard acted in concert with the CFO in a deliberate and orchestrated effort to bypass statutory safeguards under the s. 490 regime and deprive Mr. Abdelkader of due process.

2. The Cumulative Conduct of the Police

[397] The evidence leads me to conclude that, from the beginning, when the Vernon RCMP assumed the Hit and Run Investigation, through to the end, when they organized and participated in the October Search, the officers targeted Mr. Abdelkader because they believed he was involved in the drug trade and had been "untouchable" thus far. They were determined to find evidence to charge him. If they could not charge him, they were determined to deprive him of his valuable Jeep.

[398] The Crown's submission that "it is a dangerous contention to label a drug unit's investigation into a suspected drug dealer as a biased and targeted endeavour",^[11] fails to recognize that it is far more dangerous to give the drug unit unfettered rights to investigate any suspected drug dealer. Launching a drug investigation under the guise of investigating a hit and run goes far outside the scope of what the community would see as decent and fair. No matter how violent and horrific the crime, or suspected crime, the ends do not justify the means.

[399] I proceed by reviewing the police's cumulative conduct in roughly chronological order.

[400] Even though officers admitted that the normal conduit for contact with the CFO was the AFU, they bypassed that procedure and made direct contact with the CFO on May 4, 2020, following a comprehensive search of the Jeep which turned up empty. Cst. Hoard sent an email to Ms. Millwater at the CFO, stating in part that police wished to find out how much was owing on the vehicle, to try to gauge whether the CFO was likely to pursue forfeiture:

We want to know if there's any way to find out what is still owing on the vehicle. We found out that there is a loan at CIBC for it. If what is owing is close to the current value, then experience tells us your office will probably tell us not to bother or it will just go back to the lender who will then usually let the RO just resume owning it and paying for it.

[401] This inquiry was not made for legitimate purposes related to the Hit and Run Investigation. Rather, it was to determine how to keep the Vehicle away from Mr. Abdelkader. Mr. Larson at the CFO understood this to be the objective and agreed to participate.

[402] According to Mr. Larson's reply email on May 6, 2020, not only did the CFO have means for assessing value, but they could also pursue ways of having the vehicle repossessed so Mr. Abdelkader could not have it back from the bank. Mr. Larson expressed that he was "particularly interested" in the results of these efforts.:

more importantly, we have means of getting it repo'd so that he CANNOT get it back from the bank unless he pays off the full balance of the loan, and if he does that, then we go right ahead and forfeit it straight out.

Given the facts you describe, I am particularly interested in seeing this result

[403] The highly personal and improper motives behind the pursuit of the Jeep through the civil forfeiture process, are underscored by the following response from Cst. Hoard:

Thank-you Jerad this is really good news. This guy is a bad dude and he's been untouchable to us up until now. We will liaise with Crown when we get closer to recommending charges about whether they have any interest in proceeding with criminal forfeiture but I am guessing they will answer no but we will wait and see.

[Emphasis added]

[404] Mr. Larson's response to Cst. Hoard indicates that he was more than willing to bypass normal due process, in aid of the police officer's objectives. He suggested that they should proceed quickly, before Mr. Abdelkader's lawyer could seek a return under s. 490:

I only worry about making sure we get the vehicle before he has a lawyer bring a 490 return, because then it gets complicated. So even if crown agrees to kick it over to us early (you can ask them, they won't seek forfeiture of a bank lien vehicle), it would be useful.

[405] This extremely troubling exchange lends credence to the Defence argument that there was a clear effort on the part of the police and the CFO to circumvent a mandatory statutory regime under the Criminal Code. It is compounded by Sgt. Evans' admission during his cross-examination that, at this juncture, he was motivated to prevent Mr. Abdelkader from bringing a s. 490 application. Rather than allowing the process to unfold in a neutral and lawful manner, the communications between Cst. Hoard and the CFO demonstrate a clear intent to deprive the Accused of his property and the chance to exercise his lawful rights under s. 490.

[406] When Mr. Abdelkader made legitimate efforts to recover his vehicle on May 8, 2020, the police refused to return it, even though Sgt. Evans testified that they no longer needed it for the Hit and Run Investigation.

[407] Rather than viewing the May 8 request from Mr. Abdelkader as a legitimate exercise of his legal rights - which it was - Sgt. Evans decided it confirmed his suspicions about a hidden compartment and brought them "to life".

[408] On May 21, 2020, counsel for Mr. Abdelkader informed the RCMP of his intention to apply to unseal the ITO relating to the seizure of the Jeep. Again, the police did not treat this as a legitimate assertion of legal rights, but as further confirmation of their suspicions. It is notable that these suspicions did not relate to Mr. Abdelkader's involvement in the Hit and Run - but rather to the de facto drug investigation being conducted under the ruse of the Hit and Run Investigation.

[409] When the Hit and Run Investigation concluded on July 20, 2020, the police were alive to the fact that their ability to hold the Jeep was quickly diminishing. The August 3, 2020, expiry of the initial detention order for the Jeep was around the corner, and Mr. Abdelkader was intent on having the Jeep returned. To prevent Mr. Abdelkader from getting his property back, the police requested an expedited referral to the CFO.

[410] Even though I have found that Cst. Hoard did not have a working knowledge of the s. 490 regime, Sgt. Evans' testimony suggests he was aware of the positive obligation on the police to return the Jeep under s. 490 before the August 3 deadline. He testified under cross examination that he knew that, under s. 490, continued detention was only valid while the investigation was ongoing:[12]

Q And you understood you, otherwise, had no obligation under any other circumstances to release the vehicle before August the 3rd?

A No, I -- I don't believe that to be the case. I believe 490 specifies that it's -- it needs to be still be required for the investigation.

Q Can you agree with me that this vehicle was no longer required for your investigation as of July 20th?

A The -- the -- the -- my response to that would be that the -- the disposition of the items that we seized form part of our investigation, so it was required from the point of view that we had to take steps to determine how we were going to dispose of the item, but required from a perspective of further search warrant and things like that, I would agree it wasn't -- was not required anymore beyond that date.

Q And by that date you already knew that you were not forwarding this case for criminal charge approval?

A That was essentially the day that decision was made.

Q And, as a result, you knew there would be no need to keep it for a criminal forfeiture as a result?

A Correct.

[411] The police had an obligation to initiate a return of the Jeep after July 20, 2020. Despite this, they put their plan to elicit the assistance of the CFO in motion, all in an effort to prevent Mr. Abdelkader from getting the Jeep back.

[412] On July 20, 2020, Cst. Hoard wrote to Cst. Tutt from the AFU and made a formal CFO referral request for the Jeep. He indicated they had "concluded the file and are unable to reach what we feel will be charge approval standards and cannot identify driver or occupants for criminal court standards". He further noted that "ABDELKADER has his lawyer active in this case, Brad SMITH, of Kamloops and we anticipate he will continue engagement and pursue vehicle be returned as soon as possible. We apologize for the tight time frame but we hope this file can be reviewed as soon as possible".

- [413] On July 22, 2020, Cst. Tutt forwarded the referral to the CFO, writing "[p]lease note that this referral urgency, as the 5.2 ends August 3rd, 2020. I believe the accused Lawyer will be trying to have the vehicle back at [sic] the 5.2 expires." The referral indicated that: "Investigators have reached a point where there is little likelihood of identifying the driver or assailants and hence little likelihood of a charge/conviction".
- [414] This troubling exchange is clear evidence of the institutional effort by the police to circumvent Mr. Abdelkader's legal rights under s. 490. It reflects a conscious and deliberate decision to circumvent the police's obligations under s. 490, and to also impede Mr. Abdelkader's ability to pursue his legal rights. Such conduct is an affront to a sense of decency and fair play.
- [415] The quick turnaround on the request for the referral indicates that the CFO was a willing participant in the police's scheme.
- [416] Just three hours after the email from Mr. Tutt, on July 22, 2020, the Director of CFO agreed to commence a claim against the vehicle and provided a Notice of Intent to Commence Proceedings under s. 23.1 of the Civil Forfeiture Act (now s. 73). Cst. Hoard testified that this turnaround was very fast and he had never had a response from the CFO that quickly before.
- [417] The Notice of Intent had the intended objective - it extended the detention of the Vehicle and gave the police another 30 days to figure out their next steps.
- [418] On July 28, 2020, counsel for the Director of CFO wrote to CIBC to notify them that the Director was in the process of commencing a proceeding against the Jeep.
- [419] On August 5, 2020, Mr. Larson emailed Cst. Hoard to ask whether he had the video recording of the hit and run. He noted in part, "if you get any wind of a 490 application by his lawyer, please let me know asap".
- [420] In the NOCC filed on August 10, 2020, the Director pled that Mr. Abdelkader was the registered owner of the vehicle. The NOCC alleged that Mr. Abdelkader used the Jeep to commit the following offences: assault with a weapon, aggravated assault, failure to stop after an accident and failure to stop after an accident resulting in bodily harm. Further, it alleged that if the Vehicle was released, Mr. Abdelkader would use it for unlawful activity.
- [421] The CFO placed a lien on the vehicle with the BC personal property registry, but never obtained an interim preservation order for the Jeep.
- [422] At this point, there was no evidence to support the allegations made in the NOCC. While the driver bore some resemblance to Mr. Abdelkader, the police could not make any positive identification from the video or other evidence they had gathered during their investigation. The drugs were not found in the Jeep until several months after the NOCC had been filed. Thus, despite Mr. Abdelkader being the owner of the Jeep, the assertion that he used the Jeep to commit the Hit and Run and related assault, was speculative. It is

difficult to see how the CFO would have been able to prove these serious allegations against Mr. Abdelkader at that stage, even on a civil standard.

- [423] The police were aware that the forfeiture action lacked viability. During his cross-examination, Sgt. Evans testified that the amount outstanding on the loan was important for civil and criminal forfeiture purposes, as it affected "how much asset is there actually available to be forfeited versus how much is owed to the lender". He agreed that if too much money was owed to the Bank for the Vehicle, then it would not be worth it for the forfeiture offices to proceed.
- [424] The CFO was aligned with the police in their objectives. The fact they were also aware that the civil forfeiture action lacked viability is underscored by Mr. Larson in his email to Cst. Hoard, following CIBC's decision to find Mr. Abdelkader in default of his loan agreement. Mr. Larson noted on September 14, 2020, that it "appears the bank wants to repossess the Jeep - this is a good result as they will liquidate it and pay themselves out. It's not possible that any will remain, and in fact, I think he will still owe them a lot of money. I want to confirm you have the vehicle at your detachment and are ok working with the banks bailiff when the time comes."
- [425] If the CFO had commenced the civil action for bona fide reasons, this should not have been good news. Considering the other exchanges and evidence summarized here, I find the fact that Mr. Larson considered this a "good result" consistent with the view that the aim of the civil action was not to achieve the purposes of the civil forfeiture regime, but to ensure that the Jeep would not be returned to Mr. Abdelkader.
- [426] I pause here to note that in stating the above, I am aware that there ultimately were surplus proceeds from the sale of the Jeep which resulted in net payout to the CFO of \$3,207.68. However, this figure is marginal and it is evident from the above that the CFO believed at this point that they would receive nothing.
- [427] The police bias against Mr. Abdelkader is also evident from the admission by Sgt. Evans that, while they were prepared to turn the Jeep over to CIBC by September 14, 2020, they were not prepared to release it to Mr. Abdelkader.
- [428] On September 15, 2020, counsel for the Director of Civil Forfeiture informed CIBC that they would be agreeable to CIBC repossessing the Jeep on undertakings.
- [429] On September 21, 2020, Phil Tawtel wrote to Cst. Hoard to ask whether a s. 490 return order application had been made by either defence counsel or the Crown. Cst. Hoard responded that "we nor Crown has done a Sec 490 as far as I know. I am not sure if Defence went ahead with a 490 but you [sic] office had the lawyers name and contact details and I believe were in contact with him. We got the Notice of Intent to Commence Proceedings prior to the needed further detention of exhibits".

- [430] Approximately half an hour later, Mr. Tawtel responded by noting that the Bank signed the Undertaking on September 15. With the Undertaking signed, Mr. Tawtel wrote, the Vernon RCMP "should be receiving a concluding letter from us shortly confirming our action will be discontinued".
- [431] As Mr. Tawtel's email indicates, the CFO discontinued the civil action after it obtained the Undertaking. The police had anxiously awaited this step, in order to justify further searches of the Jeep. This timing also supports the conclusion that the CFO knew they were unlikely to succeed in the civil forfeiture case,
- [432] The police's decision to hold off on any further searches of the Jeep for the was timed to ensure that they could get CIBC's consent, to avoid any potential that Mr. Abdelkader retained a privacy interest in the vehicle. As noted at para. 66 of these Reasons, Sgt. Evans admitted under cross-examination that despite suspecting a hidden compartment, he knew he did not have the authority to seek a warrant and so he did not act until he was certain the Bank owned the Vehicle:[13]
- [433] The evidence suggests police pressured the Bailiff to provide consent for the search by overstating public safety concerns. In my view, the assertions that 1) they needed to search the Vehicle for public safety reasons, and, 2) the IRSC would be liable if something bad happened after the Jeep was sent to auction, were tactics to gain Ms. Yaremko's consent.
- [434] I also find that the police officers were not forthright with Cpl. Fletcher about their authority to search the Vehicle. It is clear from the evidence that Cpl. Fletcher wanted to ensure that he had lawful authority for the search. Not only did the police fail to tell him that Mr. Abdelkader continued to be the registered owner, Sgt. Evans told him that the Bailiff requested the October Search when this was not true.
- [435] There is merit to the argument that the Bank was influenced by the police and the CFO in its decision to repossess the vehicle and refuse to allow redemption. The Crown concedes that the Bank learned of the "breaches" of the Conditional Sales Contract through the CFO, but justifies this action by saying that "Mr. Abdelkader did not alert the bank to the breaches of the CSA, so there was no other opportunity for CIBC to learn of the breaches until the CFO alerted them".[14] I fail to understand how this fell under the mandate of the CFO.
- [436] In *British Columbia (Director of Civil Forfeiture) v. Onn*, 2009 BCCA 402 at para. 14, the Court held that the Civil Forfeiture Act had three purposes:
- a) To take the profit out of unlawful activity;
 - b) To prevent the use of property to unlawfully acquire wealth or cause bodily injury; and
 - c) To compensate victims of crime and fund crime prevention and remediation

- [437] Notifying a creditor that a debtor may have breached an agreement between them, in an effort to prevent the debtor from having access to their property, does not fall into those duties.
- [438] I accept that the Bank's decision to refuse redemption does not make sense from a financial standpoint. The bank's primary interest was recovering the money owed, and accepting full redemption from the debtor was a straightforward and secure way to achieve that goal. However, I find it plausible that CIBC could have decided to navigate the repossession process in order to maintain its reputation of being a good corporate citizen. It would be a leap to say the Bank acted to assist the police and CFO in their objective of depriving Mr. Abdelkader of his property.
- [439] Under the strategy Mr. Larson outlined and Cst. Hoard agreed to, the CFO seized the vehicle quickly to block its return under s. 490 and leverage forfeiture mechanisms to ensure it could not be reclaimed. This reflects a coordinated effort by the police and the CFO to bypass due process for improper motives. My concerns about the highly improper nature of the conduct and the motives of the police are compounded by the fact that the RCMP did not have reasonable grounds to arrest or charge Mr. Abdelkader, while at the same time they were under a positive duty to invoke s. 490 of the Criminal Code, the very process they worked with CFO to avoid.
- [440] It is evident that from the outset that the civil action against Mr. Abdelkader was less about pursuing the stated goals of the civil forfeiture regime and more about helping the police keep a vehicle away from its lawful owner.
- [441] The Crown relies on *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70 ("Angel Acres") to support the argument that a close relationship between the AFU and the CFO is expected given their similar purposes. In particular, they rely on para. 86 from *Angel Acres*, which states that CFO and RCMP cooperation should not be mistaken for a "colourable" intent to confuse their separate roles:
- [86] Nor are we persuaded that the fact the CFO and RCMP co operate closely in their respective roles under the Act and Criminal Code indicates a "colourable" intention to merge or confuse those roles. To the contrary, the evidence indicated that every effort is made to keep them separate.
- [442] First, the police did not use the AFU to connect with CFO - rather they reached out to CFO directly in order to garner their assistance. Cst. Hoard contacted Cst. Tutt of AFU only to make a formal referral to CFO for their consideration. The communications between the police and the CFO had already started long before.

- [443] Second, I do not agree that Angel Acres sanctions the kind of conduct that is present in this case. From the outset of their interactions, members of the Vernon RCMP and the CFO acted in concert. They held a shared objective of ensuring that Mr. Abdelkader would not regain possession of his vehicle. This was an abuse of statutory powers under the Civil Forfeiture Act and Criminal Code.
- [444] While the CFO may not have risen to the level of being agents of the police, they certainly behaved in concert with the Vernon RCMP to subvert the Accused's rights. Their intimate collaboration included providing advice to the police about who lawfully owned the Vehicle and the legality of their evidentiary search.
- [445] As held in *United States v. Rogan*, 2014 BCSC 1016 at paras. 114-120, it is an abuse of process to misuse statutory powers for purposes inconsistent with the objectives of the act from which they derive.
- [446] It is also extremely concerning that once the CFO became involved, the police abrogated all responsibility to the CFO. They did not diarize the expiry of the CFO hold on August 21, and did not take any steps to ensure compliance with s. 490 once that date had expired.

3. Conclusion

- [447] When police learned that a vehicle owned by Mr. Abdelkader had been involved in a hit and run, they seized the opportunity to investigate him. When they were unable to connect Mr. Abdelkader to the hit and run, and with a s. 490 deadline looming, they devised a plan to hold onto the vehicle through the use of the civil forfeiture office, until such time as they could legitimately (in their eyes) conduct a search for a hidden compartment.
- [448] When Mr. Abdelkader made legal and legitimate efforts to recover his vehicle, the police refused to return it, even when the investigation for which it had been seized had concluded. To justify their continued possession of the Vehicle, they engaged in deceptive tactics to retain it beyond July 20, 2020, contrary to their statutory obligations under s. 490.
- [449] To assist the Vernon RCMP, the CFO initiated a civil forfeiture action, despite knowing that it was unlikely to proceed, let alone succeed. In light of these realities, it is evident that there was never a bona fide intention to legitimately pursue forfeiture of the vehicle.
- [450] The abuse of process doctrine dissociates the courts from unacceptable conduct of investigatory and prosecutorial agencies in a variety of contexts where the conduct may offend the community's sense of fair play and decency.
- [451] The Defence has established that the conduct of the police in this case amounts to an accumulation of incidents which, together, resulted in an abuse of process and a violation of Mr. Abdelkader's s. 7 rights.

VI. Order Made

- [452] The Accused has established that his s. 7 and s. 8 Charter rights were violated.

[453] This proceeding will now move into the second stage of the voir dire regarding s. 24(2) of the Charter.

"Shergill J."

[1] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11 [Charter].

[2] The cyclist was later identified by the police as Mr. Rodney Brignall.

[3] All weights are measured with the bags or packaging.

[4] The violation ticket was successfully disputed.

[5] Crown's Brief of Argument, at para. 366.

[6] Crown's Brief of Argument, at para. 279.

[7] James A. Fontana & David Keeshan, *The Law of Search and Seizure in Canada* (Markham: LexisNexis, 2005 and 2007), 6th ed., at pp. 497-498.

[8] Defence Reply Submissions, at para. 29.

[9] Crown's Brief of Argument, paras. 173-193

[10] Transcript of testimony of David Evans, October 29, 2024, p. 102, line 15.

[11] Crown Counsel's Submission at para. 381.

[12] Transcript of Testimony of Sgt. Evans, October 29, 2024, p. 54, lines 18-43.

[13] Transcript of Testimony of Sgt. Evans, October 29, 2024, p. 99, lines 13-34.

[14] Crown Counsel Submissions, at para. 383.

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Prepared on 28 October 2026 · Esheria