
CANADA / JUDGMENT

R. v. Comacho

2011 BCSC 175

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 175 R. v. Comacho

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Camacho,

2011 BCSC 175

Date: 20110210

Docket: 25352

Registry: Vancouver

Regina

v.

Richard Patrick Camacho

Corrected Judgment: The spelling of the accused's name on the face page of the judgment and on the header throughout was corrected on June 3, 2011

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Crown:

M. Schwarz

Counsel for the Accused:

N. Cobb

Place and Date of Trial:

Vancouver, B.C.

November 15-19 and

November 26, 2010

Place and Date of Judgment:

Vancouver, B.C.

February 10, 2011

- [1] The accused, Richard Camacho, is charged with unlawfully producing marijuana, possession of marijuana for the purposes of trafficking in an amount exceeding 3 kg, and theft of electricity. He has challenged the admissibility of evidence seized during the execution of a search warrant. The Crown wishes to have a statement made by Mr. Camacho declared admissible. All of the evidence to this point of the trial has been heard in a blended voir dire. The accused elected not to call evidence on the voir dire.
- [2] These charges are all said to have been committed on August 14, 2009. On that day the police executed a search warrant at commercial premises on Bryne Road in Burnaby, BC. In those premises they found a sophisticated marijuana grow operation. Just prior to actually executing the search warrant the police were carrying out surveillance on the premises. Mr. Camacho was seen periodically entering and exiting the premises. He appeared to be working on a car parked in front of an open bay door to one of the premises that the police eventually searched. Shortly after 5 p.m. the search warrant was issued. Not long after that Mr. Camacho closed the hood on the motor vehicle he was working on and then closed the garage bay door. It appeared he was about ready to depart. As a result the police approached, announced their presence and detained him. The premises were then searched and once the marijuana growing operation was located Mr. Camacho was arrested and returned to the Burnaby detachment where he provided a statement.
- [3] Two weeks before the trial began Mr. Cobb, on behalf of Mr. Camacho, filed an application in which he set out the grounds on which he was seeking the exclusion of the evidence obtained during the search. The grounds as set out in the notice of application are:
1. that the information to the chain was based up on illegally obtained evidence;
 2. that it was drafted in a materially misleading manner in that the affiant failed to make full, fair and frank disclosure of all material facts;
 3. that the Information to Obtain [ITO] contains conclusory statements unsourced to any investigative facts;
 4. that the ITO does not support a credibly based probability that a search of the premises will result in the location of any of the evidence specified in the search warrant;

5. that Mr. Camacho's right to be secure from unreasonable search was violated when the police executed a warrantless search of his motor vehicle; and
 6. Mr. Camacho's rights under s. 10 of the Charter were violated when he was not immediately informed of his right to counsel upon detention and when he was not given immediate access to counsel after he was informed of that right.
- [4] As the voir dire unfolded the focus of Mr. Camacho's application changed in some respects and became more refined in others. There is no basis to conclude that any of the information relied upon by the police to secure the search warrant was illegally obtained. There are several asserted shortcomings in the ITO. First, the warrant was issued on the basis that the offence theft of electricity was believed to be occurring at the address to be searched. The evidence, as amplified on the voir dire, is that an electrical bypass was discovered but it was located over 100 yards from the premises. An employee of BC Hydro who had attended the premises prior to the search and informed the police that there was a theft of electricity being committed, knew that the bypass was not located in the premises to be searched. It is argued that the police, had they conducted a competent investigation, would or should have known that. Second, Mr. Cobb argues that there are simply no facts deposed to in the ITO from which it can be said that there was a credibly based probability that the items to be searched for would be located in the premises to be searched. Third, Mr. Cobb argues that there were a number of general shortcomings in the ITO which standing alone may not form a basis for the relief sought, but when viewed in combination with the other asserted difficulties or shortcomings are significant. The shortcomings include the use of "boilerplate" language contrary to the guidelines set out by the Supreme Court of Canada in *R. v. Araujo*, [2000] 2 S.C.R. 992, the inclusion of both narrative and second-hand information not sourced to any named individuals, and the inclusion of information that is meaningless on its face. This latter concern relates to the information concerning the forward-looking infrared readings that the police obtained.
- [5] Superimposed on the foregoing, or as Mr. Cobb put it, overarching these shortcomings, is a failure on the part of the police to take adequate notes of the steps they took during the investigation.
- [6] As to the statement that Mr. Camacho provided there is no basis to conclude that it was otherwise than freely and voluntarily given within the meaning of *R. v. Oickle*, 2000 SCC 38 and *R. v. Sinclair*, 2010 SCC 35. The challenge to its admissibility rests on the contention that the police violated Mr. Camacho's rights under section 10(a) and (b) of the Charter when he was arrested at the scene of the search and then later when he was returned to the detachment.

Factual Background

- [7] The ITO was sworn by Cst. Greenhalgh. He was told that he would be assigned that task the day before the warrant was sought. Although the investigation had been underway for months, it had been Cst. Lively's responsibility until August 13, 2009. She had prepared a draft of the ITO but left on holidays the same day that BC Hydro carried out a service check on the property. It was as a result of that service check that the police concluded they had the grounds necessary to believe that the offence of theft of electricity was occurring. As a result they needed to apply for the search warrant while the information was relatively fresh. Hence Cst. Greenhalgh was assigned the role of deponent.
- [8] The investigation into the activities at 5745 and 5743 Bryne Road began in early 2009 with an anonymous tip. The substance of that tip has been redacted from the ITO. In the ITO Cst. Greenhalgh described, and described accurately, the general configuration of the building that houses the civic addresses that the police wished to search. The building has a civic address of 5701 Bryne Road. It is a two-storey commercial building that houses perhaps 10 individual units. Each unit has a garage on the main floor with some office space, and more office space on the second floor. Each unit has both a man door and a garage bay door. These doors are on the south side of the warehouse; the units are side-by-side and generally arranged along the east-west axis of the building. Unit 5743 is beside unit 5745 and there are units to the east and to the west of both.
- [9] The ITO details the investigation that the police carried out to determine who was associated to these two units. That investigation consisted of surveillance of the premises; searches of various databases, including police records, municipal records, and motor vehicle branch records; and information supplied by BC Hydro. It revealed that the accused was the person associated with both of these units. Among other things there was a sign above one of the garage doors that reads "Camacho Custom Auto Marine". From time to time the police saw motor vehicles parked in front of the business and some of those motor vehicles, in fact most, were registered to the accused. The premises appeared to be used for automobile repair work, although inquiries with the City of Burnaby did not reveal a business license for the premises.
- [10] On June 18, 2009, a police helicopter equipped with a thermal imager directed that equipment at the roof of 5743 and 5745 Bryne Road. Two "heat anomalies" were detected.
- [11] In March 2009 Cst. Lively requested hydro consumption records for the subscriber at 5743 Bryne Road. The response she received was that Mr. Camacho was the subscriber at 5745 Bryne Road. On August 6, 2009, she made a further request for consumption information from BC Hydro relating to 5745 Bryne Road. This second request was made in an effort to determine if there had been significant changes in hydro consumption at that address. On August 11, 2009 BC Hydro responded. The August 11, 2009 report showed consumption that did not match the consumption revealed in the earlier report. This inconsistency was reported to BC Hydro's security arm by the police. On August 13, 2009, presumably as a

result of the information the police provided two days before, a security investigator for BC Hydro faxed a "Theft of Electricity - Report to Police" to the police. Cst. Greenhalgh exhibited that report to his affidavit. In it the BC Hydro's investigator explained that a service check was performed at the property on August 13th. The service check involved the BC Hydro employee measuring the amount of electricity being consumed and comparing that with the amount of electricity being recorded on the electrical meter. The report explained that initially there had been two independent meters which served 5743 and 5745 Bryne Road. At some point prior to August 2009 the Hydro customer amalgamated the services into what was, for Hydro's purposes, a single service devoted to 5745 Bryne Road. As a result there remained two meters, one for each civic address, but both were billed to a single customer. The report identified the meters by specific numbers. One meter was recording consumption of 643 W while the actual power usage was 16,447 W. The difference in these two figures represented the hydro being stolen. The second meter was displaying an "error code". The technician who examined this meter discovered jumpers which were installed in order to bypass the meter. A comparison of the hydro being consumed at the location serviced by this meter and the hydro being recorded on the meter also revealed a theft.

- [12] Based on all of this information, Cst. Greenhalgh sought and was granted a search warrant. The search warrant authorized a search of both 5743 and 5745 Bryne Road. As earlier noted it was granted to search for evidence relating to the offence of theft of electricity. On its face the warrant authorized the police to search for the following: "electrical meter bypass, electrical wiring, and electrical panels, keys, documentation to support occupancy and/or control of the business premises".
- [13] The police executed the search warrant on August 14, 2009. They entered the premises through the man door attached to 5743 Bryne Road. On the main floor they found an office, a large shop area and the bathroom. Upstairs they found a self-contained one-bedroom apartment. From the lower level of 5743 access to 5745 was discovered through an entrance located behind a piece of plywood. Access to the upstairs level of 5745 was via a ladder hidden behind another piece of plywood inside 5743. In 5745 Bryne Road the police found three separate rooms housing growing marijuana. In one room there were 443 plants; in another room there were 462 plants. In the third room they found two mother plants and some clones. In addition they found high-powered lights, shrouds, timers, ballasts, carbon filtered fans, and other equipment typically associated with the commercial production of marijuana.

Analysis

- [14] I will deal first with Mr. Cobb's "overarching" submission about the significance of the sparse notes taken by the police, particularly those taken at the outset of the search. He likened this to a failure of disclosure and relied on *R. v. Truong*, (29 October 2010), New Westminster No. X073015 (B.C.S.C.).

- [15] The first two police officers to arrive at the Bryne Road address were Cst. Chum and Sgt. Rintoul.
- [16] Cst. Chum testified that as he and Sgt. Rintoul were conducting surveillance of the Bryne Road address from across the street, they were advised over the police radio that the search warrant had been granted. Shortly after they saw a man, who they had earlier observed working on a car in front of the open bay door of 5743 Bryne Road, come out of the garage, close the bay door, and get into the vehicle he had been working on. When he started to back up, Sgt. Rintoul drove across the street and pulled in behind him. Cst. Chum approached the driver, later identified as Mr. Camacho, and told him to stop the car and get out. Mr. Camacho complied and Cst. Chum told him he was under investigation. Cst. Chum testified that based on his observations that afternoon, he believed that Mr. Camacho was in control of the business. He did not advise Mr. Camacho of his rights under s. 10(b) of the Charter because Cst. Greenhalgh had just arrived with the search warrant and that was to be Cst. Greenhalgh's task. Cst. Chum did, however, ask Mr. Camacho for identification, which Mr. Camacho provided. He also asked him if he had keys to the building. He said they were going to search the premises and if they had keys to access the building it would avoid the possibility of damage to any of the property that might otherwise occur when gaining access. Mr. Camacho advised that he had keys and that they were in the ignition of the car he had just gotten out of. According to Cst. Chum Mr. Camacho got into the car, retrieved the keys, and gave them to the officer. Cst. Chum then used the keys to open the door to 5743 Bryne Road. That was the end of Cst. Chum's dealings with Mr. Camacho.
- [17] Sgt. Rintoul was the senior officer on scene during the search. He had taken up a position across the street at 4:30 that afternoon. Shortly after he arrived he was joined by Cst. Chum. Just before 5:10 p.m. he said they received a radio broadcast that the search warrant had been granted. At 5:20 p.m. he saw Mr. Camacho close the hood of the vehicle he had been working on, go into the garage and then re-emerge closing and locking the door behind him. He testified that he had reasonable grounds to suspect that Mr. Camacho was involved in the theft of hydro because he appeared to have control of the premises. He pulled in behind Mr. Camacho's vehicle to prevent him from leaving. This was at about 5:23 p.m. Sgt. Rintoul testified that as he approached Mr. Camacho, Mr. Camacho asked "What's going on?", in response to which Sgt. Rintoul identified himself as a police officer and told Mr. Camacho that he was being detained for investigation. He said that he asked Mr. Camacho for identification. In the meantime Mr. Camacho said "It's in the car". He testified that Cst. Chum then retrieved Mr. Camacho's wallet from the car and gave it to Sgt. Rintoul. Mr. Camacho identified himself verbally saying "My name is Richard Patrick Camacho, can I have a cigarette?" Earlier that day, the police had agreed on the tasks that each of them would be responsible for during the execution of the warrant. Cst. Greenhalgh was to deal with people found at the premises. As Sgt. Rintoul was asking for Mr. Camacho's identification, Cst. Greenhalgh was approaching and Sgt. Rintoul gave him Mr. Camacho's wallet. He said that Cst. Greenhalgh and Mr. Camacho then walked to the front of the trailer that was parked nearby. From that point on, Sgt. Rintoul could not hear what was transpiring

between Cst. Greenhalgh and Mr. Camacho. He did, however, note that Cst. Greenhalgh produced a copy of the search warrant and gave it to Mr. Camacho. That happened at 5:29 p.m. Not long after this Cst. Greenhalgh and other officers, including Cst. Chum, went into the premises. Sgt. Rintoul testified that they came out about five to seven minutes later, and Cst. Greenhalgh advised him that there was a "grow op" inside. Cst. Greenhalgh then approached Mr. Camacho and Sgt. Rintoul assumed he was arresting him.

- [18] Sgt. Rintoul searched Mr. Camacho's vehicle at 5:50 p.m. He said he did that "incidental to arrest". In the car he found a nylon bag with identification of Mr. Camacho's in it, a set of keys in the ignition, and insurance and registration documents. The keys that he found in the ignition did not look like the keys that Cst. Chum said he had obtained and used to gain access to the Bryne Road address.
- [19] Sgt. Rintoul confirmed that a laptop computer and a desktop computer were both seized from 5743 Bryne Road. They were seized because he suspected they may contain evidence relevant to the offence. He concluded, based on the size of the grow operation, that it was a commercial enterprise. In his opinion people involved in the commercial production of marijuana keep records, sometimes in electronic form. It was on that basis that he felt justified in seizing the two computers. He acknowledged, however, that he did not search the computers nor did he instruct anyone else to do so. There is no evidence that anyone examined either of the computers. As of the date of trial, some 14 months after the search, the computers had not been returned to Mr. Camacho.
- [20] According to Sgt. Rintoul, Cst. Chum, when first dealing with Mr. Camacho, reached into the car and retrieved a black wallet which he then handed to Sgt. Rintoul.
- [21] Mr. Cobb points to the inconsistencies in the evidence of Cst. Chum who said that he retrieved the keys to the building from the ignition of Mr. Camacho's car, and Sgt. Rintoul who said that Cst. Chum retrieved Mr. Camacho's wallet from his car and that Sgt. Rintoul retrieved Mr. Camacho's car keys from the ignition. Mr. Cobb argues that because the officers made very brief notes of this aspect of the investigation the court is left in a position similar to that in *Truong*.
- [22] In *Truong* the Crown sought to introduce the results of a warrantless search of the house. The Crown argued that the accused had consented to the search. The issue turned on whether that had been proven. Stewart J. concluded, in fact the Crown conceded, that consent had not been proven. One of the reasons for reaching that conclusion was that the police had not made any significant notes of what had passed between them and the occupants of the house, neither of whom spoke much if any English, when they purportedly gave their consent. In that regard Stewart J. noted that "where the onus is on the Crown, the Crown must establish in evidence what occurred in sufficient detail that the judge can pass separate judgment on the import of what, in this case, passed between the accused and his wife and the police " (at paragraph 5). Stewart J. elaborated on this later in his reasons. He said that:

It is reasonable for the courts to expect any officer in the position of the police in this case - after the discovering of the marijuana grow operation and arresting of the accused - to act on the assumption that someday in the future a court may very well have to pass separate judgment on the effect of what was said and done and gesticulated that night. I emphasize that that is not a counsel of perfection. It is, in my opinion, entirely reasonable.

[23] The circumstances in the matter at hand are quite different from those in the *Truong*. First, the Crown does not have the onus of proving who or in what circumstances Mr. Camacho's keys or wallet were produced. That is not to suggest that there is no obligation on the police to take proper notes. The notes they take, however, will necessarily be tailored to the importance of the event. In *Truong* the Crown bore the onus of establishing consent. That was the central issue and it was known to be the central issue at the moment the consent was solicited by the police. None of that is true in relation to the production of the wallet or the keys by Mr. Camacho. Moreover, the police did testify in some detail as to what happened. The fact that their recollections are inconsistent may be the product of sketchy notes or it may be that the officers simply now recall the matter differently. To the extent that affects the analysis, it will no doubt do so in a manner contrary to the position the Crown is advancing. I am not persuaded that the notes that any of the police officers made in connection with this aspect of the matter are a basis, either in and of themselves or in a supporting role, to ground any relief.

[24] The two principal arguments that Mr. Cobb advances relate to the location of the offence and whether there was evidence before the issuing justice of the peace to support the conclusion that various things that might be evidence of a crime would be found in the location the police sought to search.

[25] As earlier noted, the electrical meters for both 5743 and 5745 Bryne Road were some 120 yards away from the premises. The BC Hydro technician who performed the service check on the property the day before did that service check in the room that housed the meters. In his report he did not disclose that the room was separate from the premises in question. To the contrary, the report contains the following: "a service check was performed at the property located at 5745 Bryne Road, in Burnaby B.C.". Later in the report the investigator wrote "The reason there are two services at this business premise, is that some time, the BC Hydro customer amalgamated 5743 Bryne Road and 5745 Bryne Road into one address, that being 5745 Bryne Road, Burnaby BC."

[26] A fair reading of that material would lead any reasonable person to conclude that the bypass that the service technician located was located in 5745 Bryne Road. Further, I think that as a matter of common sense, it would be reasonable to infer that the hydro meters for the premises were either in or attached to the premises. All of the police officers who were asked about the matter testified that they thought the bypass was actually in the premises that they were going to search. It was not until the BC Hydro technician arrived while the search was underway that they realized the meters were located elsewhere.

- [27] Finally, Mr. Cobb points to two documents that were attached to the BC Hydro report from which he argues the police should have been alive to the possibility that the meters were not in the premises. The documents are both headed "Data Environment". There is one document for 5745 Bryne Road and another for 5743 Bryne Road. The documents are internal BC Hydro reports, or more accurately photocopies of a computer screen that displayed the reports. They contain a number of lines of data, none of which are intelligible to anyone not schooled in the meaning of the reports. They also contain the meter numbers for each address. Those meter numbers are referenced in the body of the report. The line that Mr. Cobb points to reads "Device Location [serial number] O/S North". The suggestion is that this line is an indication that the meters in question were outside ["o/s"] and to the north of the property in question. That may be so, but it does not follow that in the face of the language of the report itself a reasonable person would draw that inference.
- [28] Mr. Feeney, the technician who conducted the service check, said that there was no signage on the door of the electrical room in which he found the meters. He said the hydro lines to the building were underground and there was no signage to show where the lines entered the building.
- [29] Finally, I accept that which was pointed out by Moldaver J. (as he then was) in *R. v. Adair*, [1994] O.J. 3265 at paragraphs 17 to 19, that the police have an obligation to carry out reasonably thorough investigations. They cannot, for example, purport to rely on seemingly legitimate information if the circumstances reasonably call for further investigation. In *Adair* these comments were made in relation to an informant that the police put forward as reliable. The court concluded that even a cursory investigation of the informant would have disclosed how utterly unreliable he was. Mr. Cobb likens the police investigation into the location of the bypasses in this case to that situation. I am unable to draw that parallel. For the reasons already given, in my view there was nothing to alert the police to the fact that the bypasses were elsewhere than in the premises to which the hydro was being supplied.
- [30] I am satisfied that there was a credibly based probability, based on the information set out in the ITO, that a search of 5743 and 5745 Bryne Road would yield the recovery of electrical meter bypass equipment and associated wiring.
- [31] In addition to electrical equipment, the warrant authorized the police to search for "documentation to support occupancy and or control of the business premises". There is nothing in the ITO which specifically and directly supports the conclusion that there may be documentation in the premises which would provide evidence of ownership or occupation. Mr. Cobb argues that in this respect this case is similar to *R. v. Vu*, 2010 BCSC 1260. In that case, as here, the police obtained a warrant to search for evidence to support an investigation into the offence of theft of electricity. There, as here, the warrant authorized a search for electrical equipment and "documentation identifying ownership and/or occupancy of the property". There, as here, the ITO was silent on why the affiant believed that documents evidencing ownership or occupation would be found in the premises. While recognizing the need to apply common sense when reviewing an ITO, Bruce J. noted that

common sense is not a basis on which to draw inferences when there is no evidence at all to support the inference. As she put it at paragraph 57 "the justice cannot simply fill in the gaps left in the ITO by assuming the existence of certain state of affairs". She then noted that the only evidence in the ITO that might support that inference was that hydro being consumed at the residence. It was not even apparent that the residence was occupied. Even if that could be inferred, Bruce J. was not prepared to infer from the mere fact of occupation that documents evidencing the identity of the owner or the occupant would be found in the premises. To the contrary, she thought it was at least as probable that if someone were involved in the theft of electricity that the person would not leave evidence of their identity at the location of the theft (see paragraph 58). I pause here to note that Mr. Cobb helpfully provided the ITO that was an issue in Vu.

- [32] The circumstances deposed to by the affiant in this case are markedly different than those under consideration in Vu. The police conducted surveillance of the Bryne Road property on at least 17 different days between May 21, 2009 and August 12, 2009. On some of those days the police surveilled the premises several different times. On May 21, 2009 shortly after 6 p.m. Cst. Lively noted a number of vehicles and trailers parked in front of the two addresses. Both premises appeared to be closed. She checked the registration particulars of the vehicles and learned that most were owned by Mr. Camacho. On May 29, 2009 Cst. Lively observed that the windows in the upper storey of both 5743 and 5745 were open. Just after noon that day she saw that the garage bay door at 5743 was open. In fact, she saw a man opening the door. Inside the garage bay she could see a vehicle on the lift. She also saw a man backing a vehicle out of the garage. In a 45-minute period, she saw a man come out of then re-enter the garage six times. On June 11 early in the morning Cst. Lively saw a different vehicle parked in front of the premises. On June 16 at about 10 a.m. she drove by and saw that the light was on in the upper office at 5745. She noted that the light was on in the entrance way to 5743. She returned just after midnight on June 17, 2009 and observed that a truck she had seen earlier that day was still parked in front of the garage. On June 23 she noted that some vehicles that she had earlier seen at the premises had been moved. The vehicle that she had earlier seen inside the garage was, on June 23, parked in front of the garage. On June 24 early in the morning Cst. Lively drove past the premises and saw that the front door was propped open and that there was a running fan in the doorway. She returned just before 11 p.m. and noted that several of the vehicles she had earlier seen had been moved. She saw that the main door to the premise was still open and that there was a light on. On July 29 at about 9:30 p.m. she again noted that lights were on in the upstairs office of 5745 and that a light was on in the hallway of 5743. A vehicle she had earlier seen parked in front of the units was gone. She saw that a small dog, a miniature Doberman pincher, was sitting in front of the premises. She saw the same, or at least a similar, dog at the premises on August 12, 2009. Based on these attendances and the other days on which Cst. Lively had the premises under surveillance, it is reasonable to infer that the premises were being used to do automotive repairs and that at least one person was frequently in attendance there.

- [33] Thus, there are two significant factual distinctions between the circumstances in this case and those before Bruce J. First, the circumstances in this case support the inference that the premises in question were occupied; in fact there is direct evidence they were occupied on quite a number of days. Second, the circumstances support the inference that there was legitimate activity taking place at the premises, specifically, automotive repair. Notwithstanding that there is no specific mention in the ITO of the basis upon which the deponent rested his conclusion that documentation which might prove possession or ownership might be found in the premises, I am satisfied that the justice of the peace could reasonably have inferred the basis for the asserted belief.
- [34] Next, Mr. Cobb argues that the aspects of the ITO which relate to the thermal imaging carried out by the police on June 18, 2009 are meaningless. That is so, it is said, because the ITO does not explain what the technology involves and there is no evidence to connect to the observations made with the civic addresses in question.
- [35] The ITO discloses that at 1:33 a.m. on June 18, 2009 a police officer in a helicopter made observations "of 5743 and 5745 Bryne Road". Using a thermal imager, the officer noted two heat "heat anomalies". The first was at a chimney-style vent on the roof. The heat emanating from the vent was considerably higher than that emanating from any other vent either elsewhere on the same roof or on the roofs of surrounding buildings of similar construction. The second anomaly related to an air-conditioning style vent near the chimney. Heat emanating from that vent was "considerably higher" than heat emanating from any other vent of similar construction either elsewhere on the roof of that complex or on similar roofs; in fact the air emanating from this duct was such that it was heating the surface of the roof itself. The material discloses that these readings were taken at night in order to neutralize the effects of heating caused by the sun. Finally the ITO reveals that the police officer who conducted these tests also visually examined the surface of the roofs and noted there were no light sources which might otherwise account for the anomalies.
- [36] It is not necessary, in my view, for an ITO to provide a detailed technical explanation of how "thermal imaging" works. It is apparent from the ITO that the technology detects the presence of heat on surfaces or articles at which it is directed. Absent some evidence from which it could be concluded that the affiant knew or ought to have known that the thermal imaging as described in the report was unreliable or misleading, the description of the investigative technique and its results as set out in the ITO is sufficient. This observation also applies to the submission that the ITO is lacking because it does not explain how the observations made by the thermal imaging operator were related to the premises in question. The officer who made the observations said that they related to 5743 and 5745 Bryne Road. There is nothing in the material which would cause a reasonable person to doubt that assertion.

[37] Before turning to the broad issue, I note that paragraph 35 of the ITO is "boilerplate" and irrelevant. It is really nothing more than promotional material associated with the helicopters the RCMP use. It is not misleading, but it is irrelevant and has no place in an ITO.

[38] In reviewing the sufficiency of the ITO, the test to be applied was described by Fish J. in *R. v. Morelli*, 2010 SCC 8 at paragraphs 40 and 41. There he wrote:

..."the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.

The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58). Furthermore, the reviewing court may have reference to "amplification" evidence - that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO.

[39] Applying this test, I am satisfied that there was sufficient credible and reliable evidence to permit the justice of the peace to issue a warrant to search the premises for the items listed in the warrant.

[40] The next issue relates to Mr. Camacho's detention and his later arrest and whether the police complied with the obligations imposed by s. 10 of the Charter. Section 10(a) provides that everyone "has the right on arrest or detention to be informed promptly of the reasons therefor". Section 10(b) provides that everyone has the right on arrest or detention "to retain and instruct counsel without delay and to be informed of that right." In this case Mr. Cobb argues that Mr. Camacho was not "informed promptly" of the reasons for his detention nor was he informed promptly of his right to retain and instruct counsel. Further, he argues that Mr. Camacho was asked to produce evidence against himself, namely the keys and his identification, before he was given his rights and before he had an opportunity to exercise them. Finally, he argues that when he was eventually informed of his right to counsel he attempted to exercise it but was told that he had to wait until he was at the detachment if he wanted privacy when he spoke to a lawyer. No issue is taken with the content, or the informational aspect, of the s. 10(b) rights as explained by the police to Mr. Camacho.

[41] There was a delay between Mr. Camacho's detention and when he was advised of the reason for his detention. There was a longer delay between his detention and when he was informed of his right to retain and instruct counsel. Cst. Chum detained Mr. Camacho just after 5:23 p.m. At 5:29 p.m. when Cst. Greenhalgh arrived with the search warrant, he approached Mr. Camacho and gave him a copy of the search warrant which he then read to him. He asked Mr. Camacho if he understood, and Mr. Camacho said that he did. He then

explained to Mr. Camacho that he was detained for purposes of "the execution of the warrant". Thus, there was a delay of some five or six minutes between Mr. Camacho's detention and when he was told of the reason for his detention. This amounts to a breach of s. 10(a) in the sense that the reason for Mr. Camacho's detention was not explained to him "promptly". There was no reason not to tell him why he was detained as soon as he was detained, except that the police had agreed amongst themselves that Cst. Greenhalgh would deal with that and he had not yet arrived.

- [42] After Cst. Greenhalgh explained the initial reason for Mr. Camacho's detention, he instructed to him to remain with Sgt. Rintoul while Cst. Greenhalgh went into the premises. He came out some five to seven minutes later. He approached Mr. Camacho and told him that he was under arrest for production of marijuana and possession of marijuana for the purpose of trafficking as a result of the grow operation that Cst. Greenhalgh had found inside the premises. He then explained to Mr. Camacho his rights under s. 10(b). Thus, in total, about 11 to 14 minutes passed between the time of Mr. Camacho's detention and when he was told of his right to retain and instruct counsel. What amounts to "without delay" within the meaning of s. 10(b) will vary depending on the circumstances of the case. Here there is no reason why the police could not have explained Mr. Camacho's right to counsel to him as soon as he was detained.
- [43] The next issue relates to the manner in which the police told Mr. Camacho he could exercise his right to counsel. Cst. Greenhalgh told Mr. Camacho that once the "active search" was finished Mr. Camacho would be allowed to speak to a lawyer using a cell phone, but that if he chose to exercise that option he would not necessarily have privacy. Mr. Camacho said that he would not call under those circumstances. Cst. Greenhalgh testified, and I accept, that he would have given Mr. Camacho his cell phone to use had he wished to call a lawyer from the scene. Further, I accept that he would have allowed Mr. Camacho to make the call from the backseat of a police car. He did not tell Mr. Camacho that however. All Mr. Camacho knew was that he could make a call but it might not be private.
- [44] In *R v. Manninen*, [1987] 1 S.C.R. 1233 Lamer J. (as he then was) held that s. 10(b) requires that the police, where there is a telephone available, allow a suspect to make use of it. As a general proposition, there is no justification for refusing access to counsel until the suspect is returned to the police station. Exigent circumstances may make that reasonable in a particular case but there were no such circumstances here. Further, there is no reason why Mr. Camacho could not have had the privacy that the backseat of a police car affords. As noted, while I accept that Cst. Greenhalgh would have allowed that, Mr. Camacho was not told as much. His right to counsel was, in the circumstances, violated.
- [45] To complete the narrative, Mr. Camacho was searched at the scene, placed in a police car and returned to the police detachment. Cst. Greenhalgh travelled in a separate vehicle, but on arrival at the detachment he went directly to the booking in area and met with Mr. Camacho. He offered Mr. Camacho an opportunity to speak with a lawyer in private, but Mr. Camacho declined. At 6:15 p.m. Cst. Greenhalgh read to Mr. Camacho a supplementary

warning. He told him he had the right to have a reasonable opportunity to contact counsel and that the police were obliged to not to take a statement or seek to have him provide evidence until he was certain about whether he wanted to exercise this right. Mr. Camacho said he understood, and did not wish to speak to a lawyer. He then provided a tape recorded statement.

- [46] As to the interaction at the scene between Cst. Chum and Mr. Camacho during which the officer asked Mr. Camacho if he had keys to the premises which Mr. Camacho produced, this took place after Mr. Camacho was detained and before he was advised of the reason for his detention or of his right to counsel. I accept that the police asked for the keys to avoid damaging the building when they entered it but the fact remains that they were obliged to comply with the obligations explained in *R. v. Manninen* at paragraphs 21 to 24. In particular they were obliged not to question or seek evidence from Mr. Camacho until he had had a reasonable opportunity to retain and instruct counsel. Mr. Camacho had not been given that opportunity when he was asked to produce keys to the premises.
- [47] To summarize, I am satisfied that there were a number of breaches of Mr. Camacho's Charter rights. Chronologically they are as follows: he was not advised promptly of the reasons for his initial detention; he was not advised "without delay" of his right to retain and instruct counsel; he was not afforded an opportunity to contact counsel using a phone available at the scene with as much privacy as could be afforded to a co-operative accused in the backseat of a police car; and finally, he was asked questions about his identity and for keys to the premises which the police wished to search before he had an opportunity to exercise his asserted desire to speak to a lawyer. I am not satisfied that Mr. Camacho's right to be secure against unreasonable search as it relates to the execution of the search warrant or the search of his car was violated. The latter was justified on the basis that it was incidental to his arrest.
- [48] The next issue is the question of remedy. In *R. v. Grant*, 2009 SCC 32 at paragraphs 67 to 70, McLachlin C.J. and Charon J. wrote this about the purpose of s. 24(2):
- [67] The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term "administration of justice" is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole.
- [68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would

conclude that the admission of the evidence would bring the administration of justice into disrepute.

[69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

[70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

[49] At paragraph 71 they summarized the court's task when faced with an application to exclude evidence under s. 24(2):

When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

[50] It is useful to first consider the violations individually before considering them globally. The delay in advising Mr. Camacho of the reasons for his detention was about six minutes; the delay in advising of his right to counsel was a further six or seven minutes. While these are breaches and should not have occurred, they are not particularly serious. The delay in giving Mr. Camacho access to counsel was longer and thus more serious. Even when considered collectively, I am not persuaded that these breaches reveal a cavalier or negligent disregard for the Charter-protected interests of the accused. They were relatively minor errors in a situation that unfolded otherwise than the police had planned for.

[51] In terms of the evidence sought to be excluded, it falls into two categories - that relating to the keys, his identification, and the statement he later provided, and that discovered on the search of the premises.

[52] I am not satisfied that the evidence obtained from the search of the premises should be excluded. It was not causally related to the breaches (although that is not a prerequisite to exclusion). It is evidence central to the Crown's case and reliable. The charges are serious and the breaches are relatively minor. Balancing the factors identified in *Grant*, I decline to exclude the evidence.

- [53] I am, however, satisfied that the evidence of Mr. Camacho's possession of the keys to the premises and his production of them to the police as well as the other evidence he provided at the scene and at the detachment should be excluded. First it was more directly related to the breaches, and thus the impact on his Charter- protected interests was greater. Further I am not satisfied that he would have provided the keys or given a statement if he had been afforded an opportunity to consult with counsel at the scene and before he volunteered the keys.
- [54] I have not overlooked the fact that the police seized Mr. Camacho's two computers and then kept them without searching them. That is conduct which is troubling and should be denounced. It does not, in my view, and in light of all the circumstances, rise to the level in which, along with the other breaches, supports the exclusion of the evidence realized on the search.
- [55] In conclusion, the application to exclude the results of the search at the Bryne Road addresses is excluded. The application to exclude the keys and Mr. Camacho's statements both at the scene and later at the detachment is granted.

"G.M. Barrow J."

The Honourable Mr. Justice Barrow

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