

CANADA / JUDGMENT

R. v. Fan

2013 BCSC 1406

COURT

Supreme Court of British Columbia

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2013 BCSC 1406 R. v. Fan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Fan,

2013 BCSC 1406

Date: 20130802

Docket: 30489

Registry: Williams Lake

Regina

v.

Wei Xin Fan, Yue Rong Guan and Can Jian Li

Before: The Honourable Madam Justice B.J. Brown

Voir Dire Ruling re: Execution of Warrant and

ss. 8, 9, 10(a) and (b) of the Charter

Agent for the Public Prosecution Service of Canada:

S. Nixon

Counsel for Mr. Fan:

J.P.R. Desbarats

Counsel for Mr. Guan:

P.M. Ferguson

Counsel for Mr. Li:

G.J. Wool

Place and Date of Hearing:

Williams Lake, B.C.

December 3-7, 2012

March 26, 2013

Place and Date of Judgment:

Williams Lake, B.C.

August 2, 2013

I. INTRODUCTION

- [1] The accused, Wei Xin Fan, Can Jian Li and Yue Rong Guan, are charged with possession of marijuana for the purpose of trafficking and unlawfully producing that substance.
- [2] On March 3, 2010, the police executed a search warrant at the premises located at 1651 Walters Lake Road near Horsefly, British Columbia ("property").
- [3] On this voir dire, the second in these proceedings, Mr. Fan and Mr. Guan argue that their Charter rights were breached as follows:
- (a) The police violated s. 9 of the Charter by arbitrarily arresting Mr. Guan;
 - (b) The manner of search was unreasonable and in violation of s. 8 of the Charter because the police:
 - i. entered the residence without providing adequate notice (Mr. Fan only);
 - ii. failed to comply with s. 487.1(7) of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code], which requires the police, before entering the place or premises to be searched or as soon as practicable thereafter, give a copy of the warrant to any person present and ostensibly in control of the place or premises;
 - iii. failed to file a report in Form 5.2 within the time mandated in s. 487.1(9) of the Criminal Code;
 - iv. invited an unauthorized civilian onto the property for an unauthorized purpose and showed photographs taken of the property during the search to the public;
 - v. conducted a warrantless search of all outbuildings on the property;
 - vi. searched the Plymouth Voyager, which was off the property; and
 - vii. seized Mr. Fan's vehicle without a warrant and searched Mr. Fan's vehicle outside of the time permitted in the warrant.

- (c) The police failed to advise the accused of the reason for the arrest, contrary to s. 10(a) of the Charter;
- (d) The police breached their various duties under s. 10(b), including their duty:
 - i. to advise the accused of the right to counsel without delay;
 - ii. to take adequate steps to ensure that the accused understood their right to counsel;
 - iii. to provide the accused with a reasonable opportunity to exercise the right to counsel and to refrain from eliciting incriminating evidence from the accused in the interim; and
 - iv. to facilitate the right to counsel without delay.
- [4] Mr. Li argues that he was arbitrarily detained, in breach of s. 9 of the Charter; that he was not informed promptly of the reasons for his arrest, contrary to s. 10(a) of the Charter; and that he did not receive access to counsel without delay, contrary to s. 10(b) of the Charter. Lastly, he says that the manner and conduct of the police search was unlawful and unreasonable, in breach of s. 8 of the Charter.

II. Discussion

A. Section 9: Arbitrary Arrest

- [5] With respect to arbitrary arrest, Mr. Guan concedes that the evidence falls short of establishing on a balance of probabilities a breach of s. 9 of the Charter. Mr. Li maintains that he was arbitrarily arrested.
- [6] Mr. Li gave evidence on the voir dire. He testified that on March 3, 2010, he was approximately ten meters away from the outbuilding where the marijuana operation was discovered ("Outbuilding") when he saw a person in front of him holding a long-barrelled gun.
- [7] He said that he did not at that time hear the sound of vehicles approaching over the two generators outside of the Outbuilding. Rather, he testified that he was afraid that the man might shoot him, so he tried to escape. He ran toward the Outbuilding, took a left, and ran along the Outbuilding and around towards the back. At that point, however, he saw Mr. Guan with a gun being pointed at him. Realizing that he could not get away, Mr. Li surrendered himself.
- [8] Constable Turko also gave evidence on this voir dire. He said that he and Constable Smith approached the property from the backside of the Outbuilding (that is, the opposite side to that where Mr. Li says he was standing).

- [9] Upon reaching the Outbuilding, Constable Turko stood towards one corner of the back wall and Constable Smith stood toward the other. Constable Turko had his pistol and Constable Smith was carrying a shotgun. Constable Turko was to let the other officers know when he and Constable Smith were in position, so that they would be at the rear of the Outbuilding to stop anyone who tried to flee.
- [10] Once they were in position, Constable Turko leaned up against the Outbuilding so that he could hear if anyone was inside. He was able to hear at least two individuals, who he believed were male, talking to one another. He gestured to Constable Smith that there were two people inside the Outbuilding.
- [11] Constable Turko returned to the corner of the Outbuilding, at which time he started to hear police vehicles coming. He said that the road approaching the Outbuilding was rough, so he could hear the clanging of the pickup boxes along with the noise of the engines.
- [12] An Asian male wearing a white t-shirt, later identified as Mr. Guan, then came running around the corner towards him. He put his pistol into the low ready position with the barrel pointing down and yelled, "Police! Get down to the ground!" Mr. Guan slowed to a stop and went to his knees. As Mr. Guan was doing this, a taller male wearing a red sleeveless shirt, later identified as Mr. Li, came sprinting around the same side of the Outbuilding towards him. Constable Turko repeated the same direction to get down. Mr. Li too complied, dropping to a kneeling position.
- [13] Constable Turko arrested the two males, as he thought he had reasonable and probable grounds to believe that they were committing the offence of production of marijuana and possession for the purpose of trafficking. He said that he formed those grounds based on numerous factors: during his previous surveillance, he noted the smell of marijuana coming from the Outbuilding; he heard a conversation between at least two males coming from inside the Outbuilding; the two males were wearing short-sleeved shirts in cool weather (4 degrees Celsius), which was consistent with Constable Turko's experience that grow operations project a lot of heat; the individuals had come running from the Outbuilding; and the property was in a very rural location with nothing else there except the Outbuilding. Given that there was no indication of any legitimate activity on the property, Constable Turko believed that the sole purpose was to grow marijuana. He told the two individuals that they were under arrest.
- [14] Constable Smith also testified. He said that he entered the property with Constable Turko.
- [15] He confirmed that the two officers approached towards the centre of the Outbuilding and then fanned out toward each corner, where they checked to see if there was any means of egress on the ends of the Outbuilding. He stationed himself close to the Outbuilding at the left corner. He was holding his shotgun with the barrel up in the air. He heard nothing except the faint hum of electrical equipment.

- [16] Constable Turko then indicated that he could hear two individuals. At that time, Constable Turko radioed to the rest of the search team that they were in place. About six minutes later, Constable Smith heard the vehicles of the search team coming through the property. The first vehicle that he saw was the heavy duty van driven by Corporal Evans. As the van approached, he heard Constable Turko from the other end of the barn yelling, "Get down! Get down!", or words to that effect. Apart from police officers, he did not see anyone else on the property.
- [17] I accept the evidence of Constables Turko and Smith on these points. Their evidence is consistent with what one would expect. Each of the officers described hearing the vehicles approach. Constable Turko said that as he heard this noise, the two individuals came around the side of the Outbuilding and were stopped by him. Again, this is what one would expect in the circumstances.
- [18] By contrast, Mr. Li's evidence is inconsistent with the officers' evidence. Importantly, it is inconsistent with common sense.
- [19] First, Mr. Li described himself as standing in the area in front of the silver pickup truck. From that position, however, Mr. Li would not have been able to see Constable Smith, who was around the Outbuilding toward the back corner.
- [20] Next, Mr. Li's evidence does not coincide with the timing of events. He said that he did not see Mr. Guan leave the Outbuilding. Yet Constable Turko describes Mr. Li coming around the corner of the Outbuilding just as Mr. Guan was getting to his knees. There would have been, at most, seconds between Mr. Guan and Mr. Li coming around the Outbuilding.
- [21] Third, Mr. Li says that he did not hear any police vehicles arriving. This contradicts the evidence of Constables Turko and Smith, who say they heard the police vehicles, even though they were positioned a further distance from the noise than was Mr. Li.
- [22] Finally, if Mr. Li intended to run from the individual that he saw in the bush carrying a long-barrelled gun, the direction that he ran was actually toward that person, not away.
- [23] I do not accept any of Mr. Li's evidence on this point.
- [24] As with all Charter breaches, an accused has the burden of proving, on a balance of probabilities, that his or her arrest was a violation of s. 9 of the Charter: *R. v. Lee*, 2012 BCSC 1548 at para. 34.
- [25] The power of the police to arrest a person without a warrant is set out at s. 495(1) of the Criminal Code. The relevant subsection is s. 495(1)(a):
- 495(1) A peace officer may arrest without warrant
- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence

- [26] In *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-251, the Supreme Court clarified this provision, stating that an arresting officer must "subjectively have reasonable and probable grounds on which to base the arrest". Further, those grounds must be justifiable from an objective point of view, such that a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest.
- [27] As stated in *R. v. Grunwald*, [1991] B.C.J. No. 235 (C.A.), the following language in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 167, is an appropriate description of the "reasonable and probable grounds" standard for arrest:

The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion.

- [28] Where police are executing a search warrant, the fact that a person is "at, or inside, a place believed to contain drugs, and in respect of which a search warrant has been issued, does not, without more, provide objective grounds for his or her arrest": *R. v. Whitaker*, 2008 BCCA 174 at para. 60, leave to appeal dismissed [2008] S.C.C.A. No. 296. Mere suspicion does not authorize an arrest. The police cannot simply arrest first and later determine whether that person is connected to the offence(s) under investigation: *Whitaker* at para. 60.
- [29] Although Constable Turko believed, as a result of his observations made during surveillance, that the Outbuilding housed a grow operation, the police had not linked Mr. Li to the property prior to arrest. They had not previously observed or identified Mr. Li on the property during their surveillance, and there was no other evidence that otherwise tied him to the property. Accordingly, the issue is whether it was reasonable in all the circumstances for the police to conclude that there was a reasonable probability that Mr. Li was participating in the illegal operation.
- [30] The Court of Appeal provided a helpful discussion on this issue in *R. v. Chaif-Gust*, 2011 BCCA 528. In that case, the police executed a search warrant at a residence where they suspected that a grow operation was taking place. The police believed no one was living there. The house appeared to be uninhabited and in a rundown condition, the windows were covered, nothing was in the yard, and surveillance revealed no activity in or around the residence. When the police executed the warrant, they instructed the occupants to come to the front door. Shortly thereafter, two individuals were arrested after they went out the back door. The accused argued that the police had no reasonable and probable grounds to believe that he was associated with the grow operation.
- [31] The court reviewed several cases, including *R. v. Le*, 2001 BCCA 658; *Whitaker*; and *R. v. Shokar*, 2006 BCSC 770.
- [32] Having canvassed these cases, the court in *Chaif-Gust* upheld the trial judge's ruling that the arrest was lawful. Given that the only apparent purpose of the house was as a site for a grow operation, it was reasonable for the police to infer that anyone present was there for the purpose of tending the operation: para. 62.

- [33] Based on all the circumstances, I agree with the Crown that this case is more akin to the situations in *Le*, *Shokar*, and *Chaif-Gust* than those in *Whitaker*. There were reasonable grounds to conclude that there was a reasonable probability that anyone in the Outbuilding not only had knowledge of what was going on, but was there to assist in the illegal operation and was therefore guilty of an indictable offence.
- [34] Like *Shokar*, the property was in an extremely remote location. As the Crown submits, unlike *Whitaker*, the property was entirely unlike an urban or suburban property where people might be present for all kinds of reasons unconnected to criminal activity.
- [35] Further, on the property sat the Outbuilding, which was described as a "barn" by the informant: *R. v. Fan*, 2013 BCSC 445 at para. 7. It was not a residential building that might house residents. And it did not appear to house more than one business or industry where there might be a number of persons unconnected with the suspected grow operation. The only apparent purpose of the Outbuilding was as a site to house a grow operation.
- [36] In addition, before the search team arrived, at least two male voices were heard coming from inside the Outbuilding. Upon the team's arrival, the two accused came running around the corner of the Outbuilding, both wearing attire better suited for warmer temperatures and inappropriate for the cooler weather. This suggests that the two male voices were those of Mr. Guan and Mr. Li as they worked inside in the Outbuilding.
- [37] Lastly, I agree with the Crown's submission that the two accused's apparent flight from the Outbuilding upon the police's arrival is consistent with conduct of individuals attempting to flee the property as the police arrived. The two accused were running into the wilderness.
- [38] Given all the circumstances, it was reasonable for Constable Turko to conclude that there was a reasonable probability that Mr. Li was participating in the illegal operation. Constable Turko thus had reasonable and probable grounds to arrest Mr. Li. Accordingly, in my view, the arrest of Mr. Li was not arbitrary.

B. Section 8: Unreasonable Search and Seizure

1. Unreasonable manner of entry into the residence

- [39] This alleged breach applies only to Mr. Fan.
- [40] Constable Shearer was the first officer to enter the residence. He testified that he knocked loudly and announced, "Police! ... Search Warrant". The door to the house and an inner door were both of glass. He said that he did not see anyone in the residence at any time. He spent approximately 15 seconds at the outer door before entering into a vestibule area, where he called out again. He then entered through the second door after less than 15 seconds. Both doors were unlocked. As he entered the second door, he drew his weapon and held it at the "low ready" position. He did so because he was concerned about his safety. Specifically, he was concerned that people on the property may be dangerous and that they may not recognize him as a police officer. He had a copy of the warrant, which he left on the kitchen

counter.

[41] I accept Constable Shearer's evidence.

[42] Mr. Fan argues that the police entered the residence without first allowing any potential occupants sufficient time to respond. He says that the basic rule regarding the execution of a warrant was set out in *Eccles v. Bourque*, [1975] 2 S.C.R. 739 at 746-747:

Except in exigent circumstances, the police officers must make an announcement prior to entry. In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry.

[43] In addition, citing *R. v. Cao*, 2008 BCSC 139, Mr. Fan says that the police must afford occupants sufficient time to respond.

[44] Mr. Fan argues that on Constable Shearer's evidence, the police waited less than 30 seconds prior to entry. While he concedes that the amount of time which is reasonable for the police to wait for an occupant to come to the door will vary from case to case, he says that this case clearly falls below the bar.

[45] Further, Mr. Fan says that there was no reason to enter the residence with weapons drawn. There was no indication that evidence would be destroyed, nor was there any evidence of any safety concerns. He submits that the criteria in *Cao* for a dynamic entry were not met, rendering the manner of the search unreasonable.

[46] In response, the Crown argues that the police obeyed what is referred to as the "knock and announce" rule.

[47] First, the Crown says that there was no forced entry. Constable Shearer knocked loudly on the closed external door and announced that it was the police with a search warrant. When there was no response and he could see through a window on the door that no one was coming, he opened that door, which was unlocked, and entered a vestibule. He yelled once more that it was the police with a search warrant, but again there was no response and he could see that there was no one there. He heard nothing to suggest that anyone was inside. Accordingly, he opened the second door, which was also unlocked, and entered the house.

[48] Second, the Crown argues that while the time spent knocking and announcing was short, the police's conduct was reasonable in the circumstances and was in accordance with the Court's directions in *R. v. Cornell*, 2010 SCC 31 at paras. 18, 24. The Crown submits that police need to be allowed certain latitude in the manner in which they decide to enter premises. In that regard, the court must balance the rights of suspects with the requirements of safe and effective law enforcement.

- [49] Third, pointing to *R. v. Kwiatkowski*, 2010 BCCA 124 at para. 58, the Crown says that the "knock and announce" rule should be adapted to the circumstances. It argues that the purpose of the rule is to give notice to a homeowner that police are there and to give the homeowner an opportunity to respond voluntarily. But it says the same is not true when considering rural properties. There is no requirement for the police to announce their presence – a sort of hallooing – when they arrive.
- [50] Last, the Crown says that all of the defence's cases are distinguishable on their facts. In particular, it says that Cao has no application here.
- [51] In this case, 15 seconds was insufficient time to satisfy the "knock and announce" rule, as required under s. 8 of the Charter. Whether the police entered without force is an ancillary issue.
- [52] In *Cornell*, the Supreme Court of Canada restated the "knock and announce" rule in the following manner:
- [18] Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give: "(i) notice of presence by knocking or ringing the door bell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry": *Eccles v. Bourque*, [1975] 2 S.C.R. 739, at p. 747.
- [53] In implementing this rule, the police must also give the occupants of the home a reasonable amount of time to respond: Cao at para. 25, cited with approval in *R. v. Pan*, 2012 ONCA 581 at para. 40. What is reasonable will depend on the circumstances of each case, including the nature of the property and the amount of time an occupant might need to come to the door: *R. v. Truong*, 2011 BCSC 1483 at para. 19. Although there is no magic period of time after which forced entry is reasonable in all circumstances, as a general proposition, "one or two minutes would clearly be sufficient time for an occupant to respond to a demand for entry": Cao at para. 31.
- [54] If the occupants refuse the police entry or there is no answer, the police are then entitled to force entry. "Minimally they should request admission and have admission denied": *Eccles* at 747. Again, the occupants should have sufficient opportunity to deny admission – or for that matter, grant it.
- [55] In this case, Constable Shearer gave notice of the police officers' presence by knocking loudly, identified himself as a police officer, and stated a lawful reason for entry by announcing that he had a search warrant. But did he provide sufficient opportunity to the occupants of the residence to answer? A review of the applicable case law demonstrates that he did not.
- [56] Although I agree with the Crown's submission that the facts in Cao are distinguishable from those in the case at bar, the principles apply. In that case, the police knocked on the front door, but then abandoned that route and set up an entrance team at the side door. They then

used a battering ram to gain entrance through that door. While one or two minutes passed between the knock at the front door and police entrance, there was no announcement at the side door before it was battered down. The court held that it was incumbent on the police to repeat the "knock and announce" procedure at the side door before entering, including allowing the occupants sufficient time to respond.

- [57] As the Crown points out, there was no police distraction here. Only Constable Shearer knocked and announced the police's presence. Relevant to the case at bar, however, the court in its analysis in *Cao* emphasized that the house was "not a small apartment", but rather a two-storey residence with a basement crawl space: para. 33. As such, the court held, it would be reasonable to expect that the occupants would need more time to respond to any knocking at the door.
- [58] Judge Bruce (as she then was) in *R. v. Brown*, 2003 BCPC 236, [2003] B.C.J. No. 1654 found that 20 seconds from the first knock through to the battering of the door was an unreasonable amount of time for the occupants to open the door voluntarily: para. 59.
- [59] Similarly, in *R. v. Hoang et al* (October 16, 2008), Vancouver 176421-1 (B.C. Prov. Ct.), the court found that the dynamic entry into the residence using a battering ram was "unreasonably premature". In that case, the police executed a warrant in the morning at a time when the accused had just woken up. The accused looked out the front window while the police were knocking at the front door and saw an officer gesture to him. Before he could make it downstairs to answer, however, the police breached the front door with their guns drawn and ordered him to the ground. Although the time lapse between when the police knocked and then entered was uncertain on the evidence, it was "very likely less than 30 seconds": para. 22.
- [60] Most recently, in *Truong*, the court found that a pause of 45 seconds between the first knock and the use of the battering ram was insufficient. Of particular significance in that case was the size of the house – as in the above cases, it was a two-storey residence. Further, the police failed to show that there were any exigent circumstances to justify a dynamic entry.
- [61] On Constable Shearer's own evidence, he spent approximately 15 seconds at the outside door before entering the residence.
- [62] The residence on the property is a two-storey residence with a basement crawlspace. Based on the reasoning in *Cao*, *Brown*, *Hoang*, and *Truong*, whether Constable Shearer waited 15 seconds or the lengthier period of 30 seconds before entering, he did not allow sufficient time for any occupants to come to the door. Accordingly, I find that he breached Mr. Fan's s. 8 Charter rights.

[63] Apart from allowing insufficient time to pass before entering the premises, however, there was nothing unreasonable about the search of the house. The doors were unlocked. Constable Shearer simply opened them to gain entry. I am satisfied that Constable Shearer had reasonable concern regarding his safety. This is a large and very remote property, and the only apparent activity was a marijuana grow operation. In the words of the B.C. Court of Appeal in *Kwiatkowski* at para. 62:

The police were executing a warrant at a large marihuana grow operation in a rural area with an unknown number of persons tending or protecting the operation. To ignore the modern realities of the dangers associated with sophisticated illicit operations such as this one would, in my opinion, be extremely naive. The police arrest of the appellant and his co-accused using drawn weapons was not, in these circumstances, unreasonable.

[64] These words apply equally to entering a residence on such a property.

2. Failure to provide a copy of the warrant

[65] None of the accused were provided with a copy of the search warrant, although Constable Shearer left one on the kitchen counter of the residence.

[66] Mr. Fan and Mr. Guan argue that a peace officer who executes a warrant issued by telephone or other means of telecommunication is required, pursuant to s. 487.1(7) of the Criminal Code, to give a facsimile of the warrant to any person present and ostensibly in control of the place or premises.

[67] They argue that except in highly unusual cases, failure to comply with the search warrant process is a breach of both the authorizing statute and s. 8 of the Charter, citing several cases in support: *R. v. Bohn*, 2000 BCCA 239; *R. v. Martens*, 2004 BCSC 1450; and *R. v. Paterson*, 2011 BCSC 1728.

[68] First, they say that it is relevant that no one was charged with responsibility for showing the warrant to people who may be encountered while executing the warrant. They further argue that the failure to provide available warrants exacerbates any breach. Moreover, they say that the police's failure to comply with this section occurred in the context of other Charter breaches, rendering each individual failure more serious, as it forms a pattern of poor conduct. Last, they argue that it is immaterial that Constable Shearer left a copy of the warrant behind, which is allowed for under s. 487.1(8) when a place or premises is unoccupied. Here, the three accused were arrested at the property and were present for at least 45 minutes post-arrest, yet no one made any effort to show them the warrant.

[69] The Crown submits that while s. 487.1(7) was not followed, there was at least partial compliance with s. 487.1, given that Constable Shearer complied with s. 487.1(8) when he left a copy of the search warrant on the kitchen counter of the residence. In the circumstances of this case, the Crown submits, partial compliance with s. 487.1 does not make the search unreasonable so as to be a breach of s. 8 of the Charter.

[70] In Bohn, the Court of Appeal considered s. 29(1) of the Criminal Code, which requires peace officers who execute a warrant "to have it with him, where it is feasible to do so, and to produce it when requested to do so".

[71] Madam Justice Ryan, writing for the court, began her analysis by stating that this section is imperative, such that "[a]bsent exigent circumstances, i.e. where it is not 'feasible'", it imposes a duty on police officers. As such, it is "one of the requirements for the lawful execution of a Criminal Code warrant": para. 28.

[72] Continuing in her discussion, she quoted with approval the following passage of the Nova Scotia Court of Appeal in *R. v. B. (J.E.)* (1989), 52 C.C.C. (3d) 224 at 232 (N.S.S.C. (A.D.)):

A search by police officers under a search warrant of private premises is a derogation from common law rights of ownership. The necessary formalities in the execution of the warrant must therefore, be strictly observed. One of these formalities is that the officer executing the warrant must have it in his possession at the time he executes it.

[73] Further quoting the authors from *Search & Seizure Law in Canada*, looseleaf (Toronto: Carswell, 1991) at p. 17-5, she explained that the requirement allows an occupant of the searched premises to know: (1) why the search is being carried out, so as to enable the occupant to properly assess his or her legal position; and (2) that there is, at least, a colour of authority for the search and that forcible resistance is improper.

[74] Moreover, given that the Supreme Court of Canada in *Hunter v. Southam* had shifted the focus of privacy rights analysis from "traditional notions of the preservation of property to the protection of the autonomy and dignity of the individual" (para. 32), she concluded that a breach of the mandatory requirement that the police produce the search warrant upon request constituted a serious violation of the accused's rights:

[34] In my view these cases demonstrate the seriousness with which the privacy rights of the resident of a dwelling house must be treated. A breach of the s. 29(1) duty imposed on the police deprives the resident of the home to see the legal authority on which the invasion of his privacy is based. Although the police officers in this case advised the appellant of the existence of the warrant and the reason for their presence, they could not produce the warrant which confirmed that the search had prior authorization from an independent body. Failure to produce the warrant on request, without good reason, is in my view, a significant breach of s. 8.

[75] These comments regarding the importance and purpose of the production of a warrant upon request under s. 29(1), in my view, equally apply to the production of a facsimile of a warrant under s. 487.1(7). Both ss. 29(1) and 487.1(7) are cast in imperative terms. Both sections describe the manner in which a warrant is to be executed.

- [76] The decision of Martens further supports this conclusion. While the court was considering s. 487.1(9) of the Criminal Code in that case, Davies J. relied on the principles set out in Bohn to generally conclude that, "except in highly unusual cases, the failure to comply with the search warrant process will result in a breach not only of the authorizing statute but also a breach of s. 8 of the Charter": para. 273.
- [77] I find these comments in Bohn and Martens persuasive. The Court of Appeal in Bohn highlighted the importance of compliance with the search warrant process generally. Therefore, although police have some leeway in unusual cases or exigent circumstances, it appears that failure to comply is a violation of s. 8 of the Charter.
- [78] In the case at bar, while the police had the search warrant with them, they neglected to show or read it to the accused. Thus, by not giving a facsimile of the search warrant "as soon as practicable" after entering the place or premises, the police breached s. 487.1(7) of the Criminal Code and thereby breached s. 8 Charter rights.
3. Failure to file the Form 5.2 Report on time
- [79] Under s. 487.1(9) of the Criminal Code, the peace officer to whom a search warrant is issued is required to file a report (known as a "Form 5.2 Report" or simply a "5.2 Report") to the clerk of the court "as soon as practicable but within a period not exceeding seven days after the warrant has been executed". Generally, the 5.2 Report sets out the time and date of warrant execution, a statement of the things seized pursuant to the warrant, and a statement of any things seized in addition to the things mentioned in the warrant, together with the grounds for believing that those additional things were obtained by or used in the commission of an offence.
- [80] Here, the warrant was executed on March 3, 2011. Constable Shearer did not file the 5.2 Report until March 23, nearly two weeks past the statutory deadline. Constable Shearer admitted that this was due to an error on his part.
- [81] Mr. Fan and Mr. Guan argue that this is a statutory requirement which is fundamental to the court's ability to supervise the proper execution of warrants. They rely on Paterson, where Mr. Justice Blok held that the late filing of the 5.2 Report and the failure to properly complete it constituted a breach of s. 8 of the Charter.
- [82] Mr. Fan and Mr. Guan say that the evidence suggests that Constable Shearer was unaware that he had to file a report within seven days, which in turn suggests a systemic problem. Alternatively, even if Constable Shearer was aware of the time-sensitivity of the task, he deemed himself too busy to complete it. In either case, the failure goes beyond a mere administrative issue and, as in Martens and the cases following it, constitutes a breach of both the Criminal Code and s. 8 of the Charter.

- [83] The Crown argues that Constable Shearer's failure was due to inadvertence rather than any intentional disregard of the accused's rights. Between the day of execution of this warrant and March 23, 2010, Constable Shearer was involved in the execution of two other marijuana search warrants.
- [84] Further, the Crown argues that the above cases are distinguishable. In *Martens*, the police did not file a 5.2 Report at all, and in *Patterson*, it was filed two and a half months late.
- [85] Last, the Crown relies on the comments of Mr. Justice Chamberlist in *R. v. Steeves*, 2002 BCSC 511, where he characterized the failure to file a 5.2 Report as a technical error. In this regard, the Crown says that there is no evidence to show that the accused with standing on this issue were prejudiced in any way by the late filing.
- [86] As stated above, s. 487.1(9) provides that a peace officer who has been issued a telewarrant under s. 487.1 of the Criminal Code must file a report with the clerk of the court within seven days after the warrant has been executed.
- [87] Most recently, in *R. v. Placek*, 2012 BCSC 1175, McEwan J. considered the effects of filing a 5.2 Report outside the statutorily-mandated time:
- [26] The effect of failure to file a s. 5.2 Report was recently considered by this court in *R. v. Paterson*, 2011 BCSC 1728. In that case Blok J. comprehensively addressed the impact of a breach of s. 5.2, in the context of a late filing of over two months:
- 106 In *Martens*, Davies J. reconciled these cases as follows:
- [271] To the extent, therefore, that the Ontario and Nova Scotia authorities relied upon by Ms. *Martens* may be said to establish a strict adherence policy toward the filing of a return that precludes other considerations that inform the appropriate s. 24(2) Charter analysis, I would decline to follow them.
- [272] On the other hand, I am not satisfied that the failure to file a return will, in all cases, amount to merely a "technical breach" of a search warrant. Although Chamberlist J. used that phraseology in *Steeves*, he was in that case not considering the failure to file any return, but rather the filing of an imperfect return that was out of time with the statutory filing requirements. Accordingly, I do not take the *Steeves* decision as establishing that the failure to file a return is only a technical breach of the search warrant process that does not also constitute a s. 8 Charter breach.
- [273] In my view, the decision in *Bohn* leads to the conclusion that, except in highly unusual cases, the failure to comply with the search warrant process will result in a breach not only of the authorizing statute but also a breach of s. 8 of the Charter. It will then fall to a s. 24(2) analysis to determine: whether the evidence that resulted from the breach was obtained in a manner that infringed the accused person's Charter rights; the impact of the evidence on the fairness of the trial; the seriousness of the violation; and, the effect that the admission of the evidence would have on the administration of justice.

110 The decision in Martens is carefully considered and I am satisfied I ought to follow it. I therefore conclude that the late filing of the 5.2 Report and the failure to complete it properly constituted a breach of s. 8 of the Charter. The question of the exclusion of evidence pursuant to s. 24(2) of the Charter will be addressed later in these reasons.

[27] I am of the view that the combination of Martens and Paterson are binding on this court and that the failure of the police to file the s. 5.2 Report is a breach of s. 8 of the Charter, which requires this court to consider exclusion under s. 24(2).

[Emphasis added.]

[88] I accept that Constable Shearer's failure to file the report within seven days was an oversight. Applying the decisions of Placek, Paterson and Martens, except in highly unusual cases, a failure to comply with the search warrant process will also be a breach of s. 8 of the Charter. There are no "highly unusual circumstances" in this case.

4. Unauthorized civilian and unauthorized purpose

[89] One of the people involved in the search of the property, Dave Dickson, was a civilian. While Mr. Dickson works out of the RCMP detachment as a "Safer Communities Coordinator" for the City of Williams Lake, he holds no RCMP rank. Furthermore, even though it was not explicitly authorized by the warrant, he attended at the execution of the warrant to take pictures of the property for educational purposes.

[90] The Crown says that Staff Sergeant Brown invited Mr. Dickson to accompany him to the property to make observations of the typical set-up of a rural marijuana grow operation in the Cariboo, including the environmental and electrical hazards associated with such operations. The Crown contends that this was in furtherance of his position as a Safer Communities Coordinator, in which capacity he acts as a liaison between the RCMP and the local community in the battle against rural grow operations, which have become an epidemic, in circumstances where the local police lack the resources to cope on their own.

[91] While at the property, Mr. Dickson took photographs of the interior of the Outbuilding; the interior of a shed housing a generator; and some exterior shots, one of which included Mr. Fan's vehicle. He felt that he was free to roam about the property without any limitations as to where he could go.

[92] Also, during his time on the property, Mr. Dickson witnessed at least one individual being led away in handcuffs. Mr. Dickson was eventually driven from the property by Staff Sergeant Brown in the front passenger seat of Mr. Fan's vehicle, which contained Mr. Fan's cell phone as well as other personal effects.

[93] Some of Mr. Dickson's photos were used in a series of public presentations that were held for the purpose of educating the community and other stakeholders about marijuana grow operations. In at least one of the photos, Mr. Fan's truck is showing with a legible license plate.

- [94] The RCMP later released some of Mr. Dickson's photographs to the media. Some of those photos, including the photograph showing Mr. Fan's vehicle, were published online.
- [95] Mr. Fan and Mr. Guan say that the warrant was issued to Constable Turko and other peace officers for the purpose of searching the property and seizing those items specified in Appendix "A". As such, they say that the warrant did not authorize the entry of just anyone onto the property, nor did it authorize photos to be taken for educational purposes. Accordingly, the search was unreasonable and in violation of s. 8 of the Charter because it exceeded the authority of the warrant.
- [96] They further contend that the breach was exacerbated by the fact that the police used photographs of the property in the public presentations, some of which they then released to the media for publication. In support, they refer to *R. v. West* (1997), 12 C.R. (5th) 106 (B.C.C.A.). In that case, as part of a quid pro quo between the police and media, the media attended the execution of a warrant. The media filmed police speaking with the accused in his apartment and handcuffing him. This footage and some other footage showing the interior of the residence was then broadcast on national and local news. The Court of Appeal found that the media members' attendance at the search violated s. 8 of the Charter because it "exceeded the authority of the warrant and it violated, for no investigatory or juridical purpose, the highest possible privacy interest of the accused in security of his residence": para. 22.
- [97] The Crown says that Mr. Dickson's presence on the subject property did not make the search unreasonable.
- [98] First, it argues that *R. v. Fekete* (1985), 44 C.R. (3d) 92 (Ont. C.A.), which involved a search warrant executed under the now defunct Narcotic Control Act, R.S.C. 1970, c. N-1, is inapplicable given that the Act had a specific requirement that the warrant be issued to a particular named officer or officers.
- [99] With respect to *West*, the Crown submits that the court found the search unreasonable for the following reasons, which do not apply here: (i) the police allowed the media to film inside a private residence, where they had no right to be; (ii) the warrant was executed in circumstances that permitted the intrusion of the media into the residence; (iii) the police let the media film their entrance into the apartment; (iv) the media re-entered the apartment after the accused stated that he did not want them there; and (v) the authority of the warrant had been exceeded for no investigatory or juridical purpose.
- [100] By contrast, the Crown says, Mr. Dickson is not the media, but rather is employed by the City of Williams Lake and is the "public face" of the police in the community. Furthermore, although Mr. Dickson has limited designation as a peace officer under s. 9 of the Police Act, R.S.B.C. 1996, c. 367, he comes within a broad definition of "peace officer" in s. 2 of the Criminal Code, which refers to "other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process". The Crown argues that the whole purpose of Mr. Dickson's employment as a Safer Communities

Coordinator was to assist in maintaining the public peace by, amongst other things, enlisting community involvement against the spread of illegal activities in the Cariboo. And it was for that purpose that Staff Sergeant Brown invited Mr. Dickson to accompany them.

- [101] In addition, the Crown argues that s. 12(a) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA] permits a peace officer executing a warrant under s. 11 to enlist such assistance as he deems necessary. Accordingly, Staff Sergeant Brown, as a peace officer authorized to execute the warrant under s. 11, had the authority to enlist the assistance of Mr. Dickson. As such, he was not an unauthorized person.
- [102] With respect to the photos, the Crown says that Mr. Dickson did not photograph the residence, inside or out. Nor did he photograph any of the accused or any of the police dealing with the accused.
- [103] As for the presentation, it was put together by Mr. Dickson with photos selected by Staff Sergeant Brown. It contained photos of the Cariboo countryside and photos from many grow operations. The only photo taken by Mr. Dickson of this particular grow operation was a generic close-up of a marijuana plant, and there was nothing of a private or identifying nature about this photo. And while photo #32 included the truck registered to Mr. Fan, this was an oversight. It was included only to demonstrate the presence of fuel tanks and an environmental contamination. The remaining six photos of the property were taken by Sergeant Monita, who was an authorized person.
- [104] In respect of the press release, the Crown argues that although it is unclear as to how some of Mr. Dickson's photos ended up being used, they were again all generic and did not identify any particular property. Specifically, it is impossible to determine the make, model or license number of Mr. Fan's vehicle.
- [105] Based on the foregoing, the Crown argues that it did not breach anyone's privacy. Even if Mr. Dickson was not an authorized person, which the Crown says he was, his presence on the property did not make the search unreasonable. Furthermore, the defence cannot identify any action on Mr. Dickson's part which resulted in a breach of the privacy rights of Mr. Fan or Mr. Guan.
- [106] Last, the Crown argues that Mr. Li has no standing on this issue, and if Mr. Fan has a remedy as a result of Mr. Dickson's presence on the property, it would be a civil one.
- [107] I find that the police breached s. 8 of the Charter by inviting an unauthorized civilian, Mr. Dickson, onto the property for an unauthorized purpose – that is, to take photographs for educational purposes.
- [108] If the prerequisites are satisfied under s. 487.1(5) of the Criminal Code, a justice may issue a warrant to a peace officer conferring the same authority respecting search and seizure as may be conferred by a warrant issued pursuant to s. 487(1). Section 487(1) states that a search warrant should authorize peace officers or public officers only.

- [109] As the defence points out, the search warrant in this case was issued to "Constable Leo T. Turko and other peace officers in the Province of British Columbia" for the purpose of entering the places or premises set out in Appendix "B" and searching for and seizing the things listed under Appendix "A".
- [110] Mr. Dickson was not a "peace officer" or "public officer", as those terms are defined under s. 2 of the Criminal Code. He was an employee of the City of Williams Lake. Nor was Mr. Dickson's name specifically included in the warrant.
- [111] The British Columbia Court of Appeal decision in *West* makes it clear that having civilians accompany police officers on the search of private premises has no statutory basis and is unreasonable. See also *R. v. Derksen*, 2000 SKQB 355; *Re Purday et al. and The Queen* (1972), 8 C.C.C. (2d) 52 at 60 (N.B.C.A.). If civilians are to be used in a search, their names should be included in the warrant in order for them to be able to have access to the premises. Without specific authorization granted by the warrant, Mr. Dickson's presence made the search unreasonable.
- [112] Similarly, the Crown's argument that the police had the authority to enlist the assistance of Mr. Dickson by virtue of s. 12(a) of the CDSA must fail.
- [113] Here, Staff Sergeant Brown, who invited Mr. Dickson and who directed him to take photos, did not "closely supervise" Mr. Dickson while he was on the property. Nor did Corporal Evans, who testified that he was in charge of the search.
- [114] Finally, Mr. Dickson was not there to "assist" with the authorized purposes of the warrant. Rather, Mr. Dickson was there to document the grow operation for "educational purposes" in furtherance of his employment as the Safer Communities Coordinator in Williams Lake. This was not authorized by the warrant.
- [115] I find that Mr. Dickson's presence was a breach of Mr. Fan's s. 8 rights.
- [116] I am not satisfied, however, that Mr. Dickson's presence affected the rights of Mr. Guan or Mr. Li. Although it appears that certain of their personal belongings were seized, there is no evidence that Mr. Dickson was involved. Further, he did not enter the house. And while he did photograph Mr. Guan's van, it apparently was parked on Crown land. I am not satisfied that photographing a van parked on Crown land constitutes a breach of Mr. Guan's rights. Last, although Mr. Dickson had a glimpse of someone being led away in handcuffs, I am not satisfied that this would constitute a breach of the ss. 8, 9 or 10 rights of any of the accused.
5. Warrantless search of the outbuildings
- [117] Aside from the residence and the Outbuilding, the police also searched a camper, a shed which housed the large generators, a shed which housed a smaller generator and electrical items, and a blind which had been used for hunting.

- [118] Mr. Fan argues that the warrant did not permit the police to search any buildings other than the residence and the Outbuilding. Accordingly, he argues that the search of all of these areas was warrantless and in violation of s. 8 of the Charter. Further, he contends that the breach was exacerbated by the fact that Mr. Dickson entered the generator shed and photographed inside that area.
- [119] As I held earlier in *R. v. Fan*, 2012 BCSC 1669 at para. 49, there was no evidence before the issuing justice that there were other outbuildings on the property. As a result, other than the outbuilding containing the grow operation, the search warrant was overbroad and facially invalid with respect to the reference to the "Outbuildings". As such, there were no grounds to issue a warrant for any other outbuildings. The search of the minor outbuildings on the property was therefore warrantless and a breach of Mr. Fan's s. 8 Charter rights.
- [120] To the extent that evidence was in plain view through the open doors of the Outbuilding, presumably s. 489(2) of the Criminal Code would apply.

6. Warrantless search of the Plymouth Voyager

- [121] Both Constables Turko and Shearer searched the Plymouth Voyager located near but not on the property.
- [122] Mr. Guan argues that the Plymouth Voyager was not located on the property when the police searched it. He says that the search was presumptively unreasonable because the warrant did not authorize the search and there was no lawful authority otherwise for the search. He contends that while Constable Turko may not have known that the vehicle was off the property, this is of no moment when determining whether a breach occurred. Rather, that is a consideration that pertains to whether a remedy should be granted under s. 24(2).
- [123] The property is unusual, in that the residence straddles the property line and the residents apparently have appropriated Crown property to use as the yard for the residence. It is difficult to determine whether Mr. Guan's van was parked on the property or on Crown land. The best evidence I have comes from Corporal Evans, who placed the van just off the property. On that evidence, I am satisfied on the balance of probabilities that the van was off the property. Accordingly, this was a warrantless search and a breach of s. 8 of the Charter.

7. Warrantless search and seizure of Mr. Fan's vehicle

- [124] The warrant is written in the usual format, which has been described as the "enter - time - search and seize" format. It states:

THIS IS THEREFORE, to authorize and require you to enter the said place or premises between the hours of 8:00 a.m. on March 3, 2010 and 6:00 p.m. on March 3, 2010 and upon entering to search for and seize the things, and to report thereon as soon as practicable but within a period not exceeding seven days after the execution of the warrant to the Clerk of the Court for ...

[125] It authorized the police to search the residence, the Outbuilding and the vehicles on the property and to seize items as set out in Appendix "A". In the Appendix, it does not explicitly state that vehicles may be seized, but it states in paragraph (c) that the police may seize the following items:

All apparatus used for the cultivation of marihuana including such items as lighting equipment, shrouds, timers, ballasts, pumps, heaters, fans, air conditioners, humidifiers, CO2 tanks and distribution equipment, pesticides, tools, and equipment with which to maintain and cultivate marihuana plants

[126] The police seized Mr. Fan's vehicle on March 3, 2010. Constable Shearer said that he was the officer that actually seized the vehicle and that it was seized pursuant to the warrant. Staff Sergeant Brown, with Mr. Dickson as his passenger, drove the vehicle back to the Williams Lake detachment. He said that it was seized because it was "part and parcel of the criminal offence being committed".

[127] Mr. Fan argues that the warrant did not authorize the police to seize any vehicles and certainly did not authorize Staff Sergeant Brown to drive the vehicle with a civilian passenger back to the Williams Lake detachment. He submits that the seizure was warrantless, presumptively unreasonable, and in violation of s. 8 of the Charter.

[128] Moreover, he says that as the police searched his vehicle outside the time permitted in the warrant, it was warrantless and presumptively unreasonable, also contrary to s. 8 of the Charter.

[129] The Crown, in response, says that the truck was properly seized under the authority of the warrant, as it falls within paragraph (c) of Appendix "A" as equipment used to maintain and cultivate marijuana plants. It argues that without the truck, there was no way the grow operation could have operated. First, it contained a water tank used to water the plants. Second, the truck was also used to transport a "tidy tank" that was used to carry significant quantities of diesel fuel to fuel the generators, which in turn powered the grow operation.

[130] Alternatively, the Crown argues that s. 489(1)(b) of the Criminal Code provides a basis upon which the truck was lawfully seized. That provision allows for the seizure of any item in addition to things mentioned in the warrant if the police have reasonable grounds to believe that the item in question has been used in the commission of an offence. Here, when the police executed the warrant, the water tank had a hose leading to a water barrel inside the grow operation, and the only apparent use of the diesel was to run the two diesel generators used to power the grow operation. Accordingly, in the Crown's submission, it was reasonable for the police to believe that the truck had been used in the commission of an offence.

[131] Next, the Crown contends that, having lawfully seized Mr. Fan's vehicle within the authorized time in the warrant, the police were entitled to search it after they had left the property. Relying on *R. v. Cardinal*, 2003 BCSC 158, it argues that the time specified on the

warrant is the time of entry, not the time within which the search has to be completed. Accordingly, as long as the seizure occurred within the time of the warrant (in this case, before 6:00 p.m. on March 3, 2010), the search for evidence can lawfully continue outside that time because that item is within lawful police custody.

[132] I turn now to my determination.

[133] Police may only seize items that are explicitly or implicitly included within the scope of the warrant. The search warrant here, again, authorized the police to search the residence, the Outbuilding, and the vehicles on the property and to seize the things set out in Appendix "A". And as stated above, the Crown relies on paragraph (c) of the Appendix to justify the seizure of Mr. Fan's vehicle.

[134] I disagree with this position.

[135] Mr. Fan's vehicle did not constitute apparatus or equipment used to cultivate marijuana. Although this paragraph captures the tank carried in the vehicle, in the context of the various apparatus and equipment listed – and given the nature and purpose of the specified items – it would stretch the meaning of "apparatus" and "equipment" beyond reason to say that the vehicle should be included. While Mr. Fan's vehicle may have transported various apparatus and equipment, I do not consider that this transformed the vehicle into equipment used to maintain and cultivate the plants. Such an interpretation, again in view of the specific items listed, would render the words "apparatus" and "equipment" vague and overly broad.

[136] I agree, however, with the Crown's argument regarding s. 489(1)(b) of the Criminal Code.

[137] In addition to the items expressly or implicitly included within the scope of the warrant, s. 489(1)(b) of the Criminal Code authorizes the police to seize offence-related items. Specifically, the provision provides that a police officer who is lawfully present in a place pursuant to a warrant may seize, without a warrant, anything he believes on reasonable grounds "has been used in the commission of an offence": *R. v. Bishop*, 2013 BCSC 522 at para. 179; and *R. v. Sipes*, 2011 BCSC 1763 at para. 203. It is a broad section that "permits an executing officer to seize virtually any item that is related to an offence that the executing officer uncovers during the execution of a search warrant": *Scott C. Hutchison et al., Search and Seizure Law in Canada*, looseleaf, vol. 1 (Toronto: Carswell, 2005) at p. 17-8. In relying on these powers, the Crown need only prove what the section requires: that the officer be lawfully placed and in execution of his duty, with a belief on reasonable and probable grounds that the seized items are evidence: *R. v. Makhmudov*, 2007 ABCA 248 at para. 19; *Sipes* at para. 204.

[138] In my view, s. 489(1)(b) applies here. It is a broad provision that enhances efficient law enforcement: *Sipes* at para. 210. The vehicle was being used in the commission of an offence, namely the unlawful production of marijuana. Staff Sergeant Brown testified that this was, in his view, the reason for seizing it.

[139] Finally, I agree with the Crown's submission that the police may continue to deal with seized items after the search of the property is concluded. Thus, the police did not need to search Mr. Fan's vehicle on March 3, 2010, and I find that the police did not act unreasonably in searching it on March 5, 2010.

C. Section 10(a): Right to be Informed Promptly of the Reasons for Arrest

[140] The defence argues that the police failed to advise any of the three accused of the reason for their arrest or detention, contrary to s. 10(a) of the Charter.

[141] The Crown submits that the use of Charter cards in Chinese script at the scene, together with a rudimentary understanding of English on the part of the accused, achieves compliance with s. 10(a). The Crown says that there is evidence that all three accused had at least a basic grasp of English so as to be able to understand and make themselves understood, particularly if non-verbal communication is taken into account.

[142] Section 10(a) of the Charter states that everyone has the right on arrest or detention "to be informed promptly of the reasons therefor".

[143] The Supreme Court of Canada in *R. v. Evans*, [1991] 1 S.C.R. 869 at 888, set out the test for whether there has been a breach of s. 10(a) of the Charter:

When considering whether there has been a breach of s. 10(a) of the Charter, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b).

[144] Although the accused must generally understand the jeopardy he finds himself in and appreciate the consequences of deciding for or against retaining and instructing counsel, he need not be aware of the precise charge to be laid or all of the factual details of the case: *R. v. Smith*, [1991] 1 S.C.R. 714 at 729.

[145] In an examination of an alleged breach under this section, the appellant's personal knowledge is relevant: *R. v. Carpenter*, 2001 BCCA 31 at para. 32. Where an individual is arrested for conduct that is clearly illegal (e.g. smuggling narcotics), it is not realistic to think that he or she could have believed it was lawful.

[146] Finally, as the inquiry is whether, substantively, the accused can reasonably be supposed to have understood the basis for the investigation, the informational requirement of s. 10(a) can be inferred from the context or circumstances in each case: *R. v. Lund*, 2008 ABCA 373 at para. 16.

- [147] Viewed reasonably, in all the circumstances of the case, were the accused sufficiently informed of what they were being detained for, such that they could make a decision about whether to decline to submit to arrest?
- [148] Only Mr. Li testified. As above, I did not find Mr. Li to be a credible witness. He has lived in Canada for several years and he is now a Canadian citizen. To become a citizen, he had to take his citizenship exam in English. He took English as a second language classes. I do not accept his evidence that he did not understand the reason for his arrest, or that he did not have a rudimentary understanding of English.
- [149] Furthermore, I am satisfied on the whole of the evidence that each of the accused had a rudimentary understanding of English. Each was able to have a limited conversation in English with police.
- [150] In addition, the circumstances in which the arrests occurred give some colour as to what the accused knew and understood at the time. Mr. Li and Mr. Guan were arrested while running from the Outbuilding, which housed the grow operation, and Mr. Fan was arrested at the entrance to the Outbuilding. Realistically, they knew why the police were attending the property and arresting them.
- [151] Upon apprehension, each accused was immediately advised in English that they were under arrest and the reason for the arrest.
- [152] After being advised of their arrest and the reason for arrest in English, they were transported to the area of the house, where they were provided with Chinese translations of the "Charter cards". These provided translations in Chinese script of the ss. 10(a) and (b) Charter rights. Each appeared to read one of the cards and each nodded when asked if they understood.
- [153] In my view, in all the circumstances, the accused can reasonably be supposed to have understood that they were under arrest for charges in connection to the grow operation: (i) the accused had, at least, rudimentary knowledge of English; (ii) they were told in English that they were under arrest for the possession of marijuana for the purpose of trafficking; (iii) they could reasonably be expected to know that they were engaged in unlawful conduct; (iv) the police provided Chinese Charter cards with a translation of the ss. 10(a) and (b) rights; and (v) although the accused did not understand everything that was said to them, it was clear from their conduct – including their indications that they understood what was written on the Charter cards – that they understood that they were under arrest.

D. Section 10(b): Right to Retain and Instruct Counsel without Delay and to be Informed of that Right

- [154] The accused argue that they were not afforded the opportunity to contact counsel at the scene without delay and were only able to exercise this right more than three hours later at the RCMP detachment. They were arrested at approximately 1:00 p.m. and were placed on the phone with Legal Aid duty counsel at approximately 4:00 p.m.
- [155] They say that from the outset, those tasked with providing them their Charter rights never turned their minds to these problems. Once at the property, the police further failed to consider whether there was a means to facilitate a call, including the use of a satellite phone.
- [156] They argue that the police similarly failed to attend to the need for an interpreter. In that regard, they say that the police made no effort to bring an interpreter with them or to find an officer who might speak Cantonese, Mandarin or Vietnamese. Nor did they make any effort to contact Mr. Cao (an interpreter) by telephone while at the property.
- [157] Furthermore, Mr. Guan and Mr. Fan argue that the police failed in their duty to ensure that each of the accused, in fact, understood their rights. Although they were provided with Charter cards in Chinese script, they say that this is a pro forma provision of Charter rights which does not satisfy the duty imposed on police, particularly when those arrested do not speak English.
- [158] They further complain that the police failed to make sure that they were satisfied with the legal advice that they received. Once at the station, the accused were placed on a private telephone line with Mr. Scott, the after-hours Legal Aid duty counsel. However, there was no follow-up afterward to ensure that they were satisfied with or understood the advice that they had received.
- [159] In addition, Mr. Guan and Mr. Fan argue that the police violated their right to counsel by failing to refrain from eliciting evidence from the accused. After being transported to the house subsequent to their arrest, each accused was asked to provide information about their jackets. In doing so, they say that they unwittingly provided evidence against themselves.
- [160] The Crown concedes that the police have an informational duty to inform a detainee of his right to counsel without delay and of the existence and availability of Legal Aid and duty counsel. It further agrees that if a detainee indicates a desire to exercise his right to counsel, except in urgent or dangerous circumstances, a duty then falls on the police to provide the detainee with a reasonable opportunity to do so. The Crown also agrees that there is a further police duty to refrain from eliciting evidence from the detainee until he has had a reasonable opportunity to exercise the right to counsel.
- [161] In response to the defence's complaints, however, the Crown argues that the police fulfilled all their duties and fully complied with s. 10(b) of the Charter.

- [162] The Crown says that the police provided access to counsel as soon as reasonably possible in the circumstances. First, it says that, similar to the circumstances in *R. v. Ly*, 2012 BCSC 504, delay occurred because there was no cell phone coverage at the site. Further, as the one satellite phone was hardwired into the cab of a police vehicle, it was not practically or reasonably available for use by the detainees. Finally, it says that there is no evidence that a three-way call among the police, the accused and an interpreter could be made from the satellite phone in any event.
- [163] The Crown further says that at no time did the police elicit incriminating evidence. They provided the jackets to the accused for their safety and comfort, not for the purpose of incriminating anyone.
- [164] The Crown also submits that all of the accused had a reasonable opportunity to consult counsel. Although the police did not provide the accused with a telephone book to contact a local lawyer or a list of local lawyers, the telephone books and lawyer's list in English would have been impractical. Moreover, there was no evidence that any of the accused had a personal lawyer that they wished to call or that they were not satisfied with their consultation with Legal Aid.
- [165] 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. Justice Berger in *R. v. Luong*, 2000 ABCA 301 at para. 12, provided a useful restatement of the nature and obligations that result from s. 10(b) of the Charter, the relevant portion of which reads as follows:
1. The onus is upon the person asserting a violation of his or her Charter right to establish that the right as guaranteed by the Charter has been infringed or denied.
 2. Section 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person.
 3. The informational duty is to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel.
 4. The implementational duties are two-fold and arise upon the detainee indicating a desire to exercise his or her right to counsel.
 5. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)". *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.) at 301.
 6. The second implementational duty is "to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger)". *R. v. Bartle*, supra, at 301.

7. A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.
 8. If the trial judge concludes that the first implementation duty was breached, an infringement is made out.
 9. If the trial judge is persuaded that the first implementation duty has been satisfied, only then will the trial judge consider whether the detainee, who has invoked the right to counsel, has been reasonably diligent in exercising it; the detainee has the burden of establishing that he was reasonably diligent in the exercise of his rights. *R. v. Smith*, (1989), 50 C.C.C. (3d) 308 (S.C.C.) at 315-16 and 323.
- [166] In this case, the police were aware that they were going to a very remote location which did not have an electrical connection or telephone landline. They also knew that the area did not have cell phone coverage. They anticipated that if anyone were to be arrested at the scene, that person may not be able to speak English very well. While they anticipated that the occupants might speak Vietnamese, Mandarin or Cantonese, there were no police officers in Williams Lake who could speak any of those languages. Thus, the plan was to provide Charter translations to each person arrested at the site, and provide an interpreter by telephone once they arrived at the detachment.
- [167] In furtherance of this plan, Constable Bourguignon, one of the officers tasked with providing Charter rights to those arrested, brought several Charter cards in different languages to the site.
- [168] Constable Leforte implemented this plan. He testified that after he asked each of the accused for their names, which they provided, he gave the translations of the Charter card to each of the accused. He said that when he asked Mr. Fan, "What language?", Mr. Fan responded, "Cantonese". Mr. Li informed Constable Leforte that he spoke little English, so Constable Leforte gave him both Charter cards labelled as "Chinese". Mr. Li returned one and appeared to read the other, nodding his head as though he understood the content of the card. Constable Leforte then asked Mr. Guan how his English was, to which Mr. Guan responded that he did not speak it so well. Again, Constable Leforte provided two Charter cards labelled as "Chinese". Mr. Guan took one and returned the other. He appeared to read the one he kept. As with Mr. Li, he nodded after reading it.
- [169] Constable Bourguignon's plan was to transport the accused back to the detachment, where he would arrange for a Cantonese interpreter.

- [170] They were on the road heading back to Williams Lake by 1:36 p.m. Although cell phone service was available approximately ten minutes from Williams Lake, Constable Bourguignon did not consider facilitating a call to counsel because there was no interpreter available and no privacy to speak with counsel. The accused could be provided with privacy and access to an interpreter and counsel back at the detachment.
- [171] They arrived at the detachment at 2:44 p.m. At 2:45 p.m., Constable Bourguignon called the local Legal Aid office, but he was told to contact the after-hours line. He left a message with Legal Aid at 2:56 p.m.
- [172] He received a call back from Mr. Scott at 3:04 p.m. Constable Bourguignon informed him that three males had been arrested for production of a controlled substance and trafficking, and that they would need an interpreter because they spoke Cantonese.
- [173] At 3:44 p.m., Constable Bourguignon called Mr. Scott again and was told that an interpreter was available. At that point, he started taking the accused into the phone room, one at a time.
- [174] Mr. Fan's call with the interpreter and Mr. Scott started at 3:53 p.m. Constable Bourguignon told Mr. Scott that Mr. Fan was in the room. He heard Mr. Fan start to talk to the interpreter. At 4:01 p.m., Mr. Fan knocked on the door and was taken back to his cell. Mr. Li was taken to the phone room at 4:02 p.m. At 4:06 p.m., Mr. Li's call ended. Mr. Guan was taken to the phone room at 4:07 p.m. At 4:21 p.m., Constable Bourguignon noticed that the phone light was off. Constable Bourguignon took Mr. Guan back to his cell.
- [175] In my view, the police did not breach the accused's s. 10(b) Charter rights.
- [176] First, I find that the police fulfilled their duty to inform the accused of their right to counsel without delay. In *R. v. Suberu*, 2009 SCC 33, the Court explained the meaning of "without delay" as follows:

4.2 The Meaning of "Without Delay" in Section 10(b) of the Charter

- [37] Once an individual is detained, s. 10(b) of the Charter is engaged and guarantees an individual the right to retain and instruct counsel without delay, and to be informed of that right. The issue raised on this appeal asks whether the words "without delay" require the police to execute their duties to facilitate a detainee's right to counsel immediately upon detention, or whether this obligation can be fulfilled at a later point in time.
- [38] Once engaged, s. 10(b) imposes both informational and implementational duties on the police. The informational duty requires that the detainee be informed of the right to retain and instruct counsel without delay. The implementational obligation imposed on the police under s. 10(b), requires the police to provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach a lawyer, or the detainee has unequivocally waived the right to do so.

- [39] The content of the police duties under s. 10(b) is not at issue in this appeal. Instead, the question is whether the right to retain and instruct counsel "without delay" means that these duties must be executed immediately at the outset of a detention, or whether these duties manifest at some later point subsequent to the start of a detention.
- [40] As with "detention", any interpretation of the phrase "without delay" must be consistent with a purposive understanding of the Charter provision in which it occurs. As this Court noted in *R. v. Therens*, [1985] 1 S.C.R. 613, at pp. 641-42, and in *R. v. Bartle*, [1994] 3 S.C.R. 173, the purpose of s. 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.
- [41] A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.
- [42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

[Emphasis added.]

- [177] The issue before the Court in *Suberu* was somewhat different from that before me. The Court was not concerned with the difficulties that arise when the accused are not fluent in English, and some method must be found to interpret their rights to the accused. However, the applicable principles are expressed in the portion of the judgment which I have highlighted above.

- [178] Although the accused were not advised of their Charter rights instantaneously after their arrest, in my view, they were advised of their s. 10(b) rights as soon as was reasonably possible in all the circumstances. [Mr. Fan was advised in English of his rights as he was arrested.] The accused did not speak English well and would be provided with the translated Charter cards. As it happened, the officers charged with that duty were at the house, some distance from where the accused were found and arrested. Had the accused been found at the house, the Charter rights could have been provided more quickly. Nevertheless, it was the first order of business after the accused were arrested. They were immediately taken from the arrest site to Constables Leforte and Bourguignon, who initially advised them of their rights in English, and when it appeared that these were not understood, provided the Charter translations.
- [179] Even if Constables Bourguignon and Leforte had known what language would be spoken and had an interpreter attend with them to interpret the rights to the accused as they were read, the same delay would have been involved in taking the accused from the site of the arrest to the location of the interpreter. Nonetheless, it would be the first order of business, and in that sense, immediate.
- [180] It must be in this sense that the Supreme Court intended the word "immediate"; otherwise, providing the rights in a manner which complies with s. 10(b) in circumstances such as these would be impossible. One can imagine various scenarios where police must arrest an individual who does not speak the language and must find a means of effectively advising the accused of his or her rights. They must do so without delay – and in that sense, immediately. But to impose a duty of doing so at the second of arrest in such circumstances would render compliance impossible.
- [181] Here, the police arrested the accused and took them directly to be advised of their rights. In the circumstances of this case, their actions were immediate. I am supported in this conclusion by the decision of Mr. Justice Barrow in *Ly* at para. 21:

Whether an accused has been "promptly" informed of the reason for his or her arrest and provided with the informational component necessary to comply with s. 10(b) will depend, to some degree, on the circumstances. The circumstances of note in the matter at hand are the geography of the area, the magnitude of the investigation the police were in the process of conducting, and the anticipated language barrier. As to the former, the police were searching a large rural property on which they arrested a number of people. It took time to simply secure the property, something that was not unreasonable to do, before moving the various individuals who had been arrested, around the property. As to the language barrier, the police anticipated language difficulties, but they did not know its extent or its precise nature. I will deal with the adequacy of the efforts they made to address this problem later in these reasons. For present purposes, I simply note that, in my view, it was reasonable for the police to attempt to provide the individuals who were arrested that day with their Charter rights and the other information the police are obliged to explain through a single officer who would attempt to convey this information in a language the arrestees could understand. Proceeding in that matter necessarily

occasioned some delay inasmuch as five people were processed by that officer. Mr. Ly was the fourth. In these circumstances, the delay of just over one hour between the time of Mr. Ly's arrest and when the police attempted to comply with s. 10(a) and (b) does not amount to a breach.

[182] I also find that the police took reasonable steps to ensure that the accused understood their right to counsel.

[183] Absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, police are not required to assure themselves that a detainee fully understands: Evans at 891.

[184] Where special circumstances exist, however, such as here where a detainee has language difficulties, the police have a duty to take extra steps to ensure that the accused understands his or her rights: Evans at 891.

[185] That the police officers subjectively believed that the accused comprehended his rights is insufficient: Lee at para. 61. This is because s. 10 guarantees the right to be meaningfully informed of the right to counsel: Ly at para. 26. In *R. v. Michaud* (1986), 45 M.V.R. 243 at 248-249, [1986] O.J. No. 1631 (Dist. Ct.), Stortinti J. explained:

The police may not be required to go to the extreme means in order to respect an accused's rights under S. 10 of the Charter. It is necessary, however, in order to comply with the section that an accused be meaningfully informed of the rights. The accused must understand what is being said to him or her and understand what the options are in order that he or she may make a choice in the exercise of the rights guaranteed by the Charter.

It is not sufficient for a police officer upon the arrest or detention of a person to merely recite the rights guaranteed by S. 10 of the Charter. As s. 10(b) stipulates, the accused or detainee must be informed. This means that the accused or detainee must understand what is being said to him or her by the police officer. Otherwise, he or she is not able to make an informed choice with respect to the exercise or waiver of the guaranteed rights.

If the rights are read in English only, and the accused's or detainee's knowledge of the English language does not allow sufficient comprehension of the matter, those are "special circumstances" which alert the officer and oblige him to act reasonably in the circumstances.

[Emphasis added.]

[186] These observations were endorsed by the Ontario Court of Appeal in *R. v. Vanstaceghem* (1987), 36 C.C.C. (3d) 142 at 148 (Ont. C.A.). In turn, they were applied by Melnick J. in *R. v. S.L.H.*, 2004 BCSC 410, Barrow J. in *Ly*, and Romilly J. in *Lee*.

[187] Given the foregoing, in special circumstances, the mere recitation of the right to counsel is not sufficient to inform the detainee of his or her rights. Further steps are required. Nevertheless, there is no set formula that a police officer must follow so as to ensure that a person understands his or her rights: *R. v. Averill*, [1988] B.C.J. No. 2414 (C.A.). Whatever the police officer says to a detainee, however, "it must succeed not only in giving the rights

to the accused in a way that can be understood, but it must also ensure that in fact the rights have been understood": Averill.

- [188] Whether the police have fulfilled their duty in this regard will turn on the facts of each case. Lastly, while it is not necessary for an accused to testify in order to establish a breach of s. 10(b), there must be some evidence of a lack of understanding: Ly at para. 29.
- [189] This case is unlike Vanstaceghem, Averill, and S.L.H. Although only the former involved a language barrier, importantly, the courts in each case accepted the accused's testimony and made a finding of fact that he or she did not understand the information that was given to him or her by the police. Here, only Mr. Li testified, and as I have indicated above, I reject his evidence that he did not, in fact, understand what the police told him. Further, as I found above, all of the accused had at least a rudimentary knowledge of English.
- [190] More significantly, however, recognizing that anyone arrested at the scene may not speak English, the police took Charter cards in various languages to provide to those arrested. Each accused in this case was provided a card that was translated into Chinese script. It set out the following information: (i) the right to retain and instruct counsel in private and without delay, before speaking to the police; (ii) the right to consult a lawyer of choice; (iii) the right to free legal advice from duty counsel; and (iv) the right to a telephone to call a lawyer. Each accused read the card and indicated in some way that he understood its contents.
- [191] Moreover, the police ensured that the accused would understand their Charter rights by providing them with duty counsel and an interpreter at the detachment.
- [192] I am satisfied on all the evidence that the accused understood what was being said to them and that they were able to make an informed choice with respect to the exercise of their rights.
- [193] Although none of the accused asked to speak to counsel before or after the telephone call with duty counsel, the defence argues that the police failed in various ways to fulfill their duty to facilitate access to counsel without delay. They suggest that the police could have satisfied the requirements under s. 10(b) of the Charter by checking to see if there was a satellite phone in the house, by allowing the accused to use the satellite phone in the police vehicle to contact counsel, or by allowing the accused to use a cell phone at the roadside once they were within cell phone service range.
- [194] I accept the evidence of various police witnesses that these alternatives were neither practical nor reasonably available in all the circumstances. First, there is no evidence that there was a phone available in the residence. Mr. Li said that he had never seen anyone use a phone in the house. Moreover, the satellite phone in the police vehicle required the key to be in the ignition, if not the vehicle to be turned on, which posed an obvious safety concern. In addition, there is no evidence that it had any reception. Finally, there was no cell phone coverage until approximately ten minutes outside of Williams Lake. At that

point, it would have been unreasonable and impractical to pull over to the side of the road, maintain security, and provide three accused with privacy to contact counsel.

[195] Most importantly, none of these options would have permitted the accused a three-way conversation with counsel and an interpreter.

[196] In *R. v. Ashby*, 2013 BCCA 334, the court said:

[71] Delay by the police with respect to what is known as the implementational component of their duties under s. 10(b) of the Charter was an issue in *R. v. Montgomery*, 2009 BCCA 41, 241 C.C.C. (3d) 469. Mr. Montgomery was one of four persons arrested in a vehicle for possession of cocaine for the purpose of trafficking. He indicated that he wished to speak with a lawyer. However, as the police had a policy against allowing arrested persons to use cellular telephones at the scene of an alleged crime, he was not allowed to speak with a lawyer until he was taken to the detachment. Due to the number of persons that had been arrested, several hours passed before he spoke with a lawyer. In dismissing a conviction appeal, Mr. Justice Tysoe agreed with the trial judge that the delay in allowing access to counsel did not result in a breach of s. 10(b):

[35] The trial judge concluded that it was neither reasonable nor practical to allow the appellant to use a cell phone at the scene of his arrest. I agree with him. The police considered the arrest to be one of high risk. The appellant was believed to be associated with an organization that used violence. It would have been difficult for the police to ensure that the call was not used for an improper purpose and to provide the appellant with privacy at the scene of his arrest while ensuring that he was secure.

[36] The police station had only one private phone for conversations with lawyers, and the police had to deal with the three other men arrested with the appellant, as well as an unrelated matter. The trial judge made the finding of fact that the appellant was provided access to counsel as soon as was reasonably possible in all of the circumstances. I am not persuaded that the judge made a palpable error in making this finding.

[Emphasis added.]

[72] That the exigencies of an arrest situation can excuse immediate compliance with s. 10(b) was more recently discussed in *R. v. Nelson*, 2010 ABCA 349 at para. 17, 265 C.C.C. (3d) 273, wherein the Court stated:

People are not always arrested in locations where it is possible for police to implement access to counsel. The delay that was involved in this case was, in the circumstances, minimal and the police refrained from questioning the appellant until after he had a chance to meet with counsel of his choice face to face. Immediacy does not mean instantaneous; practical considerations still play a role, particularly with respect to the police's obligation to implement an arrested person's contact with counsel.

[Emphasis added.]

- [73] In the case at bar, it was neither reasonable nor practical for Constable Thompson to implement access to counsel at the roadside. He had just arrested Ms. Ashby for a drug-related offence and had reason to believe there were drugs in her vehicle. Until back-up arrived, he was solely responsible for maintaining control of both her and the vehicle. Once back-up (i.e., Sergeant Seib) arrived, Constable Thompson did a cursory search of the Hyundai and, upon finding marihuana, immediately drove Ms. Ashby to the detachment, five minutes away. The delay here was plainly minimal.
- [197] This reasoning applies to the case at bar.
- [198] I am also not persuaded that the police attempted to elicit information implicating the accused before they were given a reasonable opportunity to exercise their right to counsel. I accept the evidence of the police officers that it was cool outside, that the accused looked cold, and that they were offered jackets from the house for the journey into Williams Lake.
- [199] Again, on the evidence, the accused were arrested while running from or coming out of the Outbuilding. That they had jackets in the house on the property is of such little evidentiary value in any event, it would make no sense for the police to elicit it to tie the three accused to the property. Rather, it makes more sense that, as the police said, they offered the jackets to the accused because they appeared cold.
- [200] I also reject defence's argument that the time to arrange for an interpreter at the detachment could have been shortened, had the police retained Mr. Cao's services. I accept Constable Bourguignon's evidence that he believed that Mr. Cao was an interpreter for Vietnamese, not Cantonese, and so he did not think he would be useful.
- [201] Moreover, I am not persuaded that any delay was occasioned because the accused were booked while Constable Bourguignon made arrangements for duty counsel and an interpreter. The police did not wait for booking to be completed before facilitating the calls to duty counsel and an interpreter, and there is no evidence that booking caused any further delay. In that sense, this case is unlike *R. v. Smith*, 2011 BCSC 1695, where Madam Justice Ker found that further delay arose when the police, out of convenience, elected to first conduct the booking-in procedure before facilitating access to counsel: para. 199.
- [202] Lastly, none of the accused asked to speak with specific counsel, before or after their phone call with duty counsel. In my view, nothing arises from the fact that the police did not ask them whether they were satisfied with the advice they received.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown

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