
CANADA / JUDGMENT

R. v. Fan

2013 BCSC 445

COURT

Supreme Court of British Columbia

DECIDED

15 March 2013

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2013 BCSC 445 R. v. Fan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Fan,

2013 BCSC 445

Date: 20130315

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: Setting Aside Search Warrant

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.

July 23 - 27;

October 19, 2012

Place and Date of Judgment:

Williams Lake, B.C.

March 15, 2013

I. introduction

- [1] The accused, Wei Xin Fan, Can Jian Li and Yue Rong Guan, are charged with possessing 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 in Horsefly, British Columbia (the "Property").
- [3] Mr. Fan applies for Charter relief, arguing that his ss. 8, 10(a) and 10(b) Charter rights have been breached. This application addresses Mr. Fan's allegations of trespass and his contention that the warrant was invalid.
- [4] Mr. Fan concedes that he has not established that the police trespassed when conducting surveillance in this case. In his submission, the remaining issue on this application is whether, after considering the record upon amplification, the search of the residence and outbuilding was conducted pursuant to a validly issued warrant. As set out in paras. 16-20 of Mr. Fan's Notice of Application, he says that the Information to Obtain a Search Warrant (the "ITO") contained false and misleading information, and therefore there was insufficient reliable evidence remaining in the ITO upon which the issuing Judicial Justice of the Peace ("JJP") could have issued the warrant, rendering the search warrantless and presumptively unreasonable, contrary to s. 8 of the Charter.
- [5] Mr. Fan was granted standing in this voir dire on the basis that he had a privacy interest in the residence and outbuilding: he was residing at the Property when the police executed the warrant; he had a key to the residence and gate to the property; his jacket and identification were found in the outbuilding.

II. facts

- [6] Counsel for Mr. Fan challenges numerous statements made by the affiant police officer in the ITO. For convenience, I will set out a significant portion of the ITO.
- [7] In the ITO, Constable Turko said on March 2, 2010:

7. The Property at 1651 Walters Lake Road, Horsefly, is a two storey single family home situated on 40 acres. ... The dwelling (hereinafter referred to as the Residence) is set back approximately 150 yards from the entrance to the property located at 1651 Walters Lake Road. At the rear of the Property is a very large outbuilding (hereinafter be referred to as the Outbuilding).
- ...
11. On February 24th, 2010, Staff Sergeant Warren BROWN ... received information of a possible marihuana grow operation at the Property, the information had been received from an unnamed insurance adjuster ... who wished to remain anonymous. BROWN believes that the Adjuster's information to be reliable. The Adjuster advised BROWN that s/he has been to a number of marihuana grow operations in the past (approximately a dozen) and knows the smell of growing marihuana. The Adjuster advised BROWN the following:
- (a) that there is a stinky marihuana grow operation located at the 6.5 kilometer mark on Walters Lake Road;
 - (b) the Adjuster was at this location on February 23rd, 2010 for business purposes;
 - (c) there were two large dogs on the Property;
 - (d) there is a large out building on this property described as a 'barn' and the odour of growing marihuana seemed to be coming from this building.
- ...
13. On March 1st, 2010, EVANS and I attended the 6.5 kilometer mark on Walters Lake Road and observed the Property referred to in the initial complaint. I observed there were no other residences or driveways located at this location. I observed there was a long unpaved road leading into the Property. I observed the metal roof of the Residence which was green. Walters Lake Road is a very rural road and there are no other dwellings or structures located within approximately 2 kilometers of the Property. This area does not even have access to electrical power (BC Hydro).
- ...
15. While conducting surveillance from the South, I observed the Residence which was a two storey building which had solar panels on the roof. Parked near the Residence were two vehicles. ...
- ...
17. While conducting surveillance from the North, I heard the sound of a gas engine running on the Property. Evans and I approached the rear of the Property and observed a large silver gas tank situated beside a large building constructed of OSB board and metal roofing ... A generator could be heard but not seen from our surveillance point, but it was apparent that the large silver gas tank was used to fuel the generator which was running continuously. Two

power cords were observed running from the generator area towards the Residence. The sound of dogs barking could also be heard while conducting surveillance.

18. EVANS and I walked around to a large clear cut bordering the rear of the Property. While near the rear of the Property I detected a strong smell of growing marihuana coming from the Outbuilding. EVANS also detected the strong scent of growing marihuana coming from the Outbuilding. The wind was coming from the direction of the Outbuilding and was blowing towards EVANS and I. The smell of growing marihuana coming from the Outbuilding remained constant while I stood near the rear of the Property.
19. I observed the Outbuilding was approximately 36'(feet) wide by 150'(feet) long and 16'(feet) high. The Outbuilding was not constructed with any windows and the exterior was unfinished. There was a venting hole facing the rear of the Outbuilding near the floor. ...
20. On March 2nd, 2010 I attended the Caribou Regional District office and spoke with Arnold JENNER. I asked JENNER for a title search print out and a map showing the Property. JENNER provided me with the requested papers. I reviewed the aerial map and the map showing the location of the property. I was confident this was the same property I observed.

...

27. My experience as a police officer finds that residency documents pertaining to addresses including: bills, mail, personal documents, photographs, or anything associating an individual to a property are located in the primary residence and in vehicles. Accordingly, in order to assist in identifying individual(s) responsible for, and associated to, the marihuana grow operation I believe to be on the Property, a search of the Residence, Outbuildings and two vehicles observed on the Property is required. ...

...

30. Based on these observations, information from other police officers, information from the witness, and my experience, I believe that there is currently a marihuana grow operation in the Residence and Outbuilding of the Property. I base my beliefs on the information in this Appendix with emphasis on the following summarizing points:
 - (a) I detected a strong odour of growing marihuana coming from the direction of the Outbuilding.
 - (b) EVANS detected the strong odour of growing marihuana coming from the direction of the Outbuilding.
 - (c) The Adjustor detected the odour of marihuana coming from the Outbuilding.
 - (d) No other private properties or structures within the vicinity of the Property.
 - (e) It is winter and it is not possible to grow marihuana outdoors during this season.

- (f) The house is powered by solar power and the presence of a large generator running is consistent with a significant requirement for electrical power.

...

33. I believe investigators have to strategically coordinate the execution of Search Warrants and that a flexible time period to execute this Search Warrant will be needed. The Property is located over 1 hours drive from Williams Lake in a very remote area. It is possible that the suspects travel from the property periodically. It is my intention to execute the search warrant while the property is occupied. Therefore, I am requesting the Search Warrant be granted from 8:00 am on Wednesday, March 3rd, 2010 up to 6:00 pm on Thursday, March 4th, 2010.

- [8] The parties also filed admissions on the voir dire, which stated as follows:

1. The Caribou Regional District aerial photo of 1651 Walters Lake Road viewed by Constable Turko and Corporal Evans on March 2nd (Exhibit 6) on voir dire #1 was taken in 1998. The top of the page is north.
2. Arnold Jenner is a geographic information systems technician. He has been employed at the Caribou Regional District office in Williams Lake for the past 22 years.
3. He is an expert in the creation of maps and the plotting of survey data and data obtained from BC Assessment on maps so as to accurately plot property lines.
4. Arnold Jenner plotted the "box" (square boundary lines) on Exhibit 6 on voir dire #1.
5. This "box" is the property line of 1651 Walters Lake Road.
6. The land outside the "box" was Crown land at all material times.
7. Attached as Schedule "A" to the second admissions filed on the voir dire is Arnold Jenner's diploma from the College of New Caledonia.

III. Law

A. General principles

- [9] Under the Charter, before a warrant may be issued and a search conducted, the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search": *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 168. These requirements form part of the "minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure": *Hunter* at 168.

[10] In determining whether a search warrant was properly issued, however, the test is "whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued": *R. v. Araujo*, 2000 SCC 65 at para. 54 (original emphasis). In the foundational case of *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452, the Supreme Court of Canada stated the test as follows:

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

See also *R. v. Bacon*, 2010 BCCA 135 at para. 25, leave to appeal ref'd [2010] S.C.C.A. No. 213.

[11] The reviewing court therefore does not conduct its review solely on the basis of the ITO as it was presented to the authorizing justice: *R. v. Morelli*, 2010 SCC 8 at para. 41. Rather, the reviewing court must excise erroneous information from the ITO and account for omissions of material facts which violate "[t]he legal obligation on anyone seeking an ex parte authorization [to make] full and frank disclosure of material facts": *Araujo* at para. 46 (original emphasis).

[12] But the reviewing court may also refer to additional evidence presented at the voir dire, so long as this additional evidence corrects some minor, technical errors made in good faith by the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice: *Araujo* at para. 59; *Morelli* at paras. 41-43. Accordingly, the scope of this "amplification" evidence on a review is narrow: *Araujo* at paras. 56-59; *Morelli* at paras. 41-43. The Crown is not entitled, in the first instance, to seek to improve or bolster the information in the ITO or to correct errors in it: *R. v. Wilson*, 2011 BCCA 252 at para. 66. Further, amplification evidence cannot be used if it was obtained by unconstitutional means or to amplify fraudulent or intentionally misleading material in the ITO: *R. v. Morris* (1998), 134 C.C.C. (3d) 539 at 569 (N.S.C.A.). In *Wilson*, Frankel J.A. succinctly summarized the use that can be made of amplification evidence in the following manner:

[68] This brings me to amplification. It is important to keep in mind that in *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, as in *Garofoli*, the discussion with respect to amplification arose in the context of "new" facts being brought out through cross-examination (which I take to include proper re-examination). As discussed by Mr. Justice LeBel in *Araujo*, amplification cannot be used to circumvent the need for the informant to satisfy a justice of the peace that the requirements for the issuance of a search warrant have been met. However, if the evidence on the voir dire reveals that the informant, "in good faith, made some minor, technical error in drafting", then, on the review, those errors can be taken as corrected...

- [13] On review, then, after excising the erroneous information and taking into consideration the facts found to have been omitted by the affiant police officer, the question is whether the reviewing court can be satisfied that the remaining information is reliable, independently verifiable, and not affected by any findings that factual assertions were misleading, such that there is some basis upon which the authorization could have been granted: *R. v. Monroe* (1997), 8 C.R. (5th) 324 at para. 25 (B.C.C.A.). This requires a review of the "totality of the circumstances", whereby the court assesses the facts cumulatively and "on a practical, non-technical, and common-sense basis": *Wilson* at para. 52.

B. Duties of the affiant police officer

- [14] The process of prior authorization is integral for the prevention of unreasonable searches. It provides an opportunity to assess and weigh the conflicting interests of the state and the individual in order to ensure that an individual's right to privacy is breached only when the interests of the state are demonstrably superior. This, in turn, ensures that the rights of all individuals are respected before, not after, the fact.
- [15] Given the importance of this process to the protection of Charter rights, the police are obliged to make full and frank disclosure of material facts, avoid boiler plate language and, whenever possible, obtain an affidavit directly from those with firsthand knowledge: *Araujo* at paras. 46-49.
- [16] As stated in *Garofoli*, however, just because the affiant police officer has a duty to make full, fair, and frank disclosure, it does not necessarily follow that a failure to do so will in itself invalidate the warrant — even in cases involving fraud or material non-disclosure in the ITO: see *Wilson* at paras. 48-51, citing *R. v. Bisson* (1994), 87 C.C.C. (3d) 440 at 455. Rather, the reviewing court is required to determine the consequences of this non-disclosure with respect to the ITO considered as a whole.
- [17] Overall, a reviewing court may invalidate a warrant, despite the presence of reasonable and probable grounds to issue it, where it concludes that police conduct was so subversive of the authorizing process that the resulting warrant must be set aside to protect the process and the preventive function it serves: *R. v. Bishop*, 2010 BCSC 1927 at paras. 47-61, citing *Morris* at 568-569 and *R. v. Colbourne*, [2001] O.J. No. 3620 (C.A.). But it appears that this is a high threshold to meet: *Lahaie v. Canada (Attorney General)*, 2010 ONCA 516 at para. 40.

C. Considering anonymous tips and the smell of marijuana on review

- [18] Several particular categories of evidence have received judicial consideration in the context of a review of an authorization. Two categories are relevant in this case: (i) tips from an anonymous police informant, and (ii) the smell of vegetative marijuana.

- [19] In *R. v. Caissey*, 2007 ABCA 380, aff'd 2008 SCC 65, the Alberta Court of Appeal recently considered how courts should approach reviewing the issuance of a search warrant based on information provided by a first-time informant. The majority stated that where the affiant police officer relies on information obtained from a police informer, the reliability of the information must be apparent in light of the totality of the circumstances:
- [17] ...In *Garofoli*, the Supreme Court of Canada summarized the propositions from *Debot* and *Grefe* as follows (at 1456 - 57):
- (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
 - (ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:
 - (a) the degree of detail of the "tip";
 - (b) the informer's source of knowledge;
 - (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.
 - (iii) The results of the search cannot, ex post facto, provide evidence of reliability of the information.
- [20] Reliability of an informant may therefore be established by confirmation from other investigative sources of part, or all, of the information provided by the informant: see also *Araujo* at para. 51. This includes by police surveillance: *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), aff'd [1989] 2 S.C.R. 1140; *R. v. Plant*, [1993] 3 S.C.R. 281. Again, the issue on review is whether there was sufficient evidence that might be reasonably believed to support the issuance of the warrant, not whether there was some guarantee that the informant was telling the truth when he made the allegation of criminal activity: *Caissey* at para. 23; *R. v. Lewis* (1998), 38 O.R. (3d) 540 at 548-549 (C.A.).
- [21] With respect to the smell of vegetative marijuana, although the review of an authorization is highly fact-sensitive, the case law supports the proposition that its detection outside a building by police may, by itself, provide sufficient grounds for the issuance of a search warrant: *R. v. Readhead*, 2008 193; *R. v. Sievert*; *R. v. Barron*, 2000 BCCA 575; *Monroe* at para. 24; *R. v. Nguyen*, 2012 BCSC 1758; *R. v. Hennessy*, 2005 BCSC 408; *R. v. Wojcik and Wojcik*, 2010 BCPC 343 at para. 28. As the Court of Appeal noted in *Monroe* at para. 24, however, "one would generally expect an explanation for other factors not being established". Accordingly, as discussed by Barrow J. in *Hennessy* at paras. 33-34, in the course of investigating a grow operation, police officers should make good faith efforts to determine whether there are any further indicia common to grow operations present, including: the otherwise unexplained

presence of condensation on windows; windows that are boarded or otherwise obscured in an unusual way; evidence developed through the use of heat-seeking devices; the unusual consumption of power; visitors frequently coming and going at odd hours; or evidence specifically related to grow operations, such as soil nutrient containers and other kinds of agricultural or electrical products related to the production of marijuana.

- [22] Furthermore, in order to ensure that the evidence of the presence of the smell is reliable, police officers are required to sufficiently localize the smell to the property which they sought to search. If adjoining residences are not sufficiently excluded, then, without more, the detection of the smell of marijuana cannot be relied upon for the issuance of a warrant: see *R. v. Oakley*, 2002 BCSC 1837; *Nguyen* at para. 49. The police in those circumstances are required to gather further evidence of "activity consistent not only with a grow operation but inconsistent with other lawful activities": *Oakley* at para. 29. This is why the police often use the practice referred to as "squaring", particularly in residential areas, where isolating the source of the odour is very difficult because there are several possible sources.
- [23] Lastly, reliability may be further enhanced if the smell is detected on a number of different occasions or confirmed by more than one person: *Hennessy* at paras. 26-27. Again, whether the evidence of the smell is reliable — and where it is the only evidence upon which to base the granting of a search warrant, sufficient — is determined based on the specific facts of the case. It is clear from the case law, however, that evidence of the smell of marijuana which is sufficiently localized to the specific property together with some other evidence commonly indicative of a grow operation, as discussed above, will usually be sufficient to support the granting of a search warrant: see *Monroe*; *Sievert*; *R. v. Cooke*, 2012 BCSC 104; *R. v. Berry and Simpson*, 2002 BCSC 1742 at para. 51.

IV. discussion

A. Mr. Fan's position

- [24] Mr. Fan argues that Constable Turko made various factual errors and misleading statements in the ITO which should be excised. He takes particular issue with the information provided by the adjuster and the location of the buildings on the Property. He also challenges Constable Turko's account of his and Corporal Evans' ability to make observations, and Constable Turko's statements that there were "suspects" at the Property and that the Property was occupied. Lastly, Mr. Fan argues that Constable Turko made misleading statements in the ITO, particularly with respect to: the location of the residence and outbuilding on the Property; his concern that he may have trespassed on the Property; and the information available to him that there was a possible grow operation on the Property in June 2009.
- [25] He says that the following information should be excised from the ITO:
- a. The Adjuster was "unnamed": para. 11;

- b. A large outbuilding was located on the Property: paras. 7, 27, 30, 31;
 - c. A residence was located on the Property: paras. 7, 27, 30, 31;
 - d. There is a marijuana grow operation on the Property: paras. 27, 30;
 - e. Constable Turko "observed the Property referred to in the initial complaint": para. 13
 - f. There are "no other dwellings or structures located within approximately 2 kilometers of the Property": para. 13:
 - g. "While conducting surveillance from the [s]outh", Constable Turko observed the residence: para. 15;
 - h. Constable Turko and Corporal Evans made observations near the "rear" of the Property: paras. 17, 18;
 - i. Constable Turko and Corporal Evans walked to "a large clearcut bordering the rear of the Property": para. 18;
 - j. Constable Turko and Corporal Evans both smelled growing marijuana coming from the outbuilding: para. 18;
 - k. There was a "venting hole facing the rear of the Outbuilding near the floor": para. 19;
 - l. Constable Turko heard the sound of a "generator", "[t]wo power cords were observed running from the generator area towards the Residence", and the "house is powered by solar power": paras. 17, 30(f);
 - m. The adjuster detected the odour of marijuana coming from the outbuilding: para. 30(c); and
 - n. There were "suspects" at the Property and the Property was "occupied": para. 33.
- [26] Mr. Fan argues that once this erroneous, misleading and unreliable information is excised, as it should be, there is insufficient information remaining to justify issuing a warrant. With regard to the smell of vegetative marijuana which Constable Turko and Corporal Evans noted was coming from the Property, Mr. Fan argues that smell is highly subjective and, in any event, that such evidence in this case is not reliable because Constable Turko did not "square" the Property so that the source of the smell could be sufficiently identified. He similarly argues that the information from the adjuster regarding the smell is unreliable.
- [27] Finally, Mr. Fan says that the outbuilding was off of the Property and that the search of it was warrantless and presumptively unreasonable.

B. The Crown's position

- [28] The Crown responds to each of Mr. Fan's arguments.

- [29] It first argues that the reference to the adjuster as "unnamed" is of no significance, as the adjuster wished to remain anonymous. The word "unnamed" may be excised without any effect.
- [30] The Crown further argues that Mr. Fan has not been able to demonstrate on a balance of probabilities that the outbuilding is not on the Property. It says that it is difficult to determine how much, if any, of the residence extends off of the Property. It further says that Exhibit 9 suggests that whatever portion of it, if any, that extends off of the Property is not significant enough for the authorities to be concerned. Finally, the Crown says that if any portion of the outbuilding or the residence were off the Property, they would be on Crown land. In that event, the warrant would apply to the search of the portion of the building which is on the Property and there would be no need for a warrant to search the portion which is on Crown land.
- [31] The Crown also argues that there is no basis for excising anything from the ITO relating to the residence. It submits that there was a credibly-based probability that marijuana or related evidence would be found in the residence, despite no marijuana odour coming from it. It says that the absence of odour from the residence is, at most, a neutral fact. A residence is often part of a marijuana grow operation, containing such things as packing materials, clone plants and equipment used in cultivating marijuana.
- [32] In addition, the Crown submits that there is ample evidence that the property which the police observed was the same property as identified by the adjuster. The Property is the only property at the 6.5 kilometer mark. It is in a very isolated location.
- [33] The Crown further says that the reference to "no other dwellings or structures located within approximately 2 kilometers of the Property" is in relation to the Property as a whole. And although Constable Turko did not refer to a log cabin on the Property, this was due to an inadvertent oversight, not intentional trickery. There is no evidence that it was occupied or used in any way, and no one has suggested that it could have been the source of the odour of marijuana.
- [34] The Crown submits that while the police officers may have been confused with respect to the directions from which they made their observations, their observations were validly made and should not be excised. The Crown says that the reference to a large clear cut "border in the rear of the Property" is not misleading and was not made with any intention to mislead.
- [35] With respect to the smell of growing marijuana, the Crown argues that Constable Turko said that the smell did not come from the residence and that the only place that the smell could have come from was the outbuilding. Furthermore, both Constable Turko and Corporal Evans smelled growing marijuana coming from the outbuilding. It says that the odour was sufficiently localized to the Property by the surveilling officers.

- [36] The Crown says that it is reasonable for Constable Turko to describe the sound that he heard as that of a generator, as he is familiar with that sound. Further, it is reasonable to make the inference that the large silver gas tank near the generator was for fuel for the generator. Similarly, a logical inference can be made that the two power cords which Constable Turko observed running towards the residence were coming from the generator. Given that the area has no access to electrical power, any power being used was being created through some other source.
- [37] The Crown also says that paragraph 33 of the ITO should not be excised simply because Constable Turko acknowledged that he wished to execute the search warrant while the Property was occupied, or for any other reason. In its submission, referring to people on the Property as "suspects" is of no consequence. The Property is remote and the presence of vehicles suggests that people attended the Property from time to time for the business of the grow operation.
- [38] The Crown argues that there is no material non-disclosure in this case. Constable Turko testified that he did not see the notation on the materials received from the district which suggested a possible grow operation was on the Property in 2009. The Crown says that there is no evidence of any sort that Constable Turko set out to deliberately mislead the issuing JJP, and it further submits that the applicant has failed to establish material non-disclosure on the balance of probabilities.
- [39] Finally, the Crown argues that after the review process, there is sufficient reliable evidence on which the JJP could have issued the warrant.

C. Upon amplification, was there reliable evidence that might reasonably be believed on the basis of which the warrant could have issued?

- [40] Upon amplification and in the totality of the circumstances, was there reliable evidence such that an authorizing judge could have been satisfied there were reasonable grounds to believe that marijuana or evidence relating to the growing of marijuana would be found inside the outbuilding or in the residence on the Property?
- [41] Everything must be viewed in context. The search warrant here was not issued solely upon the basis of information from an anonymous informant. Rather, the information comprised evidence from an informant and from police surveillance. As discussed above, the value of all aspects of that information must be assessed not individually, but in light of the "totality of the circumstances": *R. v. Saunders*, 2003 NLCA 63, aff'd 2004 SCC 70; *Caissey*.
- [42] Although counsel for Mr. Fan makes several arguments that the evidence in the ITO was false or misleading, such that there was insufficient reliable evidence to justify issuing a warrant, I am satisfied that there was evidence, after amplification, on which the warrant could have issued.
- [43] I propose to first address the information which Mr. Fan seeks to have excised from the ITO.

- [44] First, in relation to the "unnamed" adjuster, I do not consider that this was a misleading statement. The individual wished to remain anonymous and the JJP was informed of this fact. Nevertheless, I agree with the Crown that the word "unnamed" may be excised without any effect.
- [45] Next, I do not accede to Mr. Fan's argument that the police did not attend the correct property. The police went to the 6.5 kilometer mark on Walters Lake Road as a result of the tip received by Staff Sergeant Brown. I accept the officers' evidence that there was no other private property in the vicinity. In my view, the words "and observed the Property referred to in the initial complaint" are not factually incorrect and should not be excised from the ITO. At any rate, as discussed below, I find that the police found reliable evidence of a marijuana grow operation on the Property which would have been sufficient to justify the warrant.
- [46] Third, although it would have been better for Constable Turko and Corporal Evans to attend at the Caribou Regional District office and obtain Exhibit 6 prior to their attendance at the Property, Constable Turko was satisfied after reviewing Exhibit 6 that he and Corporal Evans did not trespass on the Property. Moreover, as Mr. Fan concedes, he has not established on a balance of probabilities that police trespassed on the Property in the course of conducting the surveillance.
- [47] Fourth, with respect to the location of the outbuilding, I am unable to conclude that it is off the Property. Constable Turko was adamant that the outbuilding was on the Property, and I am not satisfied that he was mistaken. Although counsel for Mr. Fan invited me to look at the aerial photos introduced as exhibits on the voir dire and conclude that the outbuildings are indeed off of the Property, I am not able to do so. Looking at the aerial photos, the most that I can say is that the outbuilding might be off of the Property. I therefore do not accede to the argument of counsel for Mr. Fan that Constable Turko made false or misleading statements in the ITO concerning the outbuilding's location on the Property.
- [48] As for the residence, it appears from Exhibit 6 that some portion of it might be off of the Property. However, the appearance of the structure crossing the Property line may simply be an anomaly caused by the angle of the photograph. Certainly, looking at Exhibit 9 on the voir dire, it does not appear that the B.C. Assessment Authority was concerned with respect to the location of the residence. I cannot conclude on a balance of probabilities that any portion of the residence is off of the Property.
- [49] But even if some portion of either building was located off of the Property, what is the significance? If the buildings are located off of the Property, then they are located on Crown land; if they are located on Crown land, then there is no need for a warrant to search on Crown land and Mr. Fan would have no privacy interest. The warrant to search the portion of the buildings on the Property would therefore be unaffected in this case if some of the buildings were off of the Property.

- [50] Furthermore, I find that had the JJP been provided with the additional information that some portion of the residence, such as the front porch, may be protruding onto Crown land, there would still have been evidence upon which the warrant could be granted. Similarly, had the JJP been advised that it was not possible without a survey to determine whether the outbuilding was properly located on the Property or on Crown land, in my view, there was sufficient reliable evidence upon which the justice could have issued the warrant.
- [51] In addition, Constable Turko's statement that he believed that there was a grow operation in the residence is not misleading. As he testified on the voir dire, in his experience, the residence is often used in a grow operation for growing clone plants. Further, the absence of the odour of marijuana is not evidence that there is no grow operation in progress; rather, it is a neutral fact: Readhead at paras. 8-9.
- [52] And even if the reference to the "grow operation in the Residence" is excised from para. 30, given the information provided in para. 27 of the ITO, I find that there was sufficient reliable evidence to support the issuance of a warrant to search the residence. The issuing JJP could have, on a common sense basis and on a totality of the circumstances, reasonably concluded that evidence relating to the grow operation would be found in the residence.
- [53] Sixth, although it is apparent from the evidence of Constable Turko and Corporal Evans that they had different views as to their directions when they made various observations on the Property -- e.g., what Constable Turko perceived to be north, Corporal Evans perceived to be east -- on cross-examination, each officer identified the location where they were standing when they made specific observations as to the generator, the smell of vegetative marijuana, the outbuilding, and the residence. It appears that the officers inadvertently provided incorrect directions. This can be corrected on amplification. In any event, in my view, no doubt has been cast on the reliability of Constable Turko's statements in the ITO that the officers had determined that the odour was coming from the direction of the outbuilding on the Property and that they could view the outbuilding and the residence: see Wilson at para. 54. Also, whether the odour was constant or could be detected in gusts does not lead me to conclude that Constable Turko provided misleading evidence on that point.
- [54] Seventh, though Constable Turko did not refer to what defence counsel described during cross-examination as an "old, broken-down log cabin" on the Property, I accept that this was an inadvertent oversight which is of reduced materiality given that there is no evidence that it was being used in the grow operation or that it could have been the source of the odour of marijuana. This may also be corrected on amplification. Accordingly, on amplification, para. 13 may now read as: "aside from a log cabin located near the Residence, there are no other dwellings or structures located within approximately 2 kilometers of the Property".
- [55] Further, I do not agree with counsel for Mr. Fan that Constable Turko's statement in para. 19 contradicts his statement in para. 13. Rather, I agree with the Crown that Constable Turko, in para. 19, was stating that he could not observe any further outbuildings on the Property itself. As I understand Constable Turko's testimony on voir dire, he believed that, aside from

those located on the Property, there were no other dwellings or structures in the vicinity of the Property because there were no driveways to any other residences within one kilometre in each direction of the Property along Walters Lake Road.

- [56] Certainly, Constable Turko could have been clearer and more precise in his evidence relating to any dwellings and structures located on and within the vicinity of the Property. In addition, I agree with defence counsel that Constable Turko should have inquired about the date of the aerial map. However, I do not consider that Constable Turko was attempting to mislead the issuing JJP or to overstate his evidence. I agree with the Crown that, on amplification, the evidence demonstrates that the Property is indeed extremely isolated and that the smell of marijuana came from the direction of the outbuilding on the Property.
- [57] In any case, even if those words in para. 13 and the similar language in para. 30(d) are excised, there was sufficient evidence to justify a warrant. The remaining evidence in para. 13, which was unchallenged, establishes that Walters Lake Road is, in fact, a "very rural road", that the Property is extremely isolated, as evidenced by the fact that it does not have access to electricity, and that the odour came from the Property.
- [58] Eighth, with respect to the informant's evidence, in my view, although Mr. Fan takes the position that the tip was unreliable because it provided little detail -- there is no description relating to the location where the smell was detected, its strength, or its duration -- in the totality of the circumstances, I find that the tip was sufficiently reliable.
- [59] The informant directed the officers to the Property at the 6.5 kilometer mark on Walters Lake Road. Based on the amplified record which demonstrates that the Property is extremely isolated, I agree with Crown that this is equivalent to providing a specific address to a residence. Further, given that the residence, the outbuilding and a log cabin were the only significant structures on the Property, I find that the informant, who described the outbuilding as a 'barn', sufficiently detailed the building from which the odour came. I do not think it is relevant in this case that the informant described the building as a 'barn' rather than as an 'outbuilding', which is a vague term in itself. Also, consistent with the informant's tip, the officers heard dogs barking. Lastly, the officers, through their own surveillance, independently determined that the smell of vegetative marijuana was coming from the outbuilding. This corroborated the informant's evidence that the smell 'seemed' to be coming from a large building on the Property. To borrow language from the Supreme Court of Canada in *Plant*, the tip here was compelling enough in its specification of the place in which the offence was occurring for the police to readily locate the exact address and corroborate the informant's report.

- [60] In any event, as already stated, given that the officers conducted their own independent investigations, I find that the informant's evidence could be excluded entirely and there would still be sufficient evidence to justify issuing a search warrant. The information from the informant may have caused the police to attend at the 6.5 kilometer mark on Walters Lake Road, but thereafter they conducted their own surveillance. That evidence was put before the JJP and he issued the search warrant.
- [61] Ninth, I accept Constable Turko's evidence that he did not remember seeing the notation relating to the grow operation in Exhibit 9, and I agree with the Crown that there is no basis to conclude on a balance of probabilities that he did.
- [62] Tenth, as for the reference to "suspects" in para. 33 of the ITO, I do not consider that this is of consequence. Whether one refers to them as 'suspects' or as 'individuals', it is clear that the police were of the view that there were people present based on the vehicles, the sound of the generator running, and the power cords running from the generator's location to the residence. As Constable Turko indicated, the police wished to execute the search warrant while the individuals were present at the Property.
- [63] Similarly, I do not consider that Constable Turko's description of the hole on outbuilding as a "venting hole" is of great consequence. Even if this could be considered a conclusory statement, the word "venting" may be excised without any effect.
- [64] Eleventh, there is no basis for excising any information relating to the generator, solar panels or power cords. Although he was challenged on his evidence, I accept that Constable Turko saw two power cords running between the residence and the outbuilding and that he heard the noise of a gas engine coming from the outbuilding.
- [65] Further, given his past experience in investigating or dismantling at least 16 marijuana grow operations, I do not consider that Constable Turko misled the JJP by stating that he heard the sound of a "large generator". As he explained during cross-examination, the noise from the gas engine became louder as the officers approached the outbuilding; and based on the level of noise, he determined that it was not a lawnmower or other small appliance, but rather a generator of significant size. Moreover, in my view, the presence of the large gas tank near the outbuilding supports this belief.
- [66] Certainly, Constable Turko should not have made such a conclusory statement about the size of the generator based only on the sound. The issuing justice should be allowed to draw his own inferences and come to his own conclusions. But as Grauer J. recently noted in *R. v. Snider*, 2012 BCSC 1906 at para. 15, an ITO will not be set aside simply because it contains conclusory statements. In fact, even though conclusory statements cannot form the basis for a warrant, "they may be helpful in disclosing how the evidence is viewed through the lens of a police investigator": *Snider* at para. 16.
- [67] I do not find in the evidence before me that there was deliberate deception on the part of the police or any deliberate attempt to mislead the JJP who issued the search warrant.

- [68] After receiving a fairly detailed tip in the circumstances, the police conducted their own surveillance and obtained some reliable evidence that might reasonably be believed upon which the JJP could have granted the search warrant.
- [69] The tip led them directly to the Property. Upon visiting the Property, Constable Turko heard dogs barking, observed a large outbuilding, and smelled a strong odour of vegetative marijuana which he identified as coming from the direction of that outbuilding on the Property, corroborating the informant's tip. Although Constable Turko could not see behind the outbuilding, the amplification evidence establishes that the Property is extremely isolated and that there are no other buildings or properties in the vicinity of the Property from where the smell could be emanating. Unlike in Oakley, where the house in question was in a residential neighbourhood and the officer failed to localize the smell to the particular house, the Property here is extraordinarily remote and is surrounded by Crown land. Further, there is no evidence to suggest that the log cabin was the source of the smell. Lastly, the reliability of this evidence is enhanced by the fact that Corporal Evans also smelled vegetative marijuana and identified the outbuilding as the source. Accordingly, I consider that the evidence of the odour of marijuana was sufficiently localized to the Property, if not to the outbuilding itself. As discussed in Hennessey, among several other cases as noted above, the evidence of smell alone has been found to support the granting of search warrants.
- [70] But smell is not the only evidence of a marijuana grow operation in this case. This is a very remote property, with the sound of a generator running continuously, power cords running from the location of the generator to the residence, silver gas tanks for fuel storage, and a large outbuilding constructed without windows and with a hole at the rear. Examining the totality of the circumstances, I am satisfied that there was some evidence that might reasonably be believed upon which the JJP could have granted the search warrant.

V. conclusion

- [71] After considering all of the issues raised by counsel, I am satisfied that there was reliable evidence that might reasonably be believed on the basis of which the warrant could have issued.

The Honourable Madam Justice B.J. Brown

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Prepared on 27 October 2026 · Esheria