
CANADA / JUDGMENT

R. v. Hugh

2014 BCSC 1426

COURT

Supreme Court of British Columbia

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2014 BCSC 1426 R. v. Hugh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Hugh,

2014 BCSC 1426

Date: 20140502

Docket: 26215

Registry: Vancouver

Regina

v.

Kevin Anthony Hugh

Before: The Honourable Mr. Justice Schultes

Ruling on Voir Dire #2

(Search Warrants)

Counsel for the Crown:

C. Fast

Counsel for the Accused:

M. Nohra

M.N.E. Cowper

Place and Date of Trial:

Vancouver, B.C.

September 18-20, 2013

November 28-29, 2013

December 6 and 13, 2013

Written Submissions of the Accused:

January 31, 2014

Written Submission of the Crown:

February 13, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 2, 2014

1. Introduction

- [1] This *voir dire* deals with alleged Charter breaches by the police in the course of obtaining search warrants for a commercial property leased by Mr. Hugh and his spouse, and for their home. The principal Charter breaches are said to arise from observations by the investigators from the roof and fire lane of the commercial property, and from a traffic stop of Mr. Hugh's vehicle that was undertaken at the investigators' request. Mr. Hugh's counsel also submits that portions of the Informations to Obtain the warrants (the "ITOs") were drafted in an inaccurate and misleading way. The defence position is that after one subtracts all of the improperly obtained and inaccurate content from the grounds for these warrants, no basis remains on which they could have been issued.
- [2] The appropriate procedure to be followed is not in issue. Any grounds that are found to have been obtained by a breach of the accused's Charter rights must be excised from the ITOs, as must any false or misleading statements in them. If the excisions leave insufficient grounds remaining on which the warrants could have been issued, the resulting warrantless search will be presumptively unreasonable and constitute a breach of s. 8. Even if sufficient grounds remain to sustain the warrant, it must still be determined whether any Charter breaches that occurred during the obtaining of the warrant are sufficiently connected to the evidence obtained that they should lead to exclusion of that evidence: *R. v. Grant*, [1993] 3 S.C.R. 223 at paras. 50, 55, and 57.
- [3] The search warrants were issued on August 30, 2011. One was for the leased commercial property at Unit 160, 12855 Clarke Place (the "Clarke Property"), and the other was for a residence at 1802 - 6233 Katsura Street (the "Katsura Property"). Both locations are in Richmond.

- [4] The grounds for these warrants came from an investigation carried out by members of the Richmond RCMP's Marihuana Enforcement Team over the preceding six weeks. Cst. Strikwerda was the author of the ITOs.
2. Observations from the Roof and Fire Lane
- a. The Clarke Property
- [5] The Clarke Property is one of nine two-level office and warehouse units, each bearing separate unit numbers, which are all part of a single building with the street address of 12855 Clarke. The building is roughly 20 feet high. The units are separated from each other within the building by internal walls, but there was evidence that there are gaps between the tops of these walls and the roof that allow air to circulate between the units.
- [6] The building shares a common parking lot with an identical set of units that has a different street address - 12851 Clarke. These two sets of units face each other across the parking lot. The units in both buildings are strata-owned and they share the same strata council. One property management company manages both buildings on behalf of the strata council.
- [7] The normal approach to Unit 160 (the one to which Mr. Hugh was associated) would have been by walking or driving into the parking lot, and then entering it by using the front door. There is also a large garage door next to the front door, which appears from the photographs in evidence as if it would roll up to allow entry. In addition, there is a door from the unit to the rear of the building.
- b. The Fire Lane
- [8] The rear door opens onto a narrow grassy fire lane formed by the backs of this building and one behind it. The door to Mr. Hugh's unit closes flush to the back wall of the building, but there is quite a large gap between the bottom of the door and the frame below it, which is part of the building's outer wall. All of the other units in the building have similar rear doors to the fire lane, although there was evidence that the gap between the door and the frame at the bottom was wider for Mr. Hugh's unit.
- [9] At the time of this investigation the grass in the fire lane was unkempt and stood two or three feet high. The lane could be accessed from Clarke Place by walking around and then under the branches of a large tree near the edge of the street. This tree appeared from the photographs to completely obscure the view of the fire lane from the road. The lane was enclosed at the far end (that is, the end farthest away from Clarke) by a chain-link fence with barbed wire on the top.
- [10] The doors to access the building's water and mechanical systems were also at the rear.

- [11] Fenton Davis, the president of the building's strata council, testified that while there would be nothing physically impeding the access by members of the public to this rear fire lane, he would consider them to be trespassing because they would have no business there. No signs were posted to that effect though.
- [12] Cst. Strikwerda made observations of the interior of Unit 160 from a position in this rear fire lane on July 13, 14, and August 10. He did so by placing himself prone, in a push-up like position, and looking through the gap between the bottom of the door and the frame. He also entered the fire lane area on July 21 and made observations about objects there that he believed were connected to marihuana growing, which he attributed to Unit 160 in his ITOs.
- [13] He did not believe that he needed permission to access the fire lane for these observations because it was an area that was accessible to the public, and he did not seek it. His understanding of the law is that it is permissible to make observations of things that are within a building, as long as one is located on publicly-accessible property.
- c. The Roof
- [14] Cst. Strikwerda also accessed the roof of the building with Cst. Deweert three times - on August 9, 24, and 30. He used a scissor lift that was loaned to the RCMP by the City of Richmond. There was some dispute about whether Cst. Deweert was actually present on the 24th, since he has no notes of that event and did not recall being there, but nothing ultimately turns on that fact for the purposes of this voir dire.
- [15] It is common ground that the odour of fresh marihuana emanating from the roof vents that appeared to correspond to Unit 160, which Cst. Strikwerda noted on August 9 and 30, is the most important evidence in the ITOs of marihuana being grown within that unit. On the 24th the officers detected only warm humid air and a chemical smell emanating from the vent for Mr. Hugh's unit. While this is also indicative, according to Cst. Strikwerda's experience, of an active marihuana growing operation, it is less specific and probative than the actual odour of marihuana.
- [16] When they accessed the roof, these officers were relying on consent, initially from the building's property manager, but later from Mr. Davis on behalf of the strata council.
- [17] Cst. Deweert had been involved in an investigation of a unit in the 12851 building (across the parking lot) in March of that year. Mr. Davis had made the original complaint. Cst. Deweert had asked Mr. Davis who could give police permission to access the roof of 12851 and Mr. Davis referred him to the complex's property manager, Mr. Spencer, who turned out to be only the person filling in for the regular manager. Mr. Spencer then gave permission to the police to access the roof of 12851. Cst. Deweert's investigation of the unit in that complex turned out to be fruitless.

- [18] Cst. Deweert appears to have been the member of the investigative team responsible for securing consent to access the roof in August, for the investigation of the unit associated to Mr. Hugh. His evidence was that for the initial time on the roof on August 9, they relied on the implied consent of the property manager, although Mr. Spencer had never mentioned 12855 when he gave his permission back in March.
- [19] Cst. Deweert then began to be concerned about the validity of that consent. As a result he spoke to Mr. Davis in his capacity as president of the strata council on August 16, and obtained permission specifically for the roof at 12855. With welcome candour, Cst. Deweert explained in cross-examination that they were "covering [their] butts" to make sure they had authority for the next rooftop check.
- [20] It was not clear to Cst. Deweert why, if he was able to give consent on August 16 in the capacity of strata president, Mr. Davis had not simply given permission for the investigation in March and for their initial time on the roof on August 9. He was the complainant for the August investigation as well.
- [21] Cst. Strikwerda spoke to Mr. Davis himself for the same purpose on August 24, after they had already accessed the roof earlier on that day.
- [22] Mr. Davis testified that he believed he had authority as strata president to grant the investigators access to the roof of 12855 for their investigation in August. In his view, the roof of 12855 is common property of the strata complex, and does not form part of any of the individual strata units that it covered. As an illustration of this separate status, he explained that owners need to get permission before making any adjustments to the roof, such as adding air conditioning units to the area over their particular unit.
- [23] The owners also share equally in the cost of re-roofing and in 1989 enacted in their bylaws a provision that all common area repairs "including roof leaks" would be covered by the "strata funds".
- [24] As I said at the beginning, Mr. Hugh was leasing this unit with his spouse, Ms. Silverstone. As lessees, they had no rights or status in relation to matters that were under control of the strata council. Their lease reserved no special privileges to the landlord or strata council to permit access to their unit, beyond what any owner is subject to under the strata's bylaws.
- [25] Section 7 of the bylaws (which are the standard bylaws in the legislation, available to be adopted by strata councils) allows for access to strata units immediately in the case of emergency or on 48 hours' notice in order to inspect, repair, or maintain common property.
- [26] Although the bylaws also provide for council meetings to decide strata complex business, including in the case of emergencies, and do not give authority to any individual council member to take unilateral action, Mr. Davis believes that a council member or the property manager can "give right", as he described it, to access the roof.

[27] The strata plan for the building was entered as an exhibit. The plan drawing for the 12855 building, showing a view as though looking down on the units from above, does not label the roof as common property, although the electrical room and an area between the front of the units and their respective parking spaces are labelled in that way. However, another plan diagram, showing a street-level view of the complex, has only the electrical room labelled as common property. It does not describe as common property that area between the front of the units and the parking spaces.

d. Submissions

[28] The defence submits that the observations by the police that I have described are analogous to the warrantless perimeter searches on private property that were found to be s. 8 violations by the Supreme Court of Canada in the landmark case of *R. v. Kokesch*, [1990] 3 S.C.R. 3. In that case Justice Sopinka denounced intrusive investigative techniques that are undertaken in circumstances where the police have nothing but suspicion and no legal way to obtain other evidence. In those circumstances, Kokesch emphasizes that the citizen must simply be left alone. The defence says that is an apt description of the present situation.

[29] Sniffing for the odour of marihuana is, in the defence submission, certainly as much of a search as any other kind of perimeter observation, and the concept of an implied invitation by a homeowner to have people approach their front door obviously cannot encompass an invitation to engage in searches of the areas of the building that were accessed by the police in this case.

[30] The defence also submits that the police never obtained any valid consent to access the roof for their observations. Mr. Spencer's permission back in March did not address the 12855 Clarke building at all, and Cst. Deweert admitted that his actions in following up with Fenton Davis after the August 9 search were based in his own lack of confidence about whether that so-called implied consent extended to 12855. He also admitted, as I have said, that it was never clear why Mr. Davis now felt he could grant that permission on August 16 when he had previously referred Cst. Deweert to the property manager.

[31] For his part, Cst. Strikwerda never confirmed with Cst. Deweert the nature of their authority to enter onto the rooftop, despite Cst. Deweert's role as the contact with Mr. Davis. Cst. Strikwerda went on to confirm the permission with Mr. Davis himself on the 24th, despite having carried out another rooftop visit without such confirmation earlier in the day.

[32] More fundamentally, the submission is that any consent to be relied on by the Crown as justifying these searches had to have been given by someone with the actual authority to do so. It is essential, the defence emphasizes, that we not confuse the reasonableness of the police's belief in the consent they had, which may eventually be a factor influencing the admissibility of the evidence under s. 24(2), with the requirement of actual consent from a valid authority.

- [33] In this regard, it is argued that Mr. Hugh's reasonable expectation of privacy in relation to the police in these areas cannot be displaced by the actions of a third party who purports to grant them access. The defence draws an analogy to the settled authority that a landlord is unable authorize a police search of the rented space of a residential tenant: *R. v. Mercer*; *R. v. Kenny* (1992), 70 C.C.C. (3d) 180 (Ont. C.A.).
- [34] In the defence submission both the rear fire lane and the roof are indisputably areas to which a reasonable expectation of privacy by Mr. Hugh attaches, based on the contextual application of the factors set out in *R. v. Edwards*, [1996] 1 S.C.R. 128. This is especially true when one looks at the relative inaccessibility of these areas and the unlikelihood of anyone unrelated to or unauthorized by strata owners being in them. The mere fact that they can be accessed under certain conditions for valid purposes relating to the operation of the complex, such as maintenance and repairs, cannot change that status.
- [35] While it is not considered as inviolable as a home by the authorities, the defence submits that an office space still ranks quite high on the hierarchy of privacy expectations that courts have used to assess claims of this kind.
- [36] Perhaps most importantly, the defence emphasizes that this Court has already decided this issue in accordance with their position in the case of *R. v. DiPalma*, 2007 BCSC 536, *aff'd* on other grounds 2008 BCCA 342. In that case, Mr. Justice Ehrcke found that the entry onto a roof by a police officer to further his investigation, with the permission of a person who was apparently a strata council member, was a breach of s. 8 because the roof was not common property. Instead, it formed part of Mr. DiPalma's unit. The fact that there was evidence of access to the roof for maintenance and repair did not remove Mr. DiPalma's expectation of privacy in the portion of the roof above his unit.
- [37] Crown counsel grounded his submission in the fundamental requirement of a reasonable expectation of privacy, without which none of the police observations undertaken here can accurately be described as searches.
- [38] The Crown draws a strong contrast between the presumptive expectation of privacy surrounding residences and other highly personal spaces, and that which attaches to a commercial setting. He also points to the lack of any such expectation in business premises that are open to the public, and emphasizes that no breach results from police officers making observations by their own unaided senses while they are located on publicly-accessible property.
- [39] Considering the totality of the circumstances, the Crown argues that there was no reasonable expectation of privacy on the rooftop. Some of the considerations cited in support of that argument were:
- the lack of any trespass by the officers, who requested access from someone with the authority to grant it (see *R. v. Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.);

- the commercial nature of the building;
- Mr. Hugh's inability to control access to that area; and
- the unintrusive nature of the police actions, which amounted to no more than smelling that which was already emanating from the vents and escaping into the atmosphere.

[40] As to the observations from the fire lane, the argument is that Cst. Strikwerda did no more than observe what was there to be seen by anyone who happened to enter this area, which I should find was open to the public. The fact that he had to assume a particular physical position in order to see under the door is not determinative.

e. Discussion

[41] I agree with the submissions of both Crown and defence that the key to the existence of any Charter breaches here is the identification of a reasonable expectation of privacy by Mr. Hugh in the roof top and/or the fire lane. The first important step in that process is to determine the nature of those areas within the ownership regime of this strata complex.

[42] First of all, I do not think that the labelling on the strata plan can determine whether or not these areas are common property. The applicable portion of the definition of "common property" in the Strata Property Act, S.B.C. 1998, c. 43 provides that it is:

(a) that part of the land and buildings shown on a strata plan that is not part of a strata lot . . .

[43] I think the plain meaning of this definition is that the words "shown on a strata plan" modify the words "that part of the lands and buildings", so that land and buildings that are shown on a strata plan but are not part of a strata lot will meet the definition. It does not mean, as I think the defence would have me read it, that only those parts of the land and buildings that are shown on the strata plan as being common property are common property. Although the nature of the application was different, Mr. Justice Smith interpreted this definition in the same way in *Chan v. Owners, Strata Plan VR-151*, 2010 BCSC 1725 at para. 32.

[44] In any case, the plan diagrams are inconsistent in what they show as common property. The strip of common property in front of the building is not even shown on the side-view diagram. The fire lane, which everyone seems to agree must be common property, is not shown at all on either diagram. These diagrams are really not helpful in determining the status of the roof.

[45] The resolution to make roof leak repairs part of the shared strata costs and Mr. Davis's example of the requirement for council permission before modifying the roof above a unit are more persuasive indications of its status.

[46] I conclude that the roof is common property and that the restrictions in the bylaws on allowing access to a strata lot do not apply to it.

- [47] Pursuant to s. 68(1) of the Act, the strata lot of Unit 160 ends at the midpoint of the ceiling below the roof.
- [48] Of course, that finding does not end the inquiry. I must consider the entire context. In *R. v. Cole*, 2012 SCC 53, Justice Fish expressed this inquiry in a helpfully concise way:
- [40] The "totality of the circumstances" test is one of substance, not of form. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances
- [49] The subject matter of the evidence in relation to the roof was the smell, temperature, and moisture emanating from the vents. In the case of the fire lane, it was observations of the interior and contents of the unit, and occasionally noise emanating from it.
- [50] Mr. Hugh certainly had a direct interest in the evidence that was being collected, since it was of activities taking place in a unit in which he was the co-lessee. Crown counsel makes the valid point that we have no testimony from Mr. Hugh on the voir dire concerning his own expectation of privacy in the areas searched, but I am prepared to infer, on the basis of all the evidence, that he would have expected subjectively that observations would not be made from those areas.
- [51] Turning to the objective reasonableness of the expectation, I have found that both of these areas were common property, and so the police did not gain unauthorized access to or trespass on property owned solely by the person from whom Mr. Hugh was leasing (and in whose shoes he could stand in expecting privacy in the unit). Contrary to the Crown's assertion, I am not satisfied that his status as a lessee put him in any less of a position to expect privacy from observation than the actual owner. The expectation of privacy analysis is never determined solely by ownership, which is but one relevant factor in the totality of the circumstances.
- [52] I think that the strata owners and their tenants had a reasonable expectation that the roof of the building would not be accessed or used for anything except maintenance and repair purposes, or for other legitimate activities that may have been officially approved. This is a different situation from apartment hallways and secure condominium parking lots in the cases relied on by the Crown, because, unlike in those locations, other tenants or owners of this building would be unlikely to admit anyone to access the roof except for those official kinds of purposes. The roof is not in public view and no activity on it or emanating from it would be routinely observed by anyone but those with an official reason to be there.
- [53] While the odours are not in themselves something that could be retained within a unit, smelling them involved the officers placing themselves in close proximity to the vents, and not merely being present on the roof and incidentally receiving the smells.

- [54] I think the same can be said for the fire lane. As Mr. Davis noted, there is no reason for the public to access that area. In fact, if someone did he would consider them to be trespassing. The lane self-evidently exists for fire department access and emergency exit from the units. Police observations made there are not analogous to the ordinary ones that a citizen might make in an apartment hallway or a public sidewalk. Further, the manner of police observation required very close proximity to the door, equivalent really to pressing an ear against a door or to the classic image of peeping in a keyhole, and went beyond anything that could be characterized as an incident of mere presence in the lane.
- [55] The information obtained by the police at these two locations did not however reveal any meaningful biographical information about the occupants, intimate or otherwise - only the nature of some of the activities going on inside of what was ostensibly a commercial operation of some kind.
- [56] Considering all of these factors, I find that Mr. Hugh did have a reasonable expectation of privacy in these two areas. They are not areas in which owners and tenants would reasonably expect the police to be present and making these sorts of observations, absent permission to do so from an authorized person.
- [57] It is common ground that no permission was ever sought with respect to the fire lane observations, so those must be excised from the ITOs.
- [58] As the investigators' own actions in securing a new consent confirmed, no consent was ever given by the strata council or its property manager in relation to the August 9 roof search, so evidence of that should be excised as well.
- [59] That leaves the attendances for which permission was sought from Mr. Davis, August 24 and 30.
- [60] As I have said, I do not think the restrictions in the bylaws on allowing access to actual strata units that were relied on by the defence actually have any application to the analysis of the validity of this consent. We are talking about the common property of the strata, not the units themselves.
- [61] There is no indication in the bylaws or governing legislation that the quorum or other meeting requirements of the council necessarily apply to the granting of permission to access common areas, or that it is beyond the authority of individual council members to grant it.
- [62] In my view, the decision in DiPalma does not assist on these facts. There, Ehrcke J.'s finding on the evidence before him was that the roof of the complex was not common property. This was based on a strata plan that was placed in evidence that "seemed to confirm" the defence position that the roof above Mr. DiPalma's unit formed part of that unit. The Crown's argument that there was valid consent from a strata council member to access the roof failed in that case because there was no evidence that a member could give that consent and because there was no admissible evidence that the complainant who had purported to give

consent was actually a member. I have a different factual record here - including direct evidence from a council member of his active involvement in providing consent - and have reached a different conclusion as a result of it.

[63] I conclude that members of the strata council, including Mr. Davis, were able to give valid consent to the access to the roof that was carried out by the police here. The situation is meaningfully different from those cases that have rejected the authority of landlords, hotel operators or other supervisory authorities to consent to searches of places occupied or primarily used by an accused. Indeed, Fish J. in *Cole* emphatically rejected any doctrine of "third party consent" to such locations, as exists in the United States. In contrast, the area to which access was granted in this case is one that is held in common for the benefit of all owners of the strata, and over which the council exercises the supervisory responsibility. While I have found that Mr. Hugh, like all owners and tenants, had a reasonable expectation of privacy in relation to it, as against anyone not officially authorized to be there, it is not the very high expectation that would attach to a residence or other highly personal location to which an individual accused can restrict access. Illegal use of a strata unit is itself a breach of the bylaws and it seems to be a reasonable exercise of this supervisory responsibility to allow the police to enter common property, without further intruding into any actual units, to determine whether any illegal activity is taking place within a unit.

[64] Therefore, I do not find any s. 8 violations in relation to the observations on August 24 and 30 and would not excise them from the ITOs.

3. The Traffic Stop

a. Evidence

[65] The stop was executed on Mr. Hugh's vehicle by Cpl. Hayes on the evening of August 26, at the request of the investigators of the current offences.

[66] Cpl. Hayes had answered a request from the investigators for assistance. He was told that the occupant had been driving poorly before stopping his vehicle, and if that occupant returned to the vehicle and drove in the same manner, they wanted it pulled over. He was in uniform and serving as the road supervisor that night, so he made himself available to assist.

[67] He was told to go to the area of Cambie and Jacombs in Richmond and so he stopped at the high school there. He was there for five or ten minutes when he heard a broadcast from the investigators that the driver had returned to the vehicle and was now underway. The next he heard was that the vehicle was eastbound on Cambie, so he had to catch up to it. He thought there might have been some delay between the first and second broadcasts.

- [68] He recalled traffic being moderate to heavy. He was listening to radio updates about the movement of the vehicle as he drove. The investigators following the vehicle were doing so covertly. He understood that it had made a left turn onto Number 5 Road and was making lane changes without signalling. He did not know the specific lane changes or the location of them.
- [69] The vehicle had made a right turn onto Westminster Highway and was heading westbound. He caught up to it and was able to identify it as a black BMW. He confirmed by radio with the investigators that it was the correct vehicle and that it had made lane changes without signalling. He was not aware of which member of the investigative team was giving him this information. He activated his emergency lights and the BMW pulled over.
- [70] After being told that he was being stopped for making lane changes without signalling, the driver, who turned out to be Mr. Hugh, told Cpl. Hayes that he had answered a call on his cell phone while driving, I infer as an explanation for his driving pattern. Cpl. Hayes issued him a ticket for driving with an electronic device. In a will-say statement prepared for court purposes, he said that he ticketed for that offence based on "the totality of the vehicle stop".
- [71] Cst. Strikwerda said the investigators' plan on October 26 was to do a dual-purpose traffic stop to identify Mr. Hugh if "a moving motor vehicle violation was observed". He was a member of the covert team, which was following Mr. Hugh in several police vehicles.
- [72] His evidence was that Mr. Hugh made a left turn onto Number 5 Road from Cambie without signalling. He believes there is a flashing green light at that intersection, which indicates an advance left turn for traffic turning onto Number 5 Road.
- [73] The vehicle then turned right onto Westminster Highway to go westbound. In the area of Westminster Highway and Shell Road, the vehicle made a lane change from the right to the left without signalling, at which point Cpl. Hayes conducted the stop. Cst. Strikwerda observed these violations personally. He thought it might have been his supervisor who actually requested the stop after they were observed, but was not sure.
- [74] He agreed that the left turn onto Number 5 Road "wouldn't cause a great amount of danger" to the public. He did not recall a vehicle being cut off or endangered by the lane change on Westminster Highway, but he was not focused on that issue at the time.

b. Submissions

- [75] The defence argues that this obvious dual-purpose traffic stop requires "a legitimate concern for public safety authorized by traffic legislation." Based on the authority of *R. v. Lauriente*, 2008 BCSC 187 (aff'd on the s. 24(2) issue at 2010 BCCA 72) in which the trial judge found that a stop for speeding during a drug investigation was in essence a ruse, the defence argues that I should find an equivalent violation here. The trial judge in *Lauriente* had relied on the decision of the Court of Appeal in *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.), and counsel draws from that case the principle, which he argues was carried forward and applied in *Lauriente*, that danger to the public must be created by the

particular driving offence before the traffic portion of the stop is valid.

- [76] The Crown responds that as long as the offence is legitimately witnessed, it does not matter what the so-called "dominant purpose" of the stop was: *R. v. Kaddoura*, 2009 BCCA 113, and *R. v. Nolet*, 2010 SCC 24.

c. Discussion

- [77] I do not think that Lauriente and Brown support as strong a proposition as the defence puts forward. A specific finding of fact in Lauriente was that the stop was a ruse - a mere pretext to advance the drug investigation. The trial judge doubted its very legitimacy because no ticket was issued for it. Nor did Lauriente or Brown establish that a violation of motor vehicle legislation that presents no danger in its specific circumstances cannot form a legitimate basis for a police stop. In fact, in Brown, the very section relied on by the police for the stop did not require any specific offence to be committed, but merely empowered the police to stop vehicles to pursue inquiries related to highway safety.
- [78] To say that the particular infraction in this case was minimal, which it certainly seems to have been, is not the same as saying it did not occur or that the resulting stop was a mere ruse. Cst. Strikwerda observed a lane change in violation of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 and relayed that to Cpl. Hayes. It appears that he did not relay the left turn onto Number 5 Road, because Cpl. Hayes recalled only hearing about lane changes.
- [79] The defence has referred to s. 170 of the Motor Vehicle Act which requires that "traffic may be affected" by the turning of a vehicle for there to be an offence, but that section deals with turns, which was not Cpl. Hayes's basis for the stop. The violation that he was informed of and could act on would have been of s. 151(c) of the Motor Vehicle Act, which involves driving from one lane to another without signalling, and which contains no requirement that the public be endangered.
- [80] Finally, Cpl. Hayes' decision to ticket for a different offence than he had been told about is not analogous to the failure in Lauriente to ticket for the very offence that allegedly supported the stop. If anything, his decision to issue for a different offence after discussions with Mr. Hugh show that he was exercising independent judgment by looking into the causes of the violation of which he had been informed, and not acting as a mere tool of the drug investigators.
- [81] As a result, I do not find any Charter violation based on this stop.

4. Inaccurate, Misleading, or Non-Charter-compliant Contents of the ITOs

a. Overview

- [82] I think it will make for a more coherent discussion of these issues if I provide my decision on each alleged misstatement or problem with disclosure in the ITOs immediately after describing it.

b. Failure to Disclose Charter Breaches

- [83] The defence argues that Cst. Strikwerda failed to disclose the facts that revealed the actual extent of Charter non-compliance of the investigative steps that I have described. That is, he did not explain in detail the lack of advance consent to access the common areas or the request to Cpl. Hayes for the check stop.
- [84] As has been said many times in the authorities, informants must make full, fair, and frank disclosure of all material facts in ITOs. But I think the requirement that they disclose details of investigative actions that did not constitute breaches to their own knowledge goes too far. Informants can only disclose shortcomings that they know exist.
- [85] I do agree, however, that it was misleading not to include the absence of explicit consent to access the roof on August 9 and the serious misgivings that must have led Cst. Strikwerda to confirm it for himself on August 24. It was also less than candid to leave the impression that Cpl. Hayes stopped Mr. Hugh for a purpose entirely unrelated to the investigation, although I have found no Charter breach occurred in the way that the investigators brought it about.

c. Unconnected Allegations

- [86] Cst. Strikwerda began his information to obtain with reference to observations of vehicles in the Jacombs/Clarke Road area that are associated to marihuana production, including a growing operation that was dismantled earlier that year. These observations had no provable connection with Mr. Hugh and could serve only to taint him in the mind of a less than careful reader. They should not have been included.

d. Identification of the Original Complainant

- [87] It is argued that Mr. Davis should have been identified as the tenant who initiated the Clarke Road investigation. I can find nothing misleading about this. It is not clear how the authorizing justice could have viewed the situation any differently, in terms of the existence of grounds for belief, if he or she had known that additional fact.

e. Criminal Background

- [88] Mr. Hugh's vague associations to related drug offences, for which he had not been convicted, should not have been included. I think his complete actual criminal record could be relevant in a general way, as demonstrating the lifestyle he had pursued and its consistency with the offences under investigation. The dates of the convictions should have been included, however, to give the authorizing justice some context within which to assess them. Suspected offences should not be included in an ITO without being accompanied by sufficiently properly-sourced facts to allow the authorizing justice to assign an appropriate amount of weight to them. Including them in this fashion risked overstating the actual degree of Mr. Hugh's provable involvement, as it might constitute part of reasonable grounds.

f. Checking "again" for Consent

[89] Cst. Strikwerda swore that he checked "again" with the property representative for permission on August 24, when he himself had never checked before. This is connected with the previously-described failure to include facts relevant to obvious areas of Charter vulnerability. In context, it was not an innocuous misstatement, because the existence of previous consent is the very thing the police were concerned about when making this further inquiry.

g. Unrelated Items in the Fire Lane

[90] Items that Cst. Strikwerda observed in the rear of the building and characterized as the refuse of growing operations were described in the ITOs in a way that left the clear impression that they were linked to Mr. Hugh's unit. In fact, Cst. Strikwerda could not recall in his evidence exactly where they were in the fire lane. This was a misleading description.

h. No Notes of Observations

[91] On August 4, two other members of the investigative team observed cooling units known as "swamp chillers", which are frequently associated with growing operations, through a window left ajar in the front of the unit. Although their observations were passed on to Cst. Strikwerda and included in the ITOs, they were unsupported by any notes or reports from those officers. This is a very odd circumstance, given the potential significance of these observations, and if those witnesses testified in the trial about the presence of these items, the defence could certainly cross-examine them on their unusual omission, but the absence of those documents is not in itself a basis to question its inclusion as grounds in an ITO. Nor can I find that Cst. Strikwerda should have been so inherently suspicious of information received on that basis that he should not have included it.

i. Hydro Readings

[92] Cst. Strikwerda asserted in the ITOs that the hydro reading for the unit was "not returned", which indicates, he explained in his evidence, that either a large amount of power is not being paid for or no hydro reading has yet been obtained. The former possibility is a potential indication of a marihuana growing operation. I agree with the defence that this was put in a misleading way, because it seems no more likely that the hydro bill was unpaid in relation to a large amount of power usage than any other level of usage. All it means is that the bill might not have been paid.

j. Gaps Between the Walls

[93] Despite Cst. Deweert's knowledge of gaps between the walls of the units at the ceiling, which based on his previous investigation of the building across the parking lot, and Cst. Strikwerda's suspicions on that point, these gaps were not mentioned in the ITOs. I think this concern raised by the defence has some substance. Any structural features of the building that could affect the strength of the inference to be drawn by the authorizing justice from the smell of marihuana emanating from a particular vent should have been included.

k. The Valmont Property

[94] Finally, there is the issue of inaccurate or misleading disclosure in connection with the so-called Valmont Property. This commercial unit was also rented by Mr. Hugh and his spouse. Cst. Strikwerda asserted in the ITOs that there had previously been a marihuana growing operation in that property, which had been dismantled by the time of his application. Cst. Strikwerda included information and referred to photographs that had been supplied to him by the property manager of the Valmont Property. Cst. Strikwerda is alleged to have made the following misleading representations concerning it in the ITO:

- He misstated the strength of the manager's authority to enter the unit, which was based only on the manager's own assertion about that authority.
- He implied that the water consumption was extremely high in the Valmont Property, another attribute of marihuana growing operations that is expanded on elsewhere in the ITOs. In fact, the consumption level he received was for the entire complex, and the purpose of the property manager's investigation was not a suspected growing operation but a water leak.
- He failed to describe the photographs that he received from the manager accurately (they were not appended to the ITOs). His descriptions of the unit left the impression that it had been extensively and recently renovated in a manner that rendered it suitable for a growing operation. Most notably, Cst. Strikwerda described the room as being enclosed in plastic, and explained that a certain type of plastic ("black and white poly") was used to control the escaping odour and reflect light from the lamps back onto the plants. In fact, when one looks at the photographs, the room is not enclosed in plastic (only one wall is covered) and what plastic is present is not black and white poly.

[95] The last two categories are meaningful misstatements. Properly described, the state of this unit is somewhat suspicious, but ultimately inconclusive. It was instead dressed up as being capable of supporting the reasonable belief of the state of the Clarke Property, based on the same lessees having had involvement with an allegedly dismantled one. The references to the Valmont Property should be excised as a result.

[96] A further argument that the property manager for the Valmont Property had acted as agent for the police was initially raised, but counsel wisely chose not to pursue it in argument. It is clear that all of the manager's observations were conveyed to Cst. Deweert without any request from the police that he do so.

5. The Katsura ITO

- [97] Most of the ITO for the warrant to search Mr. Hugh's home on Katsura was identical for the Clarke Property. However where they do differ, the defence alleges some inadequacies that are specific to the ITO for the home.
- [98] The defence submits that while the ITO for the Clarke Property at least discloses a basis for believing that the unit contained a marihuana growing operation (before the offending material is excised from it, of course), the ITO for the Katsura Property does not even meet that required standard on its face. In essence, it fails to meet the fundamental requirement of providing grounds to believe that the objects to be searched for will be found there.
- [99] First of all, there is no indication that documents that identify occupants or residency at the Katsura Property are evidence "with respect to the commission of an offence", as s. 487(1)(b) requires.
- [100] This is too narrow a reading of a search warrant's ambit. If it is reasonable to believe that drugs will be found in a residence, then documents showing who lives in a particular residence are most certainly evidence with respect to the commission of such drug-related offences. As Justice Major put it in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, (at para. 15):

On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.

- [101] Next, it is contended that there is no evidence in the ITO for the Katsura Property to support the assertion that "marihuana, currency, and/or related monetary instruments" will be found at the residence. Counsel says this is pure boilerplate language, used without regard to the actual evidence available - a practice which is strongly discouraged in the cases.
- [102] I think that the authorizing justice would have been entitled to infer, as a matter of common sense and ordinary human experience, that the product and/or the proceeds of such a marihuana growing operation will probably also be found at the grower's residence. There was no evidence of any specialized practice that runs counter to such an inference. However, I do not really know what "monetary instruments" are in this context, as distinct from currency. I agree that the term is boilerplate and should be excised from the items that were to be searched for.

- [103] In addition, it is argued that the use of email by Mr. Hugh's spouse was improperly expanded to provide the foundation for a broad assertion that digital information concerning the operation would be found at the Katsura Property. This concern is especially acute, counsel says, in light of the heightened concerns about identifying a specific basis for searching personal computers in residences by the Supreme Court of Canada in *R. v. Vu*, 2013 SCC 60.
- [104] I do not find this to be a troubling assertion by the informant. Ms. Silverstone was, according to the evidence, the co-lessee of the Clarke Property and she communicated with the landlord of the Valmont Property on her and Mr. Hugh's behalf. It is not contrary to common sense or beyond a reasonable inference that other aspects of their business, including the running of the actual growing operation, would be transacted and/or recorded digitally.
- [105] Next, Cst. Strikwerda asserted, based on his experience, that documentation relating to a grow operation is stored at a secondary site, "usually" a residence. However, he also requested authority to search for such documents in the ITO for the Clarke Property. The argument is that this tends to diminish the strength of the assertions in relation to the Katsura Property search. It also depends on his bare assertion that it is consistent with his experience that this would be done, rather than any specific evidence.
- [106] I am not convinced that this is really inconsistent. The word "usually" refers to the secondary site being a residence. Cst. Strikwerda does not assert the frequency with which the storage in a secondary site occurs, or that it necessarily excludes the possibility of such documents being found at the actual location of the operation. It would certainly have been better drafting to harmonize these requests in the two ITOs, but I read the assertion regarding documents at the Katsura Property as expanding the ambit of what might normally be inferred only to be at the actual location, rather than competing with that inference.
- [107] As to Cst. Strikwerda's reliance on his experience for this assertion and the absence of further factual assurances that such items are likely to be found, I think this sets the standard too high. At the end of the day, he needed to establish only that it was reasonable to believe that documents related to the operation would be found at the home, and in asserting that belief he is entitled to cite his related experience. He does not have to rebut every other competing theory, such as that some marihuana growers might instead destroy their paper trails.

6. Excision and Continuing Basis for Issuance

- [108] Turning to whether there continues to be a basis on which these warrants could have been granted, the task is well set out in *R. v. Scott*, 2012 BCCA 99, para. 42, [citing *R. v. Wilson*, 2011 BCCA 252, at para. 52]:

Ultimately, the reviewing judge must examine the record submitted to the authorizing justice, including any exclusions and additions arising from proper amplification on review, and decide whether on a "practical, non-technical, and common sense basis" the totality of the circumstances demonstrate reasonable grounds for the belief the appellant was committing the stated offences, and could support the issuance of a warrant

- [109] As I have indicated, the following paragraphs of the ITOs must be excised because of Charter breaches in the course of obtaining the evidence described in them: paragraphs 12, 13, 16, and 17.
- [110] The following contents of the ITOs must be excised due to the extent of their misleading disclosure: paragraph 14; the word "again" in the first line of paragraph 45; 53.a and h.(b); 55; 57, from the sentence beginning, "I further queried Kevin Hugh" to the end; and 64.
- [111] The lack of disclosure of the issue of consent to access the roof is essentially self-regulating, since the evidence of searches for which there was no consent has already been excised.
- [112] The traffic stop's status as a dual-purpose one should also be added to the acts for consideration in the amplified record.
- [113] All of the observations of smell emanating from the unit must be read in light of the additional information about the movement of air between the units.
- [114] The warrants must also be read as no longer authorizing the seizure of monetary instruments.
- [115] Even with the excisions I have described, and even reading the central assertions of fact in light of the additional facts modifying and diminishing some of them on review, I conclude that there continues to be a basis on which the warrants could have been issued. I think the smell of fresh growing marihuana emanating from the unit on August 30, supported by the warm humid air and the chemical smell emanating on August 24 and the presence of swamp coolers on the 4th, and the evidence linking Mr. Hugh both to that unit and to the Katsura Property, offered a credibly-based probability that the objects sought would be found in those places.
- [116] Further, even adding the qualification of the ability of air to move between units at the ceiling level, the observations of the odour of fresh growing marihuana on the 30th were specifically isolated and localized to Mr. Hugh's unit to an extent that the necessary standard was established.
- [117] I have also considered the additional argument of the defence that some police actions in securing search warrants are so subversive of the overall prior authorization process that it is necessary to reject the warrants to protect the integrity of that process: *R. v. Maton*, 2005 BCSC 330.

[118] I have concluded that this is not one of those cases. I will say more about the nature of this investigation when dealing with s. 24(2), but at this stage I would characterize some of the steps taken to gather evidence as inept and sloppy. The ITOs are also badly drafted in some respects and included misleading, incorrect, irrelevant and prejudicial material. However, I can find no basis on which to find any deliberate deception or reckless disregard for the truth or any attempt to subvert the processes for obtaining a warrant. In *Wilson* Mr. Justice Frankel emphasized, at para. 48, that failure to make full, fair and frank disclosure will not render a warrant invalid if sufficient grounds remain after all necessary excisions. He went on to say:

[60] This Court has yet to decide whether a warrant that withstands scrutiny under the Garofoli test can be ruled invalid because of deliberate misconduct in the application process. However, even assuming the existence of what has been called a "residual discretion", this is not a case that merits such action, given the trial judge's finding that Constable Wilton "was not motivated by a desire to mislead the judicial justice of the peace": *Bacon* at para. 27; *R. v. Neubert*, 2001 BCCA 88, 150 B.C.A.C. 15 at para. 11; *Lahaie v. Canada (Attorney General)*, 2010 ONCA 516, 101 O.R. (3d) 241 at para. 41, leave to appeal ref'd [2010] S.C.C.A. No. 371.

[119] Accordingly, I conclude that the searches conducted here were the subject of valid search warrants.

7. Effect of Charter Breaches During the Course of Gathering Grounds

[120] As I said at the outset, even if the search warrants are valid, as I have found, I must still consider whether any of the Charter breaches that occurred during the gathering of grounds for them should nonetheless lead to the exclusion of the evidence that was obtained. The breaches here were the observations by the investigators from the roof and the fire lane on the dates that they did not have permission from the strata council.

[121] I must consider three essential components: the seriousness of the Charter-infringing state conduct, the impact of the violation on the Charter-protected interests of the accused, and society's interest in the adjudication of the case on the merits: *R. v. Grant*, [2009] 2 S.C.R. 353 at paras. 71-86.

[122] Dealing first with the Charter-infringing state conduct, I find that these breaches were moderately serious. They involved the officers entering on two areas of the common property of a commercial strata complex, in one case with insufficient clarity and certainty about the existence of consent, and in the other on a mistaken understanding of the accessibility of that area to them.

[123] I think the lack of consent to be on the roof is the more serious infringement, because the police knew in general that consent from someone with the authority to do so was required, and simply pressed on without clarifying the actual applicability of the consent that had been obtained some months previously for a companion building. This attitude by police officers should not be condoned.

- [124] The intrusion into the fire lane was less serious. While I found that Cst. Strikwerda's belief that he was entitled to make observations from there was wrong, he was not recklessly disregarding a clear legal prohibition or an established process for obtaining consent.
- [125] On balance though, this factor favours exclusion.
- [126] On the other hand, the impact of the violations on the Charter-protected interests of the accused was mild at worst. This was the common property, as I have said, of a commercial strata complex, and the observations were of emanations from the unit or observations of things within it that could be seen from the outside of the building, albeit by intruding to a degree that I have found amounted to violations. Overall, the level of intrusion on privacy was sufficient to ground a breach, but in the scheme of things was quite minor. This factor favours admission.
- [127] Finally, there are the interests of society in an adjudication on the merits. The evidence obtained pre-existed the search and was not created in any way by it. I infer that it forms the core of the Crown's case and that proceeding to an adjudication on the merits would be impossible without it. It is not a case where the nature of the breaches means that a fair trial cannot be obtained if they are admitted. This factor also favours admission.
- [128] In all the circumstances, I conclude that the admission of the evidence obtained by the search warrants would not bring the administration of justice into disrepute, despite breaches committed during the investigation process, and accordingly the evidence obtained by the warrants will be admissible at trial.

The Honourable Mr. Justice T.A. Schultes

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