

CANADA / JUDGMENT

R. v. McKinnon

2013 BCSC 2295

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Supreme Court of British Columbia

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2013 BCSC 2295 R. v. McKinnon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McKinnon,

2013 BCSC 2295

Date: 20131213

Docket: 26074

Registry: Vancouver

Between:

Regina

And

Troy Dax McKinnon, John Ross Powers, Cody Alexander Sleigh,

Derek James Stephens and Van Van Vu

Restriction on publication: Pursuant to ss. 486.5(1)(9) and 648(1) CCC;

Inherent Jurisdiction

Before: The Honourable Madam Justice Fisher

Ruling on Voir Dire #3

Search and seizure incidental to arrest

Counsel for the Crown:

S. Wagner, A. Adams

Counsel for Troy McKinnon:

Counsel for John Powers:

Counsel for Cody Sleigh:

Counsel for Derek Stephens:

Counsel for Van Van Vu:

D. Lawrence

K. Westell, N. Adams

M. Berry

J. Saulnier

B. Bagnall, D. Jevning

Place and Date of Hearing:

Vancouver, B.C.

October 15-23, 28, 29, 31, 2013

Place and Date of Judgment:

Vancouver, B.C.

December 13, 2013

- [1] The accused Van Van Vu and Troy McKinnon are charged along with co-accused John Powers, Cody Sleigh and Derek Stephens with several offences, including kidnapping and conspiracy to kidnap. They are alleged to have conspired together with four unindicted co-conspirators, one being Jesse Margison.
- [2] In this voir dire, Mr. Vu and Mr. McKinnon allege that searches of their person and a Toyota Tacoma vehicle on November 23, 2011, and the seizure of electronic devices pursuant to those searches, were unlawful as contrary to s. 8 of the Charter of Rights and Freedoms. The searches and seizures were made without warrant, incidental to arrest.
- [3] Ultimately, the accused seek an order excluding this evidence under s. 24(2) of the Charter. Argument on this aspect of the application was deferred until the court determines whether the arrests and the searches incidental to the arrests were lawful. For the reasons that follow, I have concluded that they were lawful.
- [4] For ease of reference I will generally refer to individuals by their surnames only.

The arrests

- [5] Just after 11:00 am on November 23, 2011, co-accused John Powers and Cody Sleigh were arrested after police surveillance observed them force a male, believed by police to be Eric Low, into a gold Toyota Sienna van located near a Blockbuster Video store at 6580 Fraser Street (at East 50th Avenue) in Vancouver. The surveillance team followed the van as it drove away and stopped about five minutes later at the rear of 6061 Sherbrooke Street. Powers and Sleigh were found inside the van with Low. Powers and Sleigh were arrested and taken to the Surrey RCMP detachment.
- [6] At approximately 1:00 pm that same day, a dark green Toyota Tacoma truck driven by Vu, with McKinnon and Margison as passengers, was stopped by police near 2056 E. 50th Avenue in Vancouver. Vu, McKinnon and Margison were initially detained and given pat down searches. From each, a cell phone was found and seized. At 1:15 pm they were arrested for the kidnapping of Eric Low, advised of their Charter rights, and transported to the Burnaby RCMP detachment. Shortly after 3:30 pm, police searched the Toyota Tacoma, from which they seized several items, including two Blackberries and a laptop computer.
- [7] The following day, Vu, McKinnon and Margison were released without charges. The Tacoma was subsequently released but the electronic items seized were kept in police custody and later examined after a search warrant was obtained. The police continued their investigation. On February 10, 2012, Vu, McKinnon, Margison and Derek Stephens were arrested and charged with the offences that are now before the court. In August 2012, Margison was severely injured in an assault while in custody and he has since been declared unfit to stand trial.

Background facts

- [8] Project E-Navigate was an investigation conducted by the Combined Forces Special Enforcement Unit of the RCMP (CFSEU), which began in May 2011 and continued into 2012. The primary target of the investigation was Margison, who the police believed was involved in various types of criminal activity associated with violence. They had a theory that Margison had a "crime group" that conducted "rips", extortion and kidnapping. Targets were added as the investigation proceeded. McKinnon became a target in the summer of 2011 and Vu became known to police in September 2011.
- [9] On about November 15, 2011, the investigation focused on McKinnon, Vu, Stephens, Powers and Sleigh in addition to Margison and their involvement in a potential violent crime, possibly a kidnapping. Vehicles used by the targets also became targets. Between November 15 and 23, police were targeting a number of vehicles, including an Acura MDX with Alberta licence plates, a white Toyota Sienna van, a gold Toyota Sienna van, and a green Toyota Tacoma truck. The Acura MDX was associated to Vu and the registered owner of the Tacoma was Thi He Bui, who is Vu's aunt.

- [10] Project E-Navigate was directed by a "command triangle" of a team commander, a primary investigator and a file coordinator, and overseen by a senior officer, Inspector Peter Jadis.
- [11] Sergeant Fred McAndie was the team commander of E-Navigate. He is an RCMP officer of 24 years, including six years with the CFSEU. As team commander, Sgt. McAndie was responsible for resourcing the investigation, which included selecting the primary investigator and the file coordinator, putting into place the necessary teams of officers, building an operational plan, and obtaining funding. He was accountable, in conjunction with the primary investigator, for the speed, flow and direction of the investigation.
- [12] Sergeant Nathan Wells (then a corporal) was the primary investigator. He is an officer of 13 years' experience, including three years with the CFSEU. As primary investigator, Sgt. Wells had knowledge of the overall investigation from a variety of sources and was responsible, in consultation with Sgt. McAndie, for its speed, flow and direction.
- [13] In the days leading up to November 23, 2011, both Sgt. McAndie and Sgt. Wells formed the opinion that Margison, McKinnon, Stephens, Vu, Powers and Sleigh were all conspiring to kidnap Eric Low. Both officers testified that at the time of the arrest of Vu, McKinnon and Margison, they believed that these three were parties to the kidnapping that had taken place several hours earlier. In general, Sgt. Wells' belief was based on reports from other investigators, surveillance teams, intercepted communications, and information obtained as a result of the execution of a general warrant on a white Sienna van that had been driven by Powers prior to November 23. Sgt. McAndie's belief was based on reports from Sgt. Wells, other investigators, and when he was present in the command room, direct reports from surveillance teams.
- [14] The decision to arrest Vu, McKinnon and Margison on November 23 was made at 1:15 pm by Sgt. Wells and Sgt. McAndie after the Tacoma was seen on police tracking devices driving towards the vicinity and stopping very close to where the kidnapping had taken place about two hours earlier, and after McKinnon was seen by surveillance outside the vehicle operating a laptop computer. The initial decision, however, was to detain, and Corporal Chris Goebel of the Emergency Response Team (ERT) was directed to stop the Tacoma and detain the occupants. Sergeant Mark Jordan, a uniformed officer on a shadow surveillance team, was also directed to the scene to detain the occupants for kidnapping. When Sgt. Jordan arrived at the scene just after 1:00 pm, the Tacoma had been stopped by the ERT with the occupants still inside. After Sgt. Jordan detained Vu, McKinnon and Margison, he spoke to Sgt. McAndie on the phone and shortly thereafter received directions from McAndie to arrest the three for kidnapping, which he did. The Tacoma was searched several hours later by Constable Hardip Gill, who understood that the search was incidental to the arrests. Among the items he seized were a BlackBerry cell phone from the glove box, another BlackBerry from the floor on the rear driver's side, a Sony laptop computer from the rear seat, which was damaged, and a memory card from the centre console.

The issues

- [15] The accused allege breaches of their rights under s. 8 of the Charter, which guarantees the right to be secure against unreasonable search and seizure. They say that the searches were unreasonable because the arrests themselves were not lawful. They challenge the lawfulness of the arrests on the basis that (1) neither Sgt. McAndie nor Sgt. Wells had the requisite subjective grounds to believe that Vu and McKinnon had committed an indictable offence, and (2) if they did, those subjective grounds were not, objectively viewed, reasonably held.
- [16] The Crown challenges McKinnon's standing to raise a s. 8 challenge to the search of the Tacoma on the basis that he was only a passenger in the vehicle and had no personal privacy right to the vehicle or to any of the items seized from it.
- [17] The Crown relies on the arrests to support the searches of both the persons and the vehicle and says that all searches were incidental to lawful arrests.

Legal principles

- [18] The accused have the onus of proving a breach of their Charter rights on a balance of probabilities. However, a warrantless search and seizure is *prima facie* unreasonable and contrary to s. 8 of the Charter. In this circumstance, the onus is on the Crown to establish on a balance of probabilities that the arrests and searches incidental to those arrests were lawful: see *Hunter et al v Southam Inc.*, [1984] 2 SCR 145; *R v Collins*, [1987] 1 SCR 265; *R v Caslake*, [1998] 1 SCR 51 at paras. 10-11; *R v Nolet*, 2010 SCC 24 at para. 21.

The detention

- [19] There is no dispute that the initial detention of these accused was lawful. Police have the power to detain a person for investigative purposes where they have reasonable grounds to suspect that individual is connected to a particular recent or on-going criminal activity and where the detention is objectively necessary in the circumstances: *R v Mann*, 2004 SCC 52 at paras. 34-35, *R v MacKenzie*, 2013 SCC 50 at para. 35. This is a different standard than that required for arrest. For detention, it must be reasonable for the officer to believe it is possible, as opposed to probable, that the person being detained is connected to a particular criminal activity: *MacKenzie* at para. 38. Both standards require subjective grounds tested objectively.
- [20] As established in *Mann*, a search incidental to an investigative detention is limited to that which is necessary to protect the officer's safety; the investigative detention and protective search power are distinguishable from an arrest and the incidental power to search on arrest.
- [21] It is common ground that the police in this case could not have searched the Tacoma incidental to an investigative detention.

The arrest

[22] For a warrantless arrest to be lawful, it must have been conducted pursuant to s. 495 of the Criminal Code, RSC 1985, c. C-46. The relevant section in this circumstance is s. 495(1)(a), which permits a peace officer to arrest without warrant:

a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence.

[23] The reasonable grounds standard is one of "reasonable probability", which is lower than the criminal standard of proof beyond a reasonable doubt and the civil standard of proof on a balance of probabilities, but higher than mere suspicion. In *R v Debot*, [1989] 2 SCR 1140 Wilson J. described it as "reasonable belief".

[24] The police officer must subjectively believe there are reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective point of view. This objective test is whether a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed for the arrest: *R v Storrey*, [1990] 1 SCR 241 at 251. A "reasonable person" is presumed to have the experience, training, knowledge and skills of the police officer. Therefore the arresting officer's personal experience and training are relevant when determining if objective grounds to arrest existed: *R v Juan*, 2007 BCCA 351 at para. 19; *R v Luong*, 2010 BCCA 158 at paras. 19, 24; *R v Wilson*, 2012 BCCA 517 at para. 26, leave to appeal ref'd [2013] SCCA No. 71; *R v Ashby*, 2013 BCCA 334 at para. 57.

Search incident to the arrest

[25] In order for a search incident to arrest to be valid the arrest must be lawful, the search must be incident to that lawful arrest, and the search itself must have been carried out reasonably: *R v Stillman*, [1997] 1 SCR 607 at para. 27. If the arrest is found to be unlawful, the search will likewise be unlawful: *Caslake* at para. 13.

[26] Where the arrest is found to be lawful, it must also be established that the search was properly incidental to arrest. A search incident to arrest does not require reasonable grounds beyond those that were sufficient to make the arrest lawful but it must be carried out for a valid objective in pursuit of the ends of criminal justice: *Stillman* at paras. 33-34. A valid search incident to arrest generally has one of three main purposes: ensuring police and public safety, protecting evidence from destruction, and discovering evidence that can be used at trial. This was explained in *Caslake* at paras. 19-20:

The restriction that the search must be "truly incidental" to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why. There are both subjective and objective aspects to this issue. In my view, the police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one.

To be clear, this is not a standard of reasonable and probable grounds, the normal threshold that must be surpassed before a search can be conducted. Here, the only requirement is that there be some reasonable basis for doing what the police officer did.

- [27] The police officer who must have reasonable grounds for an arrest is the officer who makes the decision. Another officer may actually conduct the search, relying on the assumption that the officer who directed it had reasonable and probable grounds for the arrest: *Debot* at para. 50. Moreover, the search may be conducted before the actual arrest, provided that the officer making or directing the arrest had reasonable grounds for the arrest at the time of the search: *R v Boudreau and Gwilt*, 2006 BCSC 914 at para.12.
- [28] Finally, the search itself must be conducted in a reasonable manner, that is, the search must not be conducted in an abusive manner and the use of physical or psychological restraint must be proportionate to the police objectives and other circumstances: *Cloutier v Langlois*, [1990] 1 SCR 158 at 186. The manner of search is not an issue in this case.

Assessing reasonable grounds

- [29] The assessment of a police officer's grounds for arrest must be based on the "totality of the circumstances", or the factual matrix, that existed at the time the decision to arrest was made. Whether other information that may have been available had the police conducted further investigations might have strengthened or weakened those grounds is not relevant: *R v Jir*, 2010 BCCA 497 at paras. 28-29; *Ashby* at para. 56.
- [30] The dynamics at play in an arrest situation should also be considered, as decisions are often made quickly and in rapidly changing situations, which require the exercise of judgment on the part of the police officer making a decision to arrest: see *R v Backhouse*, [2005] O.J. No. 754 (CA) at para. 65. The flow of an investigative detention, an arrest and a search should not be analyzed on a piecemeal basis by parsing the events into static moments without regard to the overall picture: *Luong* at para. 17; *R v Amofa*, 2011 ONCA 368 at para. 19.

Standing

[31] As held in *R v Edwards*, [1996] 1 SCR 128 and reiterated in *R v Belnavis*, [1997] 3 SCR 341, the right to challenge the legality of a search depends on the accused establishing that his personal right to privacy was violated. The accused must have a reasonable expectation of privacy. This is determined on the totality of the circumstances. Factors to be considered on this issue include:

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

[32] A passenger in a vehicle does not automatically have a reasonable expectation of privacy over the vehicle. There must be circumstances to establish this other than his presence in the vehicle that is being searched. Such circumstances could relate to the relationship between the owner of the vehicle and the passenger or the terms on which the passenger came to be a passenger, or some possessory or ownership right to the items seized: see *Belnavis* at paras. 23, 24.

1. Standing

[33] There is no dispute that McKinnon has standing to challenge the arrest and search of his person. With respect to the search of the Tacoma, he asserts a privacy interest only in the BlackBerry cell phone that was seized from the glove box, acknowledging, as I understand it, that as a passenger he does not have a reasonable expectation of privacy in the Tacoma generally.

[34] In my view, there is an insufficient basis on which to find that McKinnon has a privacy interest in the BlackBerry. The only evidence connecting him to the item came from Cpl. Goebel, the ERT member who led the team that conducted the vehicle stop and initial detention. Goebel testified that as he approached the passenger's side of the Tacoma, he observed the front seat passenger (later determined to be McKinnon) throw a BlackBerry into the glove box and close it.

- [35] In *R v Belcourt*, 2012 BCSC 229, it was held that "something more" than possession or even ownership is required to demonstrate a reasonable expectation of privacy in an item. In *R v Hyatt*, 2003 BCCA 27, the accused was unable to establish a reasonable expectation of privacy in the glove box of a car in circumstances where he had placed stolen items there to hide them from police.
- [36] I do not consider this evidence sufficient to establish that McKinnon had a possessory or ownership interest in that BlackBerry. The act of placing an item in a glove box, without anything else to connect the accused to the item, does not support the inference sought.
- [37] Despite this lack of standing, I have considered Mr. Lawrence's submissions on behalf of McKinnon in relation to the lawfulness of the arrest, as this is relevant to both the searches of the person and the vehicle.
2. The grounds for the arrests
- (a) Subjective belief

Evidence of Sgt. Wells

- [38] Sgt. Wells was the officer most directly familiar with the day-to-day aspects of the investigation and he was cross-examined at length about his belief of the grounds for arrest.
- [39] Wells had been on leave from November 8 to 16, 2011. He described the information he received on November 17, when he returned to work, to the time of the decision to arrest at 1:15 pm on November 23, which formed the basis of his grounds for the arrest. The following is a summary of his evidence about this.
- [40] Wells testified that on November 17, he was updated by Corporal Mickey Harding (who acted as primary investigator in his absence) about events that occurred while he was away. He was told about an intercepted communication in which Powers spoke of a job that did not go ahead on November 16 but was planned for November 17, and about observations by surveillance of all six targets being together on November 16 at a White Spot restaurant on Kingsway.
- [41] Wells was informed by Constable Greg Ternan, the surveillance liaison officer, that on November 17 an Acura MDX with Alberta licence plates (to be referred to as the Acura MDX or the Acura) was seen in Richmond near a Mercedes dealership and a Mercedes determined to be associated with Eric Low was at that dealership. He was also informed by Constable Bamford, one of the surveillance officers, about his observations that Margison and Vu exited the Acura and walked into the parking lot of the dealership; Margison handed Vu a palm-sized object; Vu walked between two vehicles, crouched down, got back up and ran back towards the Acura; and Margison stood, drinking coffee and then followed Vu back into the Acura.

- [42] Wells was informed by Cst. Ternan that later on November 17 the Acura MDX driven by Vu went to Reliable Guns on Fraser Street, where Margison and McKinnon were seen attending, but they were not seen to be carrying any bags when they left the business.
- [43] Wells said that the information about Vu and Margison at the Mercedes dealership was significant because Vu could "possibly" have been installing a tracking device on one of the vehicles. He said he was familiar with tracking devices and was aware that a commonly used device was quite small, like a pager, and could be placed in the undercarriage of a vehicle with a magnet. He was aware that a surveillance officer did not actually find a tracking device on the Mercedes that day.
- [44] On November 17 or 18, Wells viewed a video taken by surveillance on November 16 outside the White Spot, in which he identified Margison, McKinnon, Vu, Stephens, Powers and Sleigh walking out of the restaurant. He recalled this as significant because it was their means of identifying this group.
- [45] On November 17, 18 or 19, Wells also viewed a video taken by surveillance on November 17 in the vicinity of the Chapters Starbucks in Metrotown and some still photos from the video, showing Margison, McKinnon, Stephens and Vu. Stephens is seen in these images carrying a laptop.
- [46] By November 18, Wells was aware that police had installed tracking devices on the Acura MDX and a white Toyota Sienna van. From the surveillance teams he learned that Vu was observed driving the Acura from Knight Street to Richards Street (known to be Stephens' residence), picking up a male, and driving to Burnaby in the general vicinity of Low's residence on Sidley Street. The driver and passenger were seen looking down. Wells thought they could "possibly" have been looking at a laptop.
- [47] Wells was aware of surveillance reports that the Acura drove to Metrotown Mall (the surveillance reports indicated Station Square Mall) and then to a location within two to three blocks of Low's residence, where the white Sienna was parked. A male exited the Acura carrying something in a plastic bag with the same dimensions as a laptop, placed it into the Sienna and returned to the Acura. Wells viewed a video taken by surveillance that day, as well as some still photos, which show a male identified as Sleigh walking towards the Acura and another male identified as Stephens getting inside. He testified that the white Sienna was parked in front of the Acura, with another car in between the two.
- [48] Wells was aware of surveillance reports that the Acura then drove to a McDonald's parking lot at Kingsway and Hall, near Powers' residence. He understood that surveillance observed five occupants in the Acura: Vu, Margison, McKinnon, Stephens, and another male they later identified as Sleigh. Powers was seen walking out of his apartment towards the Acura. Wells inferred from this that Powers had a brief meeting with the occupants of the Acura.

- [49] Wells was informed that evening by an officer in the monitoring room, that Powers was heard in intercepted communications with a person named Dan, talking about being broke and about a plan for the next day, after which there would be a big payout. Powers talked about the plan taking a long time; that "they" had been "trying this thing" for a few days but it hadn't happened; and the "guy" had "horseshoes up his ass" because every time they went to "do it" his wife was driving. The following day, Wells listened to the intercepted call. He said the reference to the wife driving was significant because he believed the group intended to do something with one of the vehicles and the female was not the intended target. He was aware that Eric Low was married and had a child.
- [50] On November 19, Wells learned from surveillance reports that Powers was seen driving the white Sienna and parking it in a cul de sac near Low's residence on Sidley Street, then driving "in tandem" with the Tacoma, "squaring blocks" around Sidley Street. The Tacoma went to the area around Powers' residence and the Sienna went to Burnaby General Hospital, where Low's vehicle (a 2010 Acura) was in the parking lot. An Asian female was seen getting into the 2010 Acura and the Sienna left. The Sienna was then seen parked in the area of 39th Avenue and Cambie Street in Vancouver, where a male identified as Sleigh exited the vehicle and placed a backpack into a bush, and later went back to retrieve it. The Sienna returned to the Sidley Street area and parked on Antrim Avenue. The Tacoma arrived at that location and Powers and Sleigh were seen leaving the Sienna and getting into the Tacoma. The Tacoma then dropped Powers at his residence, drove to Richmond in the same area as the Mercedes dealership, to Coquitlam where Margison and McKinnon were dropped off, and finally to the area of Kingsway and Knight in Vancouver.
- [51] Wells thought it was significant that the Tacoma was seen near the Mercedes dealership in Richmond as he believed that a tracking device had either been placed or replaced in Low's Mercedes.
- [52] On November 20, Wells participated in the execution of a general warrant on the white Sienna. A backpack was found in the vehicle which contained a Colt .45 handgun with a magazine and a plastic bag containing two 9 round magazines still in their packaging, along with a receipt from Reliable Guns dated November 17, 2011. There were other items in the backpack, including another bag of 9 mm ammunition, two pillowcases, zap straps, a cotton balaclava and gloves. Wells considered the receipt from Reliable Guns to be significant because surveillance had observed Margison and McKinnon going in and out of Reliable Guns on the same date. He directed officers to render the firearm inoperative and place all items back where they were. Later that evening, surveillance reported that the Tacoma, with Margison and McKinnon, picked up Powers in Mission and dropped him at his residence on Hall Avenue in Burnaby.

- [53] Wells' theory at that point was that there was an ongoing conspiracy by Margison, McKinnon, Stephens, Vu, Powers and Sleigh to kidnap Eric Low and that tracking devices had been placed on Low's vehicle for that purpose. He testified that he believed he had grounds to arrest all six targets for conspiracy to kidnap Low but he did not want to do so because he did not feel that an arrest at that time would stop this group from committing further offences, and he wanted to collect more evidence.
- [54] On November 21, intercepted communications revealed that Margison had attempted to contact Sleigh, and Powers had sent a text indicating that "the person he does the job with" was not available that day. Wells believed that Powers was referring to Sleigh.
- [55] Wells testified that he believed a job was going to take place on November 22 and he arranged for the ERT to be available. There were two surveillance teams out that day. One was following the white Sienna and the other was watching Powers' residence. While in the command room, Wells was updated by the surveillance teams throughout the day. They reported that Powers was seen leaving his residence and being picked up by the Tacoma, with Vu driving it and Stephens a passenger. Powers was dropped off at the white Sienna. The Tacoma left and returned with another male, believed to be Sleigh, who entered the Sienna. Surveillance observed Low's 2010 Acura, with two Asian males inside, drive to Brentwood Mall. They also observed the white Sienna at Brentwood Mall. The other team was following the Tacoma in the "general area" of Brentwood Mall.
- [56] Police had activated the audio surveillance equipment that had been installed in the white Sienna. While it was difficult to decipher the conversation, Wells heard voices that sounded quite excited that they had found what they were looking for, and then quite disappointed when Low's 2010 Acura drove away. He believed that something stopped the event that was going to take place. The Sienna moved to a different part of the mall and Powers and Sleigh were seen leaving it and getting on the Skytrain. The other surveillance team lost visual contact with the Tacoma. Later, Powers was observed returning to Brentwood Mall, picking up the Sienna, and driving to his residence. The white Sienna was then seen being driven to a rental company in Richmond.
- [57] That evening, Wells was informed by Cpl. Harding about an intercepted communication in which Powers had spoken again to "Dan" and was heard to say that they were extremely close to doing the job that day but the intended victim had someone with him, there was surveillance on them all day but they did not know until the last minute, and they had to take the vehicle back and get a new one.
- [58] Police then arranged to place tracking devices on a gold Sienna and the Tacoma, and Wells was informed the next day that this had been completed.
- [59] Wells was not on duty November 23 when the kidnapping was carried out but he had been kept apprised of the events in the morning by Cpl. Harding and was further updated by Harding and McAndie upon his arrival in the command room at 12:30 pm. He was told about the location and timing of the events that took place that involved Powers and Sleigh in the

gold Sienna and their arrest by the ERT members. He was also told about the location of the Tacoma. Shortly after he arrived, at 12:42 pm, he heard on the radio from surveillance that the Tacoma was at 49th Avenue and Fraser Street, which he understood was not far from where the kidnapping had occurred, and McKinnon was seen out on foot operating a laptop.

- [60] Wells said that this was very significant to him, as he believed that a tracking device had been installed on Low's Mercedes and tracked through the use of laptops. He believed the laptop being used by McKinnon had evidence that was directly related to the kidnapping of Eric Low. After consulting with McAndie, he decided to direct the ERT to stop the Tacoma "to preserve evidence on the laptop" and detain the three occupants for kidnapping. McAndie was the one who contacted ERT.
- [61] At 12:59 Wells was informed that the Tacoma was being pulled over and the occupants detained. There was then "a lot of radio chatter" as well as talk in the command room. He had not anticipated arresting the occupants of the Tacoma at that time but that quickly changed. At 1:15 pm the decision to arrest was made and the officers at the scene were directed to search the Tacoma incident to the arrests and seize any items found.
- [62] Wells testified that at that time, he believed that the occupants of the Tacoma were parties to the kidnapping and his grounds to arrest Vu, McKinnon and Margison were based on the information he received from being updated on his return to work on November 17, including the observations of all six of the group together on November 16 at a White Spot; the information from surveillance teams and intercepted communications between November 17 and 23, including the observations at the Mercedes dealership and at Reliable Guns, the items found in the white Sienna in the execution of the general warrant, the events of November 22 and the morning of November 23. He believed that all three were working in concert with Powers and Sleigh to kidnap Low.

Evidence of Sgt. McAndie

- [63] During the week preceding November 23, Sgt. McAndie was dealing with another investigation and was in and out of the office. However, as team commander, he was kept informed about all aspects of the E-Navigate investigation and he was in the command room at several important times, including November 22 and 23. He testified about the police theory that Margison had a "crime group" or criminal organization that conducted "rips", extortion, and kidnapping "as sources of extracting income". He was aware that on November 8, 2011, police obtained an authorization to intercept the private communications of Margison, Powers, McKinnon and Stephens (P/19/2011). He was also aware that two of the targeted vehicles, the Acura MDX and the Tacoma, were associated to Vu.

- [64] McAndie testified that on November 18, Wells informed him that Eric Low had been identified as a potential kidnapping victim, and on November 19 (through intercepted communications) that Powers had firearms at his residence and (through surveillance) the white Sienna was parked in the vicinity of Low's residence on Sidley Street and the Tacoma, with Vu and Stephens, was also in the vicinity of Sidley Street.
- [65] On November 20, Wells informed McAndie about the results of the execution of the general warrant on the white Sienna. McAndie learned that a backpack was found containing a "kidnap kit" with a handgun (which was rendered inoperable by the police), a balaclava, zap straps and a receipt from Reliable Guns. He also learned about the November 17 surveillance of Margison and McKinnon at Reliable Guns and the fact that the date of this surveillance coincided with the date of the receipt. McAndie said that the surveillance observations of Margison and McKinnon at Reliable Guns on November 17 and the receipt of the same date led him to deduce that the two had made this purchase.
- [66] Also on November 20, Cpl. Harding informed McAndie of intercepted communications of Powers calling his wife, saying that they wanted to do the job that day, he was waiting to get picked up, he wanted to drive by the residence to see if it was possible, and if not he would be going to Mission. In the afternoon, McAndie attended a strategy session with Wells, Harding and others. He said they were concerned about the firearms found at Powers' residence and the items found in the white Sienna. There were discussions about what might flow for the investigation and the options of conducting an undercover operation and monitoring the phone lines of Margison, McKinnon and others. After that he was in the command room for the afternoon.
- [67] As of the evening of November 20, McAndie said that he believed the six men were conspiring to kidnap Low.
- [68] On November 22, McAndie was present in the command room all morning. He said they believed the kidnap of Low would take place that day. They had two surveillance teams out, one on Powers and the other on the white Sienna, and they had tracking and audio devices on the white Sienna. When Powers was in the Sienna, the other team followed the Tacoma.
- [69] Through live reports from the surveillance teams, McAndie learned that Powers was picked up by Vu and Stephens in the Tacoma and dropped off at the white Sienna near Low's residence, then Sleigh was dropped off at the same place by Vu and McKinnon, also in the Tacoma. When Low's vehicle left from a location near his residence, the Sienna followed it to Brentwood Mall at Willingdon and Lougheed in Burnaby. McAndie said that the conversations in the Sienna suggested concern about "where to grab him and when" and momentarily losing sight of him. At Brentwood Mall, two occupants from Low's vehicle went inside. There was a uniformed police car in the parking lot which caused stress to Powers and Sleigh. At one point, the Sienna parked beside Low's vehicle, and then Low and another person returned. Conversation in the Sienna suggested Powers was concerned that there were two people and they missed the opportunity. Low's vehicle then left the parking lot.

- [70] Meanwhile, a surveillance team was following the Tacoma with Vu, Margison, McKinnon and Stephens inside it. While the Sienna was at Brentwood Mall, McAndie said that the Tacoma was in the vicinity of Burnaby. He accepted that entries from the command room log placed the Tacoma westbound on Rumble at Gilley at 10:22, and at Willingdon and Canada Way at 10:26 (which is south of Willingdon and Lougheed).
- [71] Powers and Sleigh were then seen to leave the Sienna and get on the Skytrain, and the Tacoma was lost to surveillance. Later, Powers was seen returning to Brentwood Mall, picking up the Sienna, and driving it back to his residence.
- [72] McAndie said that they shut down the command room at 12:30 pm. That evening he received an update from Harding about an intercepted communication between Powers and "Dan", where Powers was heard to say that they were "really close to doing the job today" but the intended victim had someone with him and there was surveillance on them all day (which they became aware of at the last minute) and they had to take the car back.
- [73] McAndie believed that the kidnap did not occur because Low was not alone and there was a police car in the parking lot.
- [74] On November 23, McAndie was again in the command room. At an early morning briefing he learned that the group had acquired another vehicle, a gold Sienna, and tracking devices had been placed on this vehicle as well as the Tacoma. McAndie was able to view the trackers on each vehicle on separate screens in the command room. Again, they had two surveillance teams out (he said one was on Powers and one on the gold Sienna), and they also had uniformed teams and the ERT out in the event enforcement action was needed.
- [75] Surveillance observed Powers and Sleigh grab Low in the area of East 50th Avenue and Fraser Street in Vancouver, and McAndie called for enforcement. Around this time, he could see that the Tacoma was in the vicinity of Vu's residence near Kingsway and Knight. Within the next hour the Tacoma became mobile and at 12:35 pm McAndie was advised that the vehicle, with Vu, Margison and McKinnon, was travelling towards the crime scene at East 50th and Fraser. At 12:42 pm he was advised by surveillance that the Tacoma had arrived within the immediate area of the crime scene and McKinnon was outside the vehicle looking at a laptop. McAndie said it was significant to him that they were now at the scene and the fact that McKinnon was seen looking at a laptop strengthened his belief that McKinnon was part of the conspiracy to kidnap. He said he "knew these guys to be tracking their victims through GPS".
- [76] McAndie testified that the basis for this latter statement was in part information learned through intercepted communications, where Powers was heard in September 2011 to say he was "trying to figure out this map thing for when they go to work" and Margison was heard around November 17 talking about changing a battery. It was also based in part on surveillance observations in September (noted in the command room log) of Stephens walking from a store that dealt with PGPs and GPS trackers, carrying a box, as well as observations of McKinnon leaving a residence with a laptop. McAndie said he believed that

in the intercept, Powers was referring to laptops and GPS trackers.

- [77] When McAndie learned that McKinnon was out of the vehicle with a laptop, he had a short strategy session with Insp. Jadis, Wells and other officers in the command room about how to deal with the situation. He said a "collaborative" decision was made to detain the occupants of the Tacoma, advise them they were under investigation for kidnapping, identify them, and seize any evidence to support the investigation. At 12:47 pm he spoke to Cpl. Goebel of the ERT and directed them to conduct a vehicle check, detain the occupants and seize evidence. At 12:51 pm he called Sgt. Jordan and requested him to attend that scene, assist with the vehicle check and detain the occupants. At 1:15 pm he received an update from Goebel, who advised him that the vehicle was "full of cell phones" and a laptop and asked if he wanted the vehicle seized.
- [78] It was at that point that McAndie told Goebel to place the occupants under arrest for kidnapping and proceed to process exhibits. He said that the possession of the laptop supported his belief that the group used tracking devices and the possession of the cell phones was consistent with his belief that they used PGP encrypted Blackberries. He believed evidence was contained in those devices to support an arrest for the kidnapping of Eric Low and that is why he ordered the arrest and seizure of those items. He gave the order to arrest but the decision to do so was a collaborative one with Wells and Jadis.
- [79] In cross-examination, McAndie said that between the decision to detain and arrest, he had some discussion with Sgt. Jordan on the phone. He did not recall the conversation, as there was "a lot on the go" but agreed that Jordan could have suggested that they needed to arrest in order to search the Tacoma.
- [80] McAndie testified that prior to November 23 he believed Margison, McKinnon and Vu were arrestable on the following grounds: the intercepted communications of Powers indicating there was a "job", which McAndie believed was a kidnapping, extortion or home invasion; the identification of Low as the victim on November 17; indications from intercepts and surveillance observations on November 17 at the Richmond Mercedes dealership that they were using tracking devices; the surveillance of Low's residence on Sidley Street; the backpack found in the white Sienna containing a "kidnap kit" with a handgun and a November 17 receipt from Reliable Guns; the surveillance observations of Margison and McKinnon at Reliable Guns on November 17; the surveillance observations of Powers and Sleigh being delivered to the white Sienna on November 22 and observing the events of that day from the command room; the intercepted communications indicating that Powers and the others had detected the surveillance and switched the vehicle to a gold Sienna; and surveillance observations of Powers and Sleigh abduct Low on November 23, the Tacoma being "in the vicinity" at the time and then going to within one block of the crime scene, with McKinnon using a laptop.

Defence submission

- [81] On behalf of Vu, Mr. Jevning submitted that the decision to arrest was driven by a desire by Wells and McAndie to obtain evidence, and they had to justify the arrests in order to justify the search and seizure. These officers mistakenly thought they could conduct a search of the Tacoma incidental to a detention, and when they realized they could not, they decided to direct an arrest without appreciating the difference between the two actions. The defence does not suggest that the arrest was a contrived decision but rather a hasty one, made without thought as to whether their beliefs amounted to more than suspicion. It is submitted that the actions of these officers are the best indication of their beliefs at the time, which were that they reasonably suspected the occupants of the Tacoma to have been involved in the kidnapping, but they did not have reasonable grounds to believe that they had committed that offence.
- [82] Key to assessing this is the evidence of Wells that he believed he did not have enough evidence to support a charge against Vu, McKinnon and Margison. Mr. Jevning submitted that the requirements of reasonable and probable grounds for arrest under s. 495 of the Criminal Code are the same as the grounds to lay an information under s. 504 and thus the "inescapable inference" from Wells' evidence is that he did not have reasonable grounds to arrest.
- [83] The defence also submitted that the temporal gap between the time of the kidnapping and the time the Tacoma was seen in the area of the kidnapping is important in assessing the officers' reasonable beliefs. Pointing to the lack of evidence of any communication between the Sienna and the Tacoma on November 23, the defence says that there is no nexus between the occupants of the Tacoma and the kidnapping. Finally, Mr. Jevning submitted that the fact that the police were largely ignoring the Tacoma that day is inconsistent with the notion that they were interested in the occupants of that vehicle, which is in turn inconsistent with having grounds to believe they had committed a criminal offence.
- [84] Mr. Lawrence adopted these submissions on behalf of McKinnon.

Crown submission

- [85] The Crown submitted that the initial decision to detain cannot colour everything Wells and McAndie did in the short period of time following that decision and given the complexity of the investigation and the speed with which things unfolded, it was well within their authority to either detain or arrest. The Crown says that each officer had ample grounds to arrest Vu and McKinnon on November 23 as soon as the kidnapping took place. Ms. Wagner submitted that both Wells and McAndie drew reasonable inferences from the information they had that Vu and McKinnon were involved in the planning and the kidnapping itself.
- [86] The Crown challenged the suggestion that Wells' belief that he did not have sufficient grounds to charge these accused equates with whether he had reasonable grounds to arrest. Although s. 495 and s. 504 employ the same reasonable grounds test, it does not follow that if

one occurs, so too must the other, as these sections serve different functions and each involves the exercise of discretion in different contexts. Ms. Wagner submitted that a police officer may have reasonable grounds to arrest but may also be of the view that there is insufficient evidence to mount a successful prosecution that would justify laying an information without conducting further investigation. In this case, the police had a broader objective and the fact that they released Vu and McKinnon the day after the arrest does not detract from their reasonable grounds to make that arrest.

Findings and assessment

- [87] McKinnon, Vu and Margison were arrested on November 23, 2011 because Wells and McAndie believed that they were involved as parties to the kidnapping of Eric Low. As s. 21(1)(b) of the Criminal Code provides, a person is a party to an offence if he "does or omits to do anything for the purpose of aiding any person to commit it". The actus reus and mens rea for being a party to an offence are different than those for the predicate offence. A person is a party to an offence when that person has knowledge of the principal person's intention to commit the crime and does something with the intent of aiding the principal person in the commission of the offence: *R v Briscoe*, 2010 SCC 13 at paras. 13-18, *R v Vu*, 2012 SCC 40 at para. 58.
- [88] The initial decision of Wells and McAndie to detain the occupants of the Tacoma was a curious one given their objective to preserve evidence they thought would be in the vehicle. They ought to have known that the power of police to search incidental to detention is limited to that which is necessary to protect an officer's safety and would not extend to a search of the Tacoma in the circumstances here: see Mann.
- [89] Wells testified that the three Tacoma occupants had to be stopped and detained quickly in order to preserve the evidence he thought would be contained in the laptop. He said that he did not direct a seizure of anything and his plan was to briefly detain the occupants and then apply for a search warrant for the Tacoma and its contents. He had not contemplated an arrest as he had no plan in place for that (i.e. no interview plans and no Report to Crown Counsel). However, that changed within 30 minutes. He said there were discussions about whether arrests would compromise Project E-Navigate and whether they would be able to lay criminal charges against the three. Despite these concerns, he decided, in consultation with McAndie, to change the plan from detention to arrest and to direct the officers at the scene to conduct a search of the Tacoma incidental to the arrest and seize items, after which a search warrant would be sought to examine the items seized.
- [90] McAndie did not say anything about applying for a search warrant. He testified that his direction to Cpl. Goebel was to detain the occupants for investigation of kidnapping, identify them and seize evidence to support the investigation. The decision to change the direction to arrest came, he said, after he was advised that there were cell phones and a laptop in the vehicle, as this supported his belief that tracking devices were being used.

- [91] However, Sgt. Jordan, who received and followed McAndie's directions, testified that after he had detained the occupants, he had a telephone conversation with McAndie in which McAndie mentioned that they wanted to search the vehicle incident to the detention. Jordan suggested that this was not a good idea and the situation should be upgraded to an arrest. It was shortly after this that he received the direction to arrest.
- [92] McAndie acknowledged that he had a telephone discussion with Jordan and while he could not recall the conversation, he agreed that it could have been as described by Jordan.
- [93] The evidence clearly shows that Wells and McAndie were dealing quickly with a dynamic, changing situation. McAndie's evidence about the timing of his directions was generally consistent with the evidence of Cpl. Goebel and Sgt. Jordan, the officers on the scene. McAndie said that he gave the initial direction to detain to Goebel at 12:47 pm and to Jordan at 12:51 pm. Both Goebel and Jordan said that they received this direction at 12:51 pm. ERT stopped the Tacoma at 12:59 pm. Jordan said that he arrived at 1:02 pm and took the occupants into custody at 1:08 pm. At 1:15 pm McAndie directed Jordan to arrest and Jordan did so at 1:19 pm.
- [94] In light of the circumstances in which these decisions were made, I do not agree with the defence that the decision to arrest was a hasty one, in the sense that it was made without thought. Both decisions, first to detain and then to arrest, were made quickly and in dynamic and changing circumstances, but they were not made without serious consideration to issues of safety and the implications to the overall investigation. I took from the evidence of Wells and McAndie that, in the context of Project E-Navigate, they were not yet ready to arrest Margison, McKinnon and Vu, as they wanted to carry on with the investigation and gather more evidence.
- [95] The decision to detain was made less than 10 minutes after Wells and McAndie learned, at 12:42 pm, that the Tacoma had been tracked to East 49th and Fraser, with McKinnon outside using a laptop. Wells was very clear about his belief that the laptop had evidence that was directly related to the kidnapping and his desire to preserve such evidence. McAndie described the situation as dynamic and fluid, with a lot going on and information coming in from many sources. He said they were in a highly stressful and charged environment as they had witnessed a kidnapping earlier that morning and did not expect the Tacoma to drive towards the crime scene. He was concerned about the risk of a "take down" by ERT and felt that a direction to ERT to simply stop the vehicle and detain the occupants was the best way to proceed at the time.
- [96] McAndie testified that the officers in the command room did not articulate their grounds for the arrest at the time but he articulated them in court as "a volume of grounds, encompassed the week prior and even beyond that", and as I have outlined above. The suggestion of the defence is that they did not articulate their grounds because they did not subjectively have reasonable grounds. I disagree. Their actions must be assessed in the context of the situation at play.

- [97] The decision to arrest was made 16 minutes after the Tacoma was stopped by the ERT at 12:59 pm, after McAndie was told that there was a laptop and cell phones in the vehicle and after he had a conversation with Jordan. McAndie was involved in discussions not only with Jordan but also with others in the command room. Jordan was also taking phone calls during this time; he said his phone "would not stop ringing". Clearly, there was a lot going on for everyone involved.
- [98] In this context, I do not accept the submission of the defence that the initial decision to detain is the best indication of the belief of these officers at the time of the arrest. Police do not have to take the most extreme action they are entitled to take on the basis of their beliefs. If a police officer has grounds to arrest, he necessarily has grounds to detain encompassed within the grounds to arrest. The relevant question, then, is not what the officer did, but what the officer believed as it pertains to the different standards to detain and to arrest. In this case, the fact that Wells and McAndie originally chose to detain and not arrest is not indicative of their belief as to what action they were entitled to take, but rather of their belief as to what action was prudent at the relevant time. I find that at the time of the detention, the officers could have directed arrests based on their subjective beliefs but chose not to do so until they had considered the matter further.
- [99] Nor do I accept the submission that because Wells did not believe he had sufficient evidence to support charges against Vu, McKinnon and Margison, he did not have reasonable grounds to arrest them. Cases have established that the validity of an arrest is not affected by the fact that police either delay charges or subsequently decide not to charge the individual. In *Storrey*, it was held that a lawful arrest does not become unlawful simply because the police intend to continue their investigation after the arrest. In *Backhouse*, *Rosenberg J.A.* dismissed an argument that a decision not to charge undermined the validity of an arrest, adding at para. 71:
- as a matter of policy, in deciding whether police had reasonable grounds to arrest I would be hesitant to attach any weight to the decision of a police officer to subsequently release a suspect. The courts should avoid an analysis of events that encourage police to detain suspects unnecessarily for fear that the decision will be held against them when the validity of the arrest is scrutinized.
- [100] I agree with the Crown that the reasonable grounds standard in s. 504 for laying an information does not mean that a police officer does not have reasonable grounds to arrest if he is also of the view that the evidence is not sufficient to support charges. As *Storrey* demonstrates, police are entitled to continue with an investigation if they are of the view that further evidence needs to be gathered. Moreover, the dynamics of an arrest situation must be taken into account when assessing the reasonable grounds standard in s. 495, which may be very different from the process of laying an information. In *R. v Golub*, [1997] O.J. No. 3097 (CA) *Doherty J.A.* compared the situation of an arrest with an application for a search warrant and made these comments at para. 18:

Both a justice and an arresting officer must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonableness standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

- [101] In this case, it is quite clear that these officers were acting in a potentially volatile and rapidly changing situation, and in the context of their overall investigation, they were not ready to proceed with charges against Vu, McKinnon and Margison. Accordingly, the three were released the following day and the investigation carried on for several more months. Although Wells did speak to Crown counsel, he did not do so before their release. He said in cross-examination that he did not believe at the time that he would be seeking Crown charge approval. It is important, in my view, that Wells' view of whether there was sufficient evidence to support a charge must be considered in light of his understanding of the Crown's charge approval standard. Earlier in cross-examination, when asked about the importance of the Report to Crown Counsel, he stated his understanding that the Crown lays charges, and the test for approving a charge is a substantial likelihood of conviction.
- [102] On these particular facts, it is clear, in my view, that Wells' belief that he did not have sufficient evidence to support a charge at the time of the arrests does not undermine his subjective belief about the grounds for the arrests of Vu and McKinnon.
- [103] The defence argued that the intercepted communications relied upon could not support either officer's subjective belief, as they involved only John Powers and none of the other targets and did not reveal the nature of the "job" he referred to. Similarly, it was argued that there were other explanations, other than a planned kidnapping, for the contents of the backpack found in the white Sienna. McAndie acknowledged that the contents of the "kidnap kit" (as he referred to it) were consistent for use in other kinds of crimes, such as "grow rips", home invasions or extortions. Wells said that they initially had several theories about what Powers was up to, which included targeting a home on Sidley Street for a "rip", or an extortion of Eric Low, but this changed. By November 22, he believed that Low was to be kidnapped for unknown reasons that may have been related to extortion, a "rip" or a robbery.
- [104] I do not see how this evidence detracts from the subjective beliefs of these officers on November 23 at the time they made the decision to arrest Vu and McKinnon. Even if they had previously thought that the "job" was a grow "rip" or if they had only suspected that it

was a kidnapping (or a conspiracy to kidnap), by the time McKinnon and Vu were arrested, they believed very clearly that it was a kidnapping, having caught Powers and Sleigh doing just that in the gold Sienna. The primary issue is whether they subjectively had reasonable grounds to believe that Vu and McKinnon were parties to this kidnapping.

- [105] I find no merit in the suggestion that the police were ignoring the Tacoma on November 23 and that this somehow bears on the validity of their grounds to believe that these accused had committed a criminal offence. The Tacoma was being watched that day by a surveillance team from 9:10 am to 1:55 pm and monitored by a tracking device the entire time. The events surrounding the kidnapping were significant, and clearly occupied the police throughout the morning. As soon as the Tacoma started to move in the direction of the kidnap scene, the police were quick to act. The evidence does not suggest that they were ignoring the Tacoma at all.
- [106] I also find no merit in the defence submission that the time gap between the kidnapping and the arrest and the lack of communication between the Tacoma and the Sienna establishes that there was no nexus between Vu and McKinnon and the kidnapping. These factors cannot be considered in a vacuum but rather must be considered in combination with all of the other information these officers knew at the time they decided to arrest. Both Wells and McAndie relied on surveillance observations during the previous week of the Tacoma, with Vu driving and McKinnon as passenger at various times, picking up Powers and Sleigh and taking them to the Sienna, observations of Vu and McKinnon meeting with Margison, Stephens, Powers or Sleigh in various combinations at various times, as well as observations of Vu and Margison which they interpreted as possibly installing or removing a tracking device on a vehicle belonging to Eric Low. Their belief about this latter fact was not changed when the surveillance officer was unable to find a device on that vehicle on that day.
- [107] I note that both Wells and McAndie overstated the evidence at times throughout their testimony. I attribute this to the difficulty they may have had discerning precisely what they knew at the time from what they learned subsequently, a difficult exercise to do in hindsight. Wells in particular, learned many things after November 23 and he admitted that he did not know all the time what he knew at specific points. However, he did not fully agree with the suggestion that he could not discern what he knew on any given day prior to the kidnapping. I do not agree with the defence submission that the evidence does not establish when the facts relied on by this witness could be said to be present in his mind at the time he directed the arrest. I found that Wells was able, through review of either his notes or the surveillance logs, to discern what information he had up to and at the time of the arrests.
- [108] The information most pertinent to Wells' belief regarding Vu and McKinnon included:
- All six being observed together at the White Spot on November 16;

- Vu and Margison observed on November 17 in an Acura MDX driving to the Mercedes dealership in Richmond and Vu observed with a palm-sized object crouching down beside a vehicle thought to belong to Eric Low (the inference drawn that he was installing or removing a tracking device);
- Vu, Margison and McKinnon observed on November 17 in the Acura MDX at Reliable Guns and Margison and McKinnon attending there, although not seen carrying anything when they come out;
- Vu observed on November 18 driving the Acura MDX, picking up Stephens, and then McKinnon and Margison; the Acura is then seen parked on Antrim Avenue behind the white Sienna where Sleight and Stephens get out of the Acura and Sleight puts a grocery bag with something shaped like a laptop into the Sienna; the Acura then drives to a McDonald's parking lot at Kingsway and Hall, where Powers is observed walking towards the Acura (inference that they had a brief meeting);
- Intercepted communications of Powers on November 18 about a plan for the next day with a big payout, something that they had been trying for a few days;
- On the morning of November 19, the white Sienna and the Tacoma observed on Sidley Street driving away in tandem; Sleight is seen getting out of the Tacoma and getting into the Sienna, which is driven by Powers; the Sienna drives to Burnaby Hospital where Low's 2010 Acura is in the parking lot and leaves when the 2010 Acura is driven away by an unidentified female; later in the afternoon the Sienna parks on Antrim Avenue, the Tacoma parks behind it and Powers and Sleight get out of the Sienna and get into the Tacoma; the Tacoma then drives by the Mercedes dealership in Richmond;
- On the execution of the general warrant on the white Sienna on November 20, the discovery of the backpack which contained a handgun, magazines and other ammunition, zap straps, gloves, a balaclava, and the November 17 receipt for magazines from Reliable Guns (inference that the items were to be used in a kidnapping or similar crime and that Margison and McKinnon made the purchase of the magazines);
- McKinnon and Margison observed the evening of November 20 in the Tacoma picking up Powers in Mission and dropping him at his residence in Burnaby;
- Vu observed on November 22 driving the Tacoma, picking up Powers at his residence and dropping him, and later Sleight, at the white Sienna, and then driving to Burnaby not far from Brentwood Mall, where the white Sienna is observed to have followed Eric Low's vehicle;
- Intercepted communications of Powers on the evening of November 22 indicating that they were extremely close to doing the job that day but the victim had someone with him and they were being watched by surveillance so they had to get another vehicle;

· The Tacoma observed on November 23 by surveillance and on a tracking device driving to the area where Powers and Sleigh had earlier kidnapped Low, and McKinnon observed outside operating a laptop (inference that they were tracking Low's vehicle to that location).

[109] McAndie relied on essentially the same information, much of which was conveyed to him by Wells but some of which he learned while in the command room. He placed more significance on the Tacoma being in the vicinity of Brentwood Mall on November 22 when the white Sienna was there. He also relied on intercepted communications of Powers ("trying to figure out this map thing" in September) and Margsion (changing a battery on November 17), as well as surveillance observations of McKinnon with a laptop and Stephens leaving a store that sold GPS trackers.

[110] Both Wells and McAndie made inferences based on their knowledge of all of this information considered together, on which they relied to form their beliefs that Vu and McKinnon were involved in the kidnapping of Eric Low. I am satisfied that on November 23, 2011, both officers subjectively believed that these accused were assisting in various ways that included the use of tracking devices and laptop computers.

(b) Objective grounds

Defence submission

[111] On behalf of McKinnon, Mr. Lawrence submitted that the beliefs of Wells and McAndie were not objectively reasonable. While conceding that the test is one of reasonable probability and the assessment must consider the factual matrix at the time the decision to arrest was made, he says that the facts do not support a reasonable belief that any acts of McKinnon constituted an aid to Powers and Sleigh in the kidnapping. Mr. Jevning adopted these submissions on behalf of Vu.

[112] Mr. Lawrence pointed out the following weaknesses in the evidence:

- the "whole group" being together on November 16 at the White Spot was simply a gathering of individuals and no inference can be drawn from this;
- there is no link between McKinnon and the intercepted communications of Powers;
- McKinnon was not observed at the Mercedes dealership November 17;
- there is no evidence of any interaction between McKinnon and Powers or Sleigh on November 22 and the issue of whether the Tacoma was in the "vicinity" of Brentwood Mall that day is therefore immaterial;
- the November 17 receipt from Reliable Guns is circumstantial evidence and not sufficient to link McKinnon to the magazines;
- at the time of the arrests, there was no direct evidence that tracking devices had been used and there is no evidence as to how these devices are used so as to connect this to the use of laptops.

- [113] The defence says that there is no foundation for the theory that tracking devices were being used, and this, in combination with the lack of evidence connecting McKinnon to the kidnapping, is insufficient to support a belief that McKinnon assisted as a party to that offence.

Crown submission

- [114] The Crown submitted that when viewed objectively and considered from a police officer standing in their position, both Wells and McAndie had ample reasonable and probable grounds to arrest McKinnon and Vu.

Findings and assessment

- [115] I have considered the defence's submissions in respect of both McKinnon and Vu. I have also considered that neither of them was ever seen in either the white or the gold Sienna, there were some days they were not seen at all, and with respect to Vu, whenever he was seen, he was driving either the Acura MDX or the Tacoma.
- [116] The defence's assessment of the totality of the evidence was that each component has zero value, and therefore when viewed in totality cannot result in anything more than zero. With respect, I disagree. While many of the individual pieces of information in themselves can be described as innocuous, when viewed in their totality from the viewpoint of a police officer standing in the shoes of either Wells or McAndie, I find them sufficient to support objective grounds for their beliefs.
- [117] The defence submitted that neither Wells nor McAndie had particular training or experience conducting this kind of investigation and thus these factors are not relevant in assessing whether objective grounds existed. While I agree that these officers did not have particularized training or experience in a certain kind of investigation (such as, for example, drug investigations, which feature in many of the cases on reasonable and probable grounds), by November 23, 2011 they had been directing Project E-Navigate for almost six months. In doing so, they had gained a considerable amount of knowledge about the targets, starting with Margison, and expanding to include others associated with him. By the summer of 2011 they had identified McKinnon as a target and by September they had become aware of Vu. Importantly, they gained this information using investigation methods that included the use of surveillance, tracking devices, general warrants and wiretap interceptions. In my view, that experience is relevant when determining whether there were objective grounds to arrest.
- [118] As the court held in *Storrey*, to assess whether a police officer's grounds are justifiable from an objective point of view, a reasonable person "placed in the position" or "standing in the shoes" of the officer would have believed that there were indeed reasonable and probable grounds for the arrest. This issue was comprehensively reviewed by MacKenzie J.A. in *Wilson*, which denied a defence request for a five judge division of the Court of Appeal to

reconsider the jurisprudence on "officer experience" in relation to the objective branch of the test for a warrantless search. At para. 21, she held that in interpreting the Storrey test, the Court of Appeal "has consistently held that an arresting officer's personal experience is relevant to whether the officer's subjective belief in the grounds to arrest is objectively justified". She reviewed a series of cases, including Juan and Luong, and concluded at paras. 26-27:

In my view, the interpretation of Storrey as reflected in these decisions is consistent both with common sense and the words used in Storrey, where the Court articulated the reasonable person test as "a reasonable person standing in the shoes of the police officer" and "a reasonable person placed in the position of the officer" (emphasis added). The use of the definite, rather than the indefinite article, signals the arresting officer's personal experience and training are relevant to whether there were objective grounds to arrest under s. 495 of the Criminal Code.

This Court's interpretation of Storrey is also consistent with that of other appellate courts across Canada: see for example, R. v. MacKenzie, 2011 SKCA 64 at para. 27, 86 C.R. (6th) 78; R. v. Shinkewski, 2012 SKCA 63 at para. 13, 264 C.R.R. (2d) 11; R. v. Biccum, 2012 ABCA 80 at paras. 20-21, 522 A.R. 310; R. v. Rajaratnam, 2006 ABCA 333 at para. 25, 397 A.R. 126; R. v. Schrenk, 2010 MBCA 38, 254 C.C.C. (3d) 277 at para. 77; R. v. Sinclair, 2005 MBCA 41 at para. 14, 192 Man.R. (2d) 283; R. v. Lawes, 2007 ONCA 10 at para. 4 72 W.C.B. (2d) 487.

[119] A person standing in the shoes of either Wells or McAndie is a person having their training and personal experience. The fact that much of their personal experience stems from the Project E-Navigate investigation itself does not change the test.

[120] In my opinion, this case is similar to the general situation described by Frankel J.A. in Ashby at para. 59: despite that fact that each factor or piece of information standing alone can be consistent with non-criminal activity, their combined effect, when viewed through the lens of an officer with the training and experience of either Wells or McAndie, cannot be ignored.

[121] For example, the fact that all five accused and Margison were together at the White Spot on November 16 can be seen as something more than a group of friends gathering at a restaurant when their activities following this are taken into account, and the fact that McKinnon or Vu were not observed at a particular time or on a particular day has less significance when their observed connections to Margison, Powers, Sleigh and Stephens throughout this period of time are taken into account, as well as the observed connections between the white Sienna and the Acura MDX and then the Tacoma.

[122] Some of the information accumulated by the investigation took on more significance after the execution of the general warrant on the white Sienna on November 20. As Mr. Lawrence acknowledged, the November 17 receipt from Reliable Guns is circumstantial evidence. While this may not be sufficient at trial to connect McKinnon to the actual purchase of the magazines, it is sufficient to support the inference drawn by both Wells and McAndie of some connection between both McKinnon and Margison and that vehicle under the

standard of reasonable probability. The significance of the white, and later the gold Sienna, as the kidnap vehicle cannot be forgotten in this analysis.

- [123] I disagree with Mr. Lawrence's submission about the lack of interaction between McKinnon and Powers or Sleigh on November 22. While there may not have been any direct interaction, McKinnon was observed in the Tacoma that morning during the time the white Sienna was at Brentwood Mall. Moreover, the evidence does establish that the Tacoma was in the "vicinity" of Brentwood Mall at the same time Wells and McAndie believed Powers was attempting to kidnap Low. The surveillance reports and McAndie's evidence, which relied in large part on the command room log, show more particularly where the Tacoma was travelling during this period of time and that it was proximate to the area surrounding Brentwood Mall.
- [124] I agree with the defence that there is no direct link between McKinnon or Vu and the intercepted communications of Powers. However, that in itself does not render the substance of those communications immaterial. The fact that Powers was discussing a "job" that they had been "extremely close to doing" on November 22 in particular is consistent with the observations of Powers in the white Sienna that day. Further, surveillance observed that it was Vu, driving the Tacoma, who dropped Powers and Sleigh at the Sienna on November 22. Combined with surveillance observations of McKinnon, Vu, Margison and Stephens nearby in the Tacoma during the same time period, this provides a basis for the belief that those in the Tacoma had some knowledge and involvement in what Powers and Sleigh were trying to do that day. Moreover, Margison was observed getting out of the Tacoma and talking to Powers at the window of the Sienna at 9:36 in the morning, before the Sienna left for Brentwood Mall. The connection of each of McKinnon, Vu, Powers and Sleigh to Margison also cannot be forgotten.
- [125] The defence placed substantial weight on the fact that there was no direct evidence that tracking devices had actually been used by any of the accused as well as the lack of evidence that connects the use of these devices with laptop computers. Mr. Lawrence submitted that the police theory that tracking devices were being used needed to be evidence-based. He also submitted that evidence that the targets were looking at computers is irrelevant in the absence of evidence that laptop computers are necessary to use a tracking device.
- [126] I appreciate that on November 17, no tracking device was located on the Mercedes thought to belong to Eric Low. This is a factor that does weaken the basis for the grounds, but it is one factor of many. The defence pointed out that the police did not take steps after that to investigate this further, but other information which might have strengthened or weakened the grounds is not a relevant consideration, as the court noted in Jir at para. 29. In my view, the defence's argument for an "evidence-based" theory would require a standard of proof more akin to a prima facie case rather than that of reasonable probability.

- [127] Wells testified in cross-examination that it appeared to him from the descriptions by surveillance on November 19 and 22 that the Sienna was tracking Low's vehicle to a location. He said that surveillance did not describe one vehicle directly following another but rather gaps in between the two, and he therefore inferred there had to be some way for the Sienna to know where Low's vehicle was going other than by relying on sight. He testified that the movements of the Sienna to the Burnaby General Hospital on November 19 and to the Brentwood Mall on November 22 followed this pattern. The November 22 surveillance report is consistent with this. The November 19 surveillance report does not reflect observations of this pattern but it does indicate that the white Sienna found its way to Burnaby Hospital, where Low's 2010 Acura was in the parkade. Moreover, the fact that the Tacoma was seen on November 23 at a location within a block of the abduction, where Low's Mercedes was parked, and where McKinnon was seen using a laptop, is evidence which supports the police belief that the people in the Tacoma found that location using a tracking device. While perhaps not the best evidence, the lack of direct evidence confirming the existence of a tracking device on Low's vehicle does not in itself mean that the officers' beliefs cannot be justified on an objective basis.
- [128] I also appreciate that there is no independent evidence in this voir dire about tracking devices and how they work. However, there is evidence that both Wells and McAndie were familiar with these devices and how they were used to track vehicles. Wells testified that the tracking devices commonly used were small, like a pager, and could be placed on the undercarriage of a vehicle with a magnet. Both officers testified that the investigators in Project E-Navigate used and installed tracking devices on several of the target vehicles, including the white Sienna, the gold Sienna and the Tacoma. McAndie said that he observed the trackers on each vehicle on monitors in the command room. Based on this evidence, it is logical to infer that if the targets themselves were using tracking devices, they would likely be viewing the trackers on an electronic device such as a laptop computer.
- [129] I have reviewed the surveillance reports, marked Exhibits 6 to 13 in this voir dire, and attached as Appendix "A" to these reasons is a summary of the most pertinent information contained in the surveillance reports, presented as a chronology. I found this exercise helpful in assessing whether Wells and McAndie were accurate in their recollections of these reports (Wells in particular, since McAndie relied on much of what Wells told him). For the most part, they were.
- [130] The defence challenged the reasonableness of a number of the inferences either Wells or McAndie drew from the information they had, particularly that Vu was placing a tracking device on Low's Mercedes on November 17; that Margison, McKinnon, Vu and Stephens met with Powers in the McDonald's parking lot on November 18; that Margison and McKinnon had purchased the magazines that were found in the backpack in the white Sienna on November 20; that the Tacoma was in the "vicinity" of Brentwood Mall at the time the Sienna was there on November 22; and that some of this group were using tracking devices and laptops to track Eric Low's vehicles.

- [131] I agree that Wells' assumption that Powers met with Margison, McKinnon, Vu and Stephens in the McDonald's parking lot on November 18 was overstated, in that Powers is only seen walking toward the Acura at 11:10 and leaving two minutes later. Mr. Lawrence argued that Wells was incorrect when he assumed that McKinnon was in the Acura MDX at that time, as McKinnon was earlier seen getting out of the vehicle. In my view, Wells' assumption that McKinnon was there was reasonable given the contents of the surveillance report of that day. The report states that McKinnon, Margison and another were picked up by the Acura at 10:13 at Station Square Mall, after which the Acura returned there at 10:38 and McKinnon and Stephens got out, went to the bank and Starbucks, and then walked into the parking lot. While the body of the report does not state that they got back into the Acura, the synopsis states that they did, and both Stephens and McKinnon were seen in or near the Acura after that.
- [132] Other than the inference that Powers met with the occupants of the Acura at the McDonald's, I do not consider any of the other inferences drawn by either Wells or McAndie to have been unreasonable when all of the information available to them at the time is considered in its totality. Despite the absence of direct evidence confirming that a tracking device was located, the movements of the Acura MDX and the white Sienna on November 17 from the vicinity of Low's residence to the Mercedes dealership, Margison's presence that day and continuing, and the movements of the Acura and then the Tacoma throughout the week in relation to the Sienna, all provide a reasonable basis for this inference, as well as the more general one that they were using tracking devices, as discussed above. The fact that the receipt from Reliable Guns found in the backpack in the white Sienna was dated the same day that Margison and McKinnon were seen at Reliable Guns is a fairly strong basis on which an inference could be drawn that they made the purchase on that receipt. And McAndie's evidence that the Tacoma was in the "vicinity" of Brentwood Mall at the same time the Sienna was apparently tracking Low's vehicle there on November 22 is supported by the surveillance reports as well as the command room log for that day. He was incorrect, however, in saying that the Tacoma was also in the vicinity of the kidnapping at the time it was occurring on November 23.
- [133] In my opinion, there is a body of evidence that pointed to the likelihood that McKinnon and Vu were involved with Margison in particular, as well as Stephens, in assisting Powers and Sleigh to carry out the kidnapping of Eric Low, and that a reasonable person standing in the shoes of Wells and McAndie would have reached the same conclusion. The cumulative effect of the information available at the time provides objective support for the beliefs of these officers that they had reasonable and probable grounds to arrest Vu and McKinnon on November 23, 2011.
- [134] There is no dispute that if the arrests were lawful, the searches conducted incidental to the arrests were done for the purpose of protecting evidence from destruction and discovering evidence that could be used at trial, which are valid objectives.

[135] For all of these reasons, I have concluded that the arrests were lawful and accordingly, the searches and seizures conducted incidental to those arrests were also lawful.

"Fisher J."

APPENDIX A - Surveillance chronology summary

November 16, 2011

- from 10:18 to 10:42 all six men are seen together at the White Spot on Kingsway; McKinnon, Powers, Margison and an unknown Asian male leave together in an Infiniti and drive to Antrim Avenue in Burnaby (near Sidley Street).

November 17, 2011

- at 8:33 the white Sienna is parked on Antrim Avenue; Sleigh is dropped off there at 12:07 in an Acura MDX; Sleigh gets into the passenger side of the Sienna and it drives away;
- at 12:48 Vu, McKinnon, Margison and an unknown male carrying a laptop are at the Chapters Starbucks in Metrotown and they all leave together at 12:51 in the Acura MDX with Vu driving;
- at 12:50 the white Sienna is parked at Verdun Place in Richmond with Powers as the driver and at 13:11 the Acura MDX arrives at Verdun Place; the white Sienna then moves to Viking Way;
- at 13:18 Vu and Margison are seen by the Acura MDX walking towards the Mercedes dealership on Verdun Place, where Margison hands Vu a palm-sized object and Vu crouches between a white and silver Mercedes appearing to put something underneath one of them, Margison appears to be standing guard and Vu returns empty handed (the white Mercedes is later identified to belong to Eric Low);
- at 13:19 Vu and Margison drive away in the Acura MDX, meet with the white Sienna and the two vehicles drive away in tandem, eventually both parking on Antrim Avenue; the Acura MDX drives away two minutes later;
- at 14:13 the Acura MDX drives to Hall Avenue where Powers gets out; the Acura MDX then drives to New Westminster, making several stops; Vu is driving;
- at 15:11 the Acura MDX parks behind Reliable Guns on Fraser Street in Vancouver and at 15:17 McKinnon and Margison are seen walking out of the store empty handed.

November 18, 2011

- at 8:55 Vu drives the Acura MDX to Richards Street, picks up Stephens;
- at 9:45 the Acura MDX stops on Imperial Avenue in Burnaby and Vu and Stephens are looking at something in Stephens' lap;

- at 10:02 the Acura MDX drives to Station Square Mall in Burnaby and at 10:13 McKinnon, Margison and an unknown male get in the car; the Acura MDX drives around and at 10:38 McKinnon and Stephens get out and eventually both are at Starbucks, then they walk into the parking lot (the surveillance synopsis indicates that they get back into the Acura);
- at 10:49 the Acura MDX is on Antrim Avenue parked behind the white Sienna, where Sleigh and Stephens get out of the Acura and Sleigh takes a bag "shaped similar to a laptop" and puts it into the white Sienna, then they both get back into the Acura and at 10:51 it drives away;
- at 11:03 the Acura MDX drives to the parking lot of the McDonalds on Kingsway; at 11:10 Powers walks from Hall Avenue to the parking lot towards the Acura and runs back to Hall two minutes later;
- at 11:40 the Acura MDX is parked at North Fraser Regional Correctional Centre on Kingsway and at 11:54 McKinnon and Margison are standing outside; at 12:02 McKinnon, Margison, Vu, Stephens and an unknown male get into the Acura.

November 19, 2011

- at 8:50 the white Sienna is parked on Antrim Avenue and Powers is seen getting in and driving away; the Sienna is tracked to Sidley Street three minutes later;
- at 9:19 a 2010 Acura pulls up and parks on Sidley Street; an unidentified female gets out;
- at 9:46 the Tacoma drives down Sidley Street, does a u-turn in front of the Sienna and the two vehicles drive off in tandem; Sleigh gets out of the Tacoma and gets into the Sienna, which Powers is driving; three occupants are seen in the Tacoma and Stephens is identified as a passenger;
- at 10:37 the white Sienna parks just south of Burnaby Hospital facing the Hospital parkade and at 10:48 the 2010 Acura is seen in the hospital parkade;
- at 11:28 the 2010 Acura, driven by an unidentified female, leaves the Hospital parkade and at 11:30 the Sienna drives away;
- at 15:23 the white Sienna arrives at Antrim Avenue and at 16:05 the Tacoma arrives and parks behind the Sienna; Powers and Sleigh get out of the Sienna and get into the Tacoma;
- after dropping off Powers on Salisbury Avenue the Tacoma drives to the Mercedes dealership on Verdun Place in Richmond; no one is observed getting out.

November 20/21, 2011

- that night, the Tacoma makes several stops in Maple Ridge and Mission; at 00:47 McKinnon, Margison and Powers are at a Tim Horton's on Lougheed Highway, leaving together at 1:29 and Powers is dropped off at Hall Avenue in Burnaby.

November 22, 2011

- at 8:52, Powers is picked up by Vu in the Tacoma; Stephens is also a passenger;
- at 9:07 Powers gets into the drivers' seat of the white Sienna, drives to Sidley Street, parks, and five minutes later drives back to Antrim Avenue and parks;
- at 9:36 the Tacoma arrives and parks on Antrim Avenue; Sleigh gets out of the Tacoma carrying something under his jacket and gets into the front passenger seat of the white Sienna; Margison gets out of the Tacoma to talk to Powers at the window of the van and then gets back in the Tacoma; the two vehicles drive off in tandem; the Sienna drives around in circles near Royal Oak Avenue and Sidley Street; the Tacoma goes north on Royal Oak Avenue;
- at 9:43 the Tacoma is parked on Kingsway between Hall and Salisbury Avenues; Vu is standing by the driver's door and McKinnon, Margison and Stephens get out of the vehicle and run across Kingsway to a Starbucks;
- at 9:56 the Sienna parks on Macpherson Avenue;
- at 10:00 two Asian males get into the 2010 Acura parked in an open lot on Macpherson Avenue and drive north; the Sienna does the same;
- at 10:22 the white Sienna is northbound on Willingdon Avenue at Lougheed Highway and at 10:24 it is circling the parking lot of Brentwood Mall; at 10:38 the 2010 Acura is parked at the Starbucks at Brentwood Mall and the white Sienna is parked beside it;
- at 10:39 the 2010 Acura drives away and the Sienna drives around the mall;
- at 10:50 the white Sienna parks on the east side of the mall; Powers and Sleigh get out and go to the Skytrain at Willingdon and Lougheed;
- during this same time period, the Tacoma is in the vicinity of Burnaby not far from Brentwood Mall;
- at 10:16 Vu, McKinnon, Margison and Stephens get into the Tacoma, leave Kingsway and drive towards Georgia Street in Burnaby;
- at 10:22 the Tacoma is seen westbound on Rumble at Gilley and at 10:26 at Willingdon and Canada Way (from command room log);
- at 10:38 the Tacoma arrives at 4478 Georgia Street; at 10:48 Vu, McKinnon, Margison and Stephen are seen outside, a minute later the Tacoma drives away, after which it was lost to surveillance;
- at 12:06 Powers goes back to the white Sienna at Brentwood Mall, drives to Hall Avenue and then parks it on Elwell Street just west of Hall; he gets out and goes inside Hall Avenue;
- at 13:00 Stephens is seen in the Sienna, which is driving to Trans Canada Rentals in Richmond, and later at Cantrust 4S Autobody and Service, where Stephens and two other men get into a gold Sienna and drive away.

November 23, 2011

- at 11:00 the gold Sienna is seen parked in the lot of a Blockbuster video at 6580 Fraser Street (at East 50th Avenue) parked next to a white Mercedes; an unknown Asian male (later identified as Eric Low) walks up to the driver's door of the white Mercedes and at 11:01 the two men from the Sienna are seen forcing Low into the Sienna;
- at 11:03 the Sienna is driving northbound on Prince Albert Street from East 50th Avenue; the passenger sliding door is open and Low appears to be unconscious with his feet hanging out the door;
- at 11:05, the Sienna is pulled over by the ERT members at the rear of 6061 Sherbrooke Street and Powers and Sleight are arrested;
- meanwhile, Vu picks up Margison and McKinnon in the Tacoma at 9:53 at the Central Park Pool and they drive to De Dutch Pancake House at 4003 Knight St. in Vancouver;
- they leave the pancake house at 11:41, driving west on East 24th Avenue, stopping east of Nanaimo Street near the Skytrain Station at 11:46; Margison is seen outside pacing around for a few minutes and they leave at 11:50;
- at 12:04 the Tacoma pulls into an underground parkade at 4028 Knight Street, leaving eight minutes later with Margison, McKinnon and Vu inside;
- at 12:36 the Tacoma pulls into the parking lot of the Starbucks at 6544 Fraser Street (at East 49th Avenue) and McKinnon is seen outside at 12:38 with a black shell laptop in his left hand, the screen is open and he appears to be pushing keys on the keyboard while looking at the screen; he gets back in the Tacoma at 12:41;
- at 12:55 the ERT stop the Tacoma at Victoria Drive and East 50th Avenue.

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