
CANADA / JUDGMENT

R. v. Purchase

2011 BCSC 154

COURT

Supreme Court of British Columbia

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2011 BCSC 154 R. v. Purchase

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Purchase,

2011 BCSC 154

Date: 20110207

Docket: 56978-2

Registry: Chilliwack

Between:

Regina

And

Jason Warrick Purchase

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment on Voir Dire

Counsel for Crown:

J.M. Le Dressay

Counsel for Accused:

K. Beatch

Place and Date of Hearing:

Chilliwack, B.C.

January 10 - 14, 2011

Place and Date of Judgment:

Chilliwack, B.C.

February 7, 2011

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I. Overview of issues and facts

- [1] These voir dire reasons consider whether the way police officers responded to a 911 call constitutes a breach of the defendant's rights under sections 7, 8, 9, 10(a) and (b) of the Canadian Charter of Rights and Freedoms [Charter]. Also considered is whether evidence of a marihuana grow operation and the firearms and ammunition the police saw in their initial warrantless, and ensuing warranted, searches of the defendant's residence should be excluded under s. 24(2) of the Charter.
- [2] The accused, Mr. Jason Purchase, did not testify in the voir dire. The Crown called seven witnesses: St. Sgt. Hermann, the officer in charge; Sgt. Mitchell, a member of the Abbotsford emergency response team [ERT]; Sgt. Jack; and Constables Durocher, Basaraba, Mason and Patterson.
- [3] Events engaging the police occurred on May 9, 2007, beginning around 1526, when the dispatcher's call went out to officers. It ended around 1810, after Mr. Purchase and six other occupants of the residence in question had been arrested and transported to the police station.
- [4] Mr. Purchase was charged with two counts under the Controlled Drugs and Substances Act [CDSA] and seven counts under the Criminal Code relating to unlicensed firearms and unsafe storage of both firearms and ammunition.
- [5] The 911 caller identified herself and gave the dispatcher contact information. She was worried about her brother, who reportedly told her he had driven to an Abbotsford, B.C. residence located at 4610 Sumas Mountain Road, an investment rental property [the residence], where an unknown occupant had threatened him with a gun. The caller had lost contact with her brother and after 15 to 20 minutes still had been unable to re-establish contact with him.
- [6] The most relevant parts of the conversation between the caller and dispatcher are set out below.

RR: Hmm hmm.

Some guy came out with a gun and I don't know if he's okay or not.

RR: Okay. Alright, and so he was being threatened with a gun?

Yeah, he just went to - went there to check it see if the house was okay and if everything was okay and I just - now I can't get a hold of him.

RR: Okay, and what's the address there

46 - 4610 Sumas Mountain Road

...

RR: Alright, and so did they know the person?

No, they were just going there to check the house.

RR: Okay, alright - going to check the house.

Yeah.

RR: And is it Upper Sumas Mountain Road?

I don't - I don't know.

RR: Okay, and this is your residence?

No, it's not my residence. It's a rental property that -

RR: It's a rental -

Yeah, that's why they went to check it.

RR: okay uh, alright. Okay, just stay on the line with me. And so uhm, how long ago did he call?

Uhm, he called me about - what, fifteen, twenty minutes ago and he said the guy came out with a gun. And then I tried calling him back. I said well I'm gonna call the police and then I tried calling him back and I can't get a hold of him.

RR: Okay, alright. Okay, Okay, alright now uh, -- alright so they have no clue who came out?

SZ: No, I have no idea.

RR: Okay. Okay. And you say umh, you got called about twenty minutes ago?

Yeah

[7] The most relevant parts of the radio communications between officers, exhibit 14A, are set out below:

Wav 6 - 11 seconds

NK: What were the numbers again? The address?

RR: The numbers are 4610 Sumas Mountain Road.

Wav 7 - 44 seconds

NK: (U/I) twenty-five

RR: Go ahead

NK Send us a copy of the call uh, (U/I)

RR: 10-4

NK: Abbotsford, give us that too.

RR: Zulu five-two

Wav 8 - 22 seconds

NK: Can you tell us the circumstances of the suspect male come outside the residence with a gun?

RR: I'm just finding out it's a third party call and that's all the information we have.

Wav 12 - 37 seconds

NK: I'm wondering if we know what type of gun? Was it a rifle or a handgun?

RR: the only information I have is a third party thing, a man came out of the house with a gun. We have no other information.

Wav 15 - 11 seconds

RR: And Zulu two-five, it's supposed to be an older house across from the new development. That's all we've got.

Wav 17 - 36 seconds

NK: Okay those units attending uh, Sumas Mountain apparently the comp - uh, the complaint was the third party, called us to say that her brother and another party went to the house and a male came out waving a gun. The male, not with a gun, the other male called his sister on his cell and then they were disconnected. We don't have any names or anything. She's trying to get her brother on the cell again.

Wav 18 - 1:28 minutes

NK: Further members on scene. It's gonna be the blue house where the uh, glass van is parked in front of right now.

RR: Sierra two-five. You said it's a blue house with a glass what?

NK: A white Chevy glass van parked out in front. Uh, maybe the air unit can see that cause I was advised that it'd be up - up above.

RR: Copy that, a blue house with a white Chevy glass van out front.

Wav 36 - 57 seconds

NK: Alpha five-two. Radio advises they have no phone number. Negative on the phone number for the residence. The only phone number they have is a cell phone number for the glass truck still parked on the side street. They said there is no gun.

- [8] St. Sgt. Hermann was the road supervisor that day, so he was in charge of officers who responded to the 911 call. The residence was situated in a forested mountain top rural area divided into parcels ranging between 1 and 20 acres. The nearest neighbouring residence was located about 40 to 50 meters to the north. The residence driveway runs a distance of about 20 to 30 meters from the road to the residence. Dense trees and bushes line both sides of it. It is common for residents in the area to use firearms to scare off coyotes.
- [9] Units began responding to the 911 call at 1526. St. Sgt. Hermann and Cst. Durocher arrived at roughly the same time, between 1537 and 1539. Sgt. Mitchell, an ERT member, arrived soon after. Other members gradually assembled. St. Sgt. Hermann testified they were understaffed that day. He was concerned he would not have enough officers to contain the residence safely.
- [10] Officers arriving on scene noticed the smell of marijuana in the immediate vicinity. Staff Sergeant Hermann said the smell of it wafted in the air; sometimes he could smell it, sometimes not. He acknowledged the smell of growing marijuana can spread a few blocks, thus he could not be positive the smell was coming from the residence. He acknowledged the source of the smell could be pinpointed with techniques such as "squaring off," and that without more particularity, he likely would not have had sufficient grounds to obtain a search warrant for an offence under the CDSA. That aside, all officers questioned at trial confirmed that, while the smell of marihuana concerned them because of their experience that firearms, used to protect grow operations from "grow rips" and from intruders, are often found on the site, the 911 gun threat call, not investigation of a grow operation, was their focus. Officers' testimony about smelling marihuana gains credence from the fact that large amounts of marihuana were being harvested inside the residence at the time.

Dispatcher's information

- [11] Planning and handling the response to the 911 gun call was St. Sgt. Hermann's responsibility. He testified he called the dispatcher to get a better overview of information the 911 caller had relayed, and to obtain updates. The call was identified as a third party 911 call because the caller had not directly witnessed the incident.
- [12] St. Sgt. Hermann understood that the caller's brother had gone to the residence on behalf of the property owner to check on it. The brother had told the 911 caller he had been confronted at the residence by someone with a gun. Then she was disconnected from the caller, who had not been able to contact him further. He testified there might have been other bits and pieces of their conversation he could not recall. Although the 911 call was a third-party call, St. Sgt. Hermann considered it reliable because the caller had left her name and contact information and the identity and cell phone number of her brother.
- [13] Defence counsel challenged St. Sgt. Hermann's recall of this information, pointing out to him to how he had described the 911 call at the preliminary inquiry. On pre-trial cross-examination, he said the call information was vague; that there was an address, that the

information was not specific about who was involved or what the "dynamics" were. St. Sgt. Hermann said he was not questioned at the preliminary inquiry about these specifics, and he thought these issues had been covered off by others. He said he was surprised to learn that what he called the "exigencies of the situation," referring here to the details of the 911 call, had come into question. Counsel suggested St. Sgt. Hermann based his trial testimony on his reading of the file, not his memory of what he knew arriving at the scene. St. Sgt. Hermann said he had spoken to the dispatcher and had made ongoing off-radio inquiries about the 911 call. He said he instructed dispatch to keep trying to make a connection to find out the status of the party and to keep him advised.

- [14] Pressing the point, defence counsel pointed out to St. Sgt. Hermann that, with the police training a gun on someone, then conducting a warrantless search and infringing a citizen's fundamental rights, police could very well be called on to justify their actions. He suggested dispatch details reported to Crown counsel were especially important on a gun call should the situation not resolve well. St. Sgt. Hermann conceded details turned out to be more important than he thought at the time. He said making notes of the details was not practical as events unfolded, and recording details did not seem important. In any event, St. Sgt. Hermann insisted the 911-call dispatch information he received had informed his operational decisions.
- [15] St. Sgt. Hermann could be faulted for not providing more details in the report to Crown counsel; perhaps also faulted for his not expanding on answers given at the preliminary inquiry. Nonetheless, Exhibit 14-A, the transcript of radio calls made between officers attending the scene, supports St. Sgt. Hermann's testimony he was aware of more details than just that of a 'third party report of a man with a gun at a residence.' (Although the speaker of the following police radio excerpt does not identify the speaker, most likely it was St. Sgt. Hermann).

NK: Okay those units attending uh, Sumas Mountain apparently the comp - uh, the complainant was a third-party, called us to say that her brother and another party went to the house and a male came out waving a gun. The male, not with a gun, the other male called his sister on his cell and then they were disconnected. We don't have any names or anything. She is trying to get her brother on the cell again.

- [16] Looking objectively at circumstances surrounding the dispatch, it would make sense that St. Sgt. Hermann would want to try to keep in contact with dispatch and obtain further available information to better ensure officer and public safety. Resources St. Sgt. Hermann allocated to the call, including a helicopter to help contain the area and aid communications between officers on the scene, needed as radio and cell phone transmissions were unreliable in the area, confirm he took the call seriously. He did not call in all full-time members of the ERT, but Sgt. Mitchell was a member of this unit, and provided operational support. St. Sgt. Hermann explained he had to make judicious use of available resources.

- [17] Defence counsel also challenged the accuracy of what the above-quoted radio relay states, pointing out the caller did not say the man at the residence had waved a gun or that there had been a disconnection. St. Sgt. Hermann testified this is what he understood. I will discuss this further later.
- [18] St. Sgt. Hermann agreed he had not formed a belief the person was missing, as in the sense of a person failing to turn up for a planned meeting. Constable Durocher agreed on cross-examination that information was vague and it was not clear when the 911 call had occurred. However, she said that because it was a 911 call it would have occurred recently or would still be in progress. She agreed people sometimes call 911 incorrectly. Sgt. Mitchell likewise agreed the available information was vague.
- [19] The police confirmed they did not make any neighbourhood inquiries at residences in the vicinity. On their arrival they heard no shots in the area, saw no indication of blood or spent shells, although St. Sgt. Hermann said he had not specifically turned his mind to that aspect.
- [20] The 911 third-party caller told the dispatcher her brother had her Dodge truck with him. The police found no Dodge truck at the scene when they arrived. Defence counsel emphasized the importance of this absence during argument, as discussed later.
- [21] When police responders arrived at the scene, they found a white Chevrolet glass panel truck [the Chevrolet] parked out in front. Although reasons why the Chevrolet was in the area and details of any specific questioning of the driver were not in evidence, according to police radio transmissions in Exhibit 14A, officers did obtain his cell phone number. The transcript also notes, "they said there is no gun."

Police Intentions on the scene

- [22] The police had no phone number to communicate with anyone who might have been inside. Sightlines at the scene were limited, but the front door of the house could be seen from the road. No one was seen outside the house.
- [23] St. Sgt. Hermann said cell phone and radio communication at the scene was extraordinarily poor. He ordered officers to switch to "radio 2" for car-to-car communication, using the helicopter as a relay. This left dispatch out of the ongoing car-to-car communication. St. Sgt. Hermann acknowledged on cross-examination the real possibility the lost communication the caller had described could have resulted from poor cell phone communication on Sumas Mountain or from the caller's brother having left the area. He said, "We were there because there were a lot of things we did not know."

- [24] St. Sgt. Hermann ordered closures of the road at both ends to prevent access to or from the area. His basic plan was to get people of the house, to see what occurred, to see if the brother was in the house and to ascertain his well-being. His concern for the safety of the officers and anyone inside was raised by the smell of marijuana wafting in the air in the immediate vicinity. He conferred with Sgt. Mitchell after his arrival on the scene and relied on his specialized training and expertise as a member of the ERT.
- [25] Sgt. Mitchell has 20 years of policing experience and is a member of the ERT. Abbotsford police have five full-time ERT members, supplemented by other so-called hybrid members who also perform other duties. He explained ERT Members deal with various levels of risk. If patrol officers lack resources to contain the scene, ERT members can take over the operation. The decision to call in a full ERT team rests with the supervisor, which in this case would be St. Sgt. Hermann.
- [26] As an ERT member, Sgt. Mitchell is responsible for operational support of regular patrols. He heard the dispatch and attended the scene as a regular part of his duties. He said it takes about 20 minutes to get from downtown Abbotsford to the area. He understood there had been a 'man with a gun call' [gun call]. He said radio communication breaks down on Sumas Mountain and cell phone communication is also intermittent.
- [27] Sgt. Mitchell confirmed he spoke to St. Sgt. Hermann about the resources available. Officers were slowly arriving on the scene, but St. Sgt. Hermann told him he did not think he had sufficient numbers to deal with the circumstances. Due to Sgt. Mitchell's specialized training, St. Sgt. Hermann testified he relied on Sgt. Mitchell's recommendations for safely containing the scene.
- [28] Sgt. Mitchell recalled the house was set back from the road between about 50 to 100 feet. He could not determine the depth of the property, or see what was behind the house. He noted the smell of freshly harvested marijuana plants. He felt this lent more credence to the 911 call, saying "grow-op rips" are common and growers try to protect their property with booby-traps, dogs, weapons and firearms.
- [29] Sgt. Mitchell parked his police Suburban at the bottom of the driveway. Other vehicles were deployed to prevent anyone from leaving the residence and for officer protection. He recalled the helicopter operated as a radio relay and monitored activities in the area.
- [30] None of the officers testifying were sure how many officers ultimately arrived on the scene. Sgt. Hermann said that he would not have deployed with less than three officers in front of the house and two in the rear. Initially, in addition to officers blocking access to the scene from either end of the public road, he had the five officer minimum he required.
- [31] Sgt. Mitchell explained he is trained in a standard operating procedure for de-escalating gun calls such as this. The first step is containment. Officers were positioned around the house to prevent occupants leaving the residence undetected, which Sgt. Mitchell said was hard to do in such rural settings. By 1547, he considered the area around the residence was contained,

with units positioned as well as resources allowed. The phase following containment is the call-out. The intention of a call-out is to call anyone inside the house to come out one by one. St. Sgt. Hermann said this was for the safety of the officers and occupants and so a search could be performed in a safe manner.

- [32] After the call-out was finished and anyone who came out was debriefed, the decision had to be made whether to enter the house for a clearing search. St. Sgt. Hermann said that in this case the goal would be to ensure there was not a man with a gun hiding inside the house. (They had become aware there were firearms in the house, as explained later). St. Sgt. Hermann testified the focus of the clearing search in this case was to ensure no one was harmed, to ensure everyone was accounted for and to see to their well-being. Just before Sgt. Mitchell was about to call out any occupants, Jason Purchase, the accused, exited the front door. When first seen, his connection with the house was unknown, whether he was an owner, tenant, visitor, or was connected in some other way. Sgt. Mitchell, his gun drawn, then gave voice commands to Mr. Purchase to come forward, to raise his hands in the air and turn in a circle. This allowed Sgt. Mitchell to clear his waistband for weapons. He then ordered Mr. Purchase to crawl the remaining distance from where he was to the bottom of the driveway, a distance of about 20 to 30 feet according to Sgt. Mitchell. He said that in his mind, he was dealing with a fairly high threat situation and that this was part of standard operating procedure to permit assessment and containment of the threat. The crawl position limits a person's reactions and allows for a safer containment. Mr. Purchase complied. After Mr. Purchase had crawled forward to the Suburban at the bottom of the driveway, he was taken to the back of the Suburban, placed in a prone position, handcuffed and questioned.
- [33] St. Sgt. Hermann said Mr. Purchase was handcuffed for safety reasons because it was not yet known if or how he was involved. He was not being detained in relation to any specific offense, but for an investigative purpose. He told Mr. Purchase police were investigating the report of a man with a gun, but did not give him much detail. St. Sgt. Hermann questioned Mr. Purchase for what he said were tactical, not evidentiary reasons. He could not recall specific questions. He did not tell Mr. Purchase he had a right to remain silent that point. He did not tell Mr. Purchase he was a suspect or had been arrested and did not read Mr. Purchase his Charter rights because he believed he had nothing at the time to arrest him for. Mr. Purchase advised him he had guns in the house, but nothing was going on and no one was injured. St. Sgt. Hermann said he could not recall if Mr. Purchase said the guns were licensed. Mr. Purchase also provided names of the six people in the house.
- [34] Sgt. Mitchell said he had no direct conversation with Mr. Purchase, over and above the directions he gave to him during the callout. He said he knows Mr. Purchase was debriefed but he did not know by whom. He recalled debriefing questions related to who was in the residence and whether there were any weapons in the house. He recalled Mr. Purchase giving a list of names of others in the house and that Sgt. Mitchell was to use these to individually call them out by name.

- [35] Constable Durocher said she overheard Mr. Purchase's statements made in response to questioning by other officers. She heard Mr. Purchase say there was a grow operation in the residence. She heard Mr. Purchase say said he lived in it, had firearms inside, and described their location. She was unsure who Mr. Purchase was speaking to.
- [36] After being debriefed, Mr. Purchase was then escorted to a police vehicle parked in the shade and placed in the rear seat.
- [37] St. Sgt. Hermann testified Mr. Purchase was not immediately advised of his right to counsel for several reasons. He said cell phone service in the area was unreliable. He did not know the extent of Mr. Purchase's involvement at that stage of the investigation, and had security concerns that Mr. Purchase could contact people in the house and compromise public safety. However, I note St. Sgt. Hermann had learned from Mr. Purchase he was a resident. And Exhibit 12, the ITO prepared later that day, states that, "one of the males who identified himself as Jason indicated that it was his residence, that there were guns in the house and that there was a marijuana production inside the house."
- [38] Sgt. Mitchell had intended to call out each occupant individually, but after he called out the name of one of the individuals on the list of six, all six came out at the same time. In response, officers required everyone to come forward and to lie down on the driveway, where they were handcuffed and "debriefed." In their debriefing, all six individuals said there was no one in the house with a gun and no injured person inside.
- [39] After the detention of Mr. Purchase and the other six individuals, St. Sgt. Hermann decided it was still necessary to enter the house. He told Sgt. Mitchell, who was to lead the search, what he thought should be done. St. Sgt. Hermann said the call had not been cleared - he had not found the person indicated in the 911 call; he had not yet heard from dispatch about the well being of the caller's brother. He saw the call as reliable and said his focus was to ensure no one was injured and everyone accounted for.
- [40] Counsel for the defendant cross-examined St. Sgt. Hermann on his decision. He emphasized the driver of the Chevrolet, Mr. Purchase and the six other occupants had said there was no one at the residence with a gun, and the 911 caller's Dodge truck had not been found at the scene. St. Sgt. Hermann pointed out police knew nothing about Mr. Purchase and the six other occupants, who had enough time to agree on their story before coming out, and all of them could have been lying. He agreed the information from the Chevrolet driver was "a piece of the information," but it was not determinative and someone injured could have been inside the house. St. Sgt. Hermann said had they left, they would not know if they were leaving behind injured people still inside the house. The smell of a grow operation heightened their concerns.

- [41] Six officers entered the residence at 1635, several junior officers among them. One was still in training, and Constable Durocher and others had limited experience. Because of their limited experience, Sgt. Mitchell instructed them before entering the residence. Counsel for the defendant suggested a motivation for searching was the training opportunity this gave junior officers. St. Sgt. Hermann said the training was not a motivation for the search. Training was required to conduct the search and it had become a "teachable moment."
- [42] I accept the potential training opportunity did not figure in St. Sgt. Hermann's decision to search. Given the presence of junior officers it is reasonable they would require a briefing to ensure briefing to ensure the search was conducted as safely as possible.
- [43] Sgt. Jack had 16 years experience on the drug squad at the time. When he arrived at the scene, after the seven people from the residence were already in custody, he noticed an overwhelming smell of marijuana. He said he participated in order to ensure no one was injured and to clear the original complaint. He was not an active member of the drug squad at that time. He was in uniform. He said Sgt. Mitchell was in charge of the clearing search.
- [44] Sgt. Mitchell testified he had to juggle resources until he was able to make safe entry. He says standard operating procedure is to take no more than six officers inside the residence. Once inside, he gave additional instructions. The residence was searched one room at a time, with two officers searching while two or three other officers watched to make sure no one was hiding. He said this can be very time-consuming.
- [45] Sgt. Mitchell said officers needed to check for people hiding behind objects and hidden entrances. Small rooms sometimes lie behind false walls, and on previous searches Sgt. Mitchell has found people hiding behind them. As a consequence, the officers had to ensure the search covered off the foundation; that is, all the walls and rooms inside had to square off with the exterior dimensions. Searchers had to be on the lookout for anything that could injure officers. The marijuana grow operation, discovered in the crawlspace, with the close proximity of lights, water and electricity, raised additional concerns. As well, Sgt. Mitchell said searches can reveal secreted weapons. The search was completed at 1715. Sgt. Mitchell testified 40 minutes is not an unusual amount of time for such a search.
- [46] Sgt. Durocher remembered four to six other officers, including Sgt. Jack, St. Sgt. Hermann and Sgt. Mitchell, were involved in the search. She recalled a methodical search throughout the whole house, including any areas where someone could be hiding. She said they looked in every room upstairs and downstairs for someone injured, a hostage, presence of a handgun: "all hypotheticals."
- [47] Constable Durocher testified she was unsure what they might be responding to, especially knowing it was a grow op; whether there would be a person with a gun, or whether someone might require medical attention. She said that in her own mind there was a safety concern.

- [48] Containers of ammunition were seen in various places. Some contained packaged shells, others open shells of various calibers and types. In addition to a handgun, unsafely stored rifles of various calibers in various locations in the house could be seen in plain view.
- [49] Also in plain view, parts of marihuana plants could be seen on the floor. In one room, a table with scissors, covered in plant residue, with boxes and bags containing buds separated from the plants, as well as leaves, were in plain view. Sgt. Jack testified the house was in midst of a marihuana harvest, otherwise known as a "clipping party," referring to the crop owner's hiring of individuals to do the labour intensive work of separating the bud from the rest of the plant.
- [50] The clearing operation did not turn up any other occupants. I will not set out further details of what the officers could see in plain view. There is no question a significant marihuana production system had been set up inside the residence and there were 11 rifles, one handgun, and boxes of ammunition in plain view.
- [51] Later on, officers carried out a warranted search of the residence. I will discuss this and the defence challenge to the legality of that search later in these reasons.

Arrests at 1715

- [52] After the search was completed at 1715, Constable Durocher arrested Mr. Purchase and two other residents and read their s. 10(a) and 10(b) Charter rights. With respect to grounds for arresting Mr. Purchase, Constable Durocher said she formed her belief because Mr. Purchase indicated he lived in the house, had knowledge of the firearms and where they could be located, and said he had a grow operation in the house. She said her own observations during the search, in conjunction with Mr. Purchase's statements, led her to believe she had reasonable and probable grounds to arrest. To confirm Mr. Purchase's identity after his arrest, Cst. Durocher asked Mr. Purchase for his address. He replied that it was the address they were at. He also gave Cst. Durocher his full name and phone number. At 1735, the prisoners were escorted to headquarters and, at around 1810, were placed in their cells. St. Sgt. Hermann testified that when he was at the police station, around 1755, he saw Mr. Purchase using the phone. He required particulars before lodging Mr. Purchase in his cell, and stated Mr. Purchase confirmed his name and his date of birth as May 9, 1973.

II. Discussion

Overview

- [53] Mr. Purchase seeks exclusion of all statements made before his arrest, all evidence derived from the warrantless seizure, all evidence identified on the authorized seizure, and evidence of his identification after his arrest. He says his initial detention was arbitrary and his Charter rights were violated. He says that because the warrantless search was illegal, all information gathered from it must be redacted from the ITO, leaving only the statement the affiants could smell marihuana in the vicinity, a statement that would not give reasonable

and probable grounds to issue the warrant. Moreover, he submits the warranted search was not served in the time specified and did not authorize a search for firearms and weapons; therefore the search, and the seizure of the weapons, was illegal.

- [54] During the two days of counsel submissions, counsel for Mr. Purchase canvassed many authorities. Many involved investigative detentions of suspects and searches incidental to them. He submits breaches of Mr. Purchase's section 8, 9 and 10 Charter rights were so egregious that, in order to protect the integrity of the justice system, evidence of his identification, as well as evidence found within the residence should be excluded.
- [55] Crown counsel submitted defence counsel's emphasis on principles grounded in the necessity of the officers' showing reasonable and probable grounds for Mr. Purchase's arrest was misplaced. He pointed out St. Sgt. Hermann and other officers testifying were adamant they were focused on the possible presence of an injured person in the residence, not the possible presence of a marijuana grow operation. He submitted reliability of the 911 gun caller's report was strengthened by the smell of marijuana and Mr. Purchase's confirmation of guns in the residence, justifiably strengthening officer concerns about the possibility of someone hiding inside. Likewise, a grow-rip "gone bad" was a credible ground for concern. Counsel submitted the law clearly recognizes the right of police to take steps to ensure officer and public safety, including detaining individuals where necessary.
- [56] Crown counsel also pointed out all the officers recalled Mr. Purchase confirming the presence of guns in the residence. Cst. Durocher recalled Mr. Purchase saying there was a grow operation inside the house. St. Sgt. Hermann did not mention this in his testimony, but the ITO grounds included a statement that Mr. Purchase said this.

Law

- [57] Crown counsel submits the police actions in this case were a justifiable response to a 911 gun call. The leading case on warrantless entry and search related to a 911 call is *R. v. Godoy*, [1999] 1 S.C.R. 311 [Godoy].
- [58] There is no question a search of a residence constitutes a violation of a nearly inviolable right of privacy. Many decisions comment on the very high level of constitutional protection this right of privacy attracts: *Godoy*; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Feeny*, [1997] 2 S.C.R. 13. There are relatively few circumstances in which the police are justified in violating an individual's right to privacy in their own home. These instances are well categorised and include: the pursuit of an offender, warranted searches, and the knowledge a crime is being committed inside the residence. Responding to a 911 call is another possible exceptional category, one that is grounded in public policy.
- [59] In *Godoy*, police officers received a 911 dispatch. Before the caller spoke, the line was disconnected (evidence showed officers gave such distress calls, with their element of the unknown, second highest priority, after hurt officer calls). After officers arrived at the apartment door, a man inside partially opened it and told officers things were alright. An

officer asked if they could enter the apartment to investigate if there was a problem. The appellant tried to close the door. The officer put his foot in the doorway. Four officers then entered and heard a woman crying, evidently assaulted. She said the man had assaulted her.

- [60] Godoy confirmed public policy requires police have authority to investigate 911 calls. Whether that authority includes entering a dwelling depends on circumstances in each case: Godoy, para. 11. The court followed *R. v. Dedman*, [1985] 2 S.C.R. 2 [Dedman] and other authorities that had adopted the Waterfield statement of the common law powers and duties of the police: *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.) [Waterfield]. Once it is decided police action has prima facie interfered with a person's liberty or property, as it clearly does in the case at bar, Waterfield sets out a two part test for deciding whether the interference was justifiable: First, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law? Second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty? See Godoy, para. 12 - 13.
- [61] As noted in Godoy, the Supreme Court in *Dedman* had held the common-law duties of the police include the "preservation of the peace, the prevention of crime and the protection of life and property." The duty to protect life is a "general duty" and is not limited to protecting the lives of victims of crime: Godoy, para. 15.
- [62] Regarding 911 calls, in Godoy the court said:
- [16] The point of the 911 emergency response system is to provide whatever assistance is required under the circumstances of the call. In the context of a disconnected 911 call, the nature of the distress is unknown. However, in my view, it is reasonable, indeed imperative, that the police assume that the caller is in some distress and requires immediate assistance. To act otherwise would seriously impair the effectiveness of the system and undermine its very purpose. The police duty to protect life is therefore engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined.
- [63] In the case at bar, none of this is so far controversial. The first part of the Waterfield test is, on the evidence, satisfied. The next branch of the test that must be answered is whether the conduct called into question involved an unjustifiable use of police powers considering all the circumstances.
- [64] Godoy, citing *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 [Simpson], at page 499, a case considered in *Dedman*, confirms:
- [18] ...the justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.

- [65] The private interest residents have in the sanctity of their home unquestionably informs a Simpson/Dedman analysis. In *R. v. Plant*, [1993] 3 S.C.R. 281 [Plant], at p. 292, the Supreme Court of Canada found the underlying values of the privacy interest protected by s. 8 of the Charter are "dignity, integrity and autonomy." These three values were elaborated further in *R. v. Edwards*, [1996] 1 S.C.R. 128 [Edwards], with its addition of the "right to be free from intrusion and interference" [para. 50]. However, Edwards also noted the values of dignity, integrity and autonomy are the very values engaged in a "most immediate and pressing nature by a disconnected 911 call:" Godoy, para. 19. As Godoy explains, at para. 23, in 911 calls, concern that a person's life or safety may be in danger is enhanced. And, the interest of the person who seeks help by calling 911 is closer to the core values of dignity, integrity and autonomy than the interest of the person who seeks to deny entry to police arriving in response to the call for help. Although the security interest of a person needing 911 assistance and the public good interest share common underlying values, interference with an individual's privacy interest must be displaced enough to permit the police to enter the dwelling to protect life and safety.
- [66] Another simpler way of seeing this is that the Supreme Court has placed a high value on the communal good of looking out for one another's well-being. The police 911 system enables this. For the system to be effective, this public good and the protection of individual integrity displaces, in limited circumstances, the otherwise almost inviolable right to privacy in the home.
- [67] In Godoy, the Supreme Court explained that the police intrusion must be necessary for carrying out the public duty, and must be reasonable.
- [22] The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident's privacy or property... [T]he interference with liberty must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. Each case will be considered in its own context, keeping in mind all of the surrounding circumstances.
- [Emphasis added]
- [68] In the case at bar, the question remains, were the police actions necessary for carrying out the police duty, and were they reasonable, having regard to all the circumstances?

The 911 call threat

- [69] Counsel for Mr. Purchase minimized the nature and extent of the threat disclosed in the 911 call. He submits it came not from directly inside the residence and was just a third party 911 call, entailing little more than a description of a man with a gun. As mentioned earlier, counsel submitted this descriptor could relate to anything at all; for example, a man cleaning his gun on his patio. He submitted the transcript contains no statement of a gun being waved at the caller's brother, nor of the call being disconnected. I find the fact the 911 caller was a third party does not diminish the seriousness of the call in this case. The caller identified both herself and her brother and gave the dispatcher contact information. The police were justified in treating this as a credible call they should treat seriously. Although a first person call from inside a residence would be more compelling in many circumstances, especially if the caller is in distress and the call is disconnected, the seriousness of the call is not diminished merely because a third party is relaying the information. The seriousness of the call depends on the nature of the call and the totality of the circumstances. Defence counsel criticized Crown counsel's use of the term "gunplay" during his submissions, suggesting this unduly dramatized the true nature of the threat to life. I agree the word "gunplay" suggests a shootout and is not apt in this case; but I note the word also carries a sense that encompasses threats with firearms. What is important in cases such as this is that the police in Canada take 911 calls that involve credible reports of firearms use or threats seriously and the public expect them to do so: *R. v. Clayton*, 2007 SCC 32 [Clayton], para. 99.
- [70] As for whether the 911 caller had reported her brother had been threatened with a gun and that St. Sgt. Hermann's then wrongly thought the caller's brother had a gun waved at him, the third party caller did confirm, albeit in response to a leading question, her brother had been threatened. St. Sgt. Hermann, who testified he had more conversations with the dispatcher than what is seen recorded in the radio dispatch, confirmed he understood the occupant had waved the gun. Even if he was mistaken in this, in the circumstances I cannot see the distinction between a report of a man waving a gun and a gun being used to threaten a man a significant one in a case such as this.
- [71] As for whether the 911 call had been disconnected, which is how St. Sgt. Hermann saw it, defence counsel submitted this is an important factor because the word 'disconnected' in the context of a 911 carries an insidious connotation. This can certainly be the case, especially if one were to come to understand the disconnection happened whilst the man was being threatened. But the information the caller provided still gave cause for serious concern. The caller said she had been unable to get hold of her brother for 15 to 20 minutes. At page 7 line 15 of Exhibit 14-A, the dispatcher confirmed the caller had "lost contact with them;" and, at line 36, stated:

Okay, and uh, you are trying to reach them and uh, they were not answering? No, and I just talked to him and he sounded like something can be wrong with him.

- [72] In my view, the caller's information would reasonably give rise to a serious concern for the well-being of the caller's brother.
- [73] Careful receiving and relaying of 911 calls is obviously important to ensure officers responding to the call receive accurate information. But it is not always possible to have complete or accurate dispatch information on 911 calls. Police conduct is judged partly on the basis of their reasonably justifiable understanding of the information available to them. I find St. Sgt. Hermann's view of the threat does not depart unreasonably from the information in Exhibit 14, the 911 call, so as to suggest he was heedless or careless in his understanding. Further, I accept his testimony that he had some discussions with the dispatcher outside the radio transmissions recorded in Exhibit 14. One would expect St. Sgt. Hermann to obtain an overview and updates to better ensure officer and public safety.
- [74] However, defence counsel submits that even if the 911 call revealed a plausible threat, the officer's actions at the residence were not reasonable. He says significant questions should have arisen in the minds of the officers, given the alternative explanations and contrary information known to them, which should have suggested the caller's brother was not in danger. Counsel referred to authorities that hold police must not disregard information given by a suspect who is cooperative and denying any involvement in a crime: *Regina v. Long*, [1970] 1 C.C.C. 313 (BCCA); *Dumbell v. Roberts et al*, [1944] 1 All E.R. 326. Counsel submits these alternative explanations and information should have led the officers to further investigations before they decided to intrude on Mr. Purchase's privacy rights.
- [75] Counsel pointed out the 911 caller's problems reaching her brother by cell phone were explainable by unreliable cell phone service and the possibility he had left the area. While it is true the reason for the caller's broken communication with her brother was unknown, the officers would have been derelict in their duty to preserve life and safety had they acted on the assumption he was out of cell range.
- [76] St. Sgt. Hermann acknowledged there were a lot of things the police did not know, pointing out that this was why they were investigating. He could not know whether the six occupants had contrived a common response and his focus remained on the still unaccounted for man credibly reported to have been threatened by a gun. The absence of the caller's Dodge truck was significant, but this also has to be considered in the context of all the circumstances.

Godoy and 911 scenarios

- [77] In *Godoy*, the court, referring to scenarios of unknown individuals answering the door, said it could not accept the police should simply take the word of the person who answers the door and says there is "no problem" inside: para. 20. While the court was dealing with a case of domestic violence, in my view it was not suggesting police officers should pay lesser heed to what occupants answering the door say in cases where the 911 call comes from a third party instead of a caller from inside the residence. Whether the police response was reasonable depends on the totality of the circumstances.

I find the police were not obligated to accept the statements of the occupants. They had a duty to ensure officer and public safety and particularly to ensure no one else was inside, hurt or at risk. The safety and whereabouts of the caller's brother (and the person reportedly with him) was still unconfirmed. While the police on a 911 call should consider plausible information available to them, they are not bound by the explanations of occupants. To simply take the word of individuals encountered at the scene could be irresponsible: *R. v. Nguyen*, Unreported Voir Dire Judgment, Surrey Prov. Ct 15490-1, December 14, 2007, para 54 [Nguyen]; *R. v. Yamanaka*, Unreported Judgment, Vancouver CA023333, August 18, 1998 (C.A.) [Yamanaka], para 13.

- [78] Each case must be assessed in the totality of the circumstances and the importance of the particular facts cannot be over emphasized: Clayton, para. 99.
- [79] One of the important circumstances in the case at bar is the expectation police will respond effectively to 911 gun calls. In Clayton, a 911 call reporting 10 males were openly displaying handguns led to a roadblock that netted two men in a vehicle not matching any of the caller's descriptions. The Supreme Court commented generally on 911 gun calls:
- [99] ...a "gun call" imports a threat to public order including real concerns for the safety of the investigating officers. Canadian society has emphatically rejected the existence of the sort of "gun culture" that affects some societies, and rightly expects the police to be able to respond effectively to 911 "gun calls".
- [80] I find it was reasonable for the police in the circumstances to treat the 911 gun call seriously, justifying the focus of St. Sgt. Hermann on the safety of the officers, and on the occupants of the residence, and on the wellbeing of the caller's brother and the man reportedly with him.
- [81] As mentioned earlier, the smell of marihuana in the vicinity justifiably raised the level of the concerns of the officers. Although St. Sgt. Hermann had requested the dispatcher to report if the whereabouts and wellbeing of the caller's brother was confirmed, no follow-up assurances had been received. Mr. Purchase's confirmation of firearms in the dwelling lent further credibility to the 911 gun call.
- [82] I am satisfied the police were justifiably concerned about the safety of all the potential actors. The possibility of there being a grow operation inside the residence justifiably heightened officers' safety concerns. But I find their reasons for calling out the residents and conducting a search remained focused on the 911 gun call information and related safety concerns, not on investigation of the possible presence of a marihuana grow operation inside the residence. It is uncontested the police have a strong duty to protect life and public safety, and indeed, in the context of 911 calls, "giving aid is the essence of the police duty to protect life" (Godoy, para. 8). I find the actions of the police in the case at bar were directed toward that end: Godoy, *R. v. Brown*, 2003 BCCA 141 [Brown].

Police duties must be reasonable

- [83] Nonetheless, even where officers act within the ambit of their 911 duty their interference with the defendant's constitutional right must still be justifiable. The standard of justification must be commensurate with the fundamental rights at stake: Clayton, para 21. Privacy is one of the most cherished rights in our society: R. v. Silveira, [1995] 2 S.C.R. 297 para. 62.
- [84] As Godoy explains, the 911 system was established to protect life and prevent serious injury, but this intention does not mandate an unjustifiable use of powers associated with that duty:
- [28] ...emergency response systems are established by municipalities to provide effective and immediate assistance to citizens in need. The 911 system is promoted as a system available to handle all manner of crises, including situations which have no criminal involvement whatsoever. When the police are dispatched to aid a 911 caller, they are carrying out their duty to protect life and prevent serious injury. This is especially true where the call is disconnected and the nature of the emergency unknown. When a caller uses a 911 system, he or she has requested direct and immediate intervention and has the right to expect emergency services will arrive and locate the caller. The public interest in maintaining this system may result in a limited intrusion in one's privacy interests while at home. This interference is authorized at common law as it falls within the scope of the police duty to protect life and safety and does not involve an unjustifiable use of the powers associated with this duty.

Summary of factors

- [85] Whether the actions of police responding to 911 calls are justifiable will depend on a number of factors that include: the duty being performed; the importance of the duty to the public good; the extent to which some interference with individual liberty was necessary to perform that duty; and, the nature and extent of the interference: Godoy, at para. 21.
- [86] The specific focus here is on whether the officers' calling out of the occupants, their detention and warrantless search were justifiable in the totality of the circumstances. Counsel for the defendant was highly critical of the police action at all stages of their investigation. He submits that given the circumstances, police action was "over the top," the call-out unnecessary, the detentions and warrantless search illegal.
- [87] To recap what has been found thus far, there is no question the duty performed by police in this case was important and that it encompassed virtually all police duties, including preservation of the peace, the prevention of crime, and the protection of life and property. The facts known to them justified serious concern for the safety and well being of the caller's brother and for public safety generally. Society expects police to react swiftly and effectively to 911 calls involving firearms: Clayton, para. 36. While the call did not originate from within the residence or directly from a threatened individual whose call was disconnected, that comparative scene does not then mean police should not have treated the

911 call in this case less seriously. While the facts in this case are not in the league of active gunplay, a gun threat is potentially but one-step removed from firing. A third party caller's report of a display of handguns by 10 young men in Clayton was enough to justify a police road block that did not have to be confined to vehicles matching the 911 callers description. The police, in the case at bar, had the identity and contact information of the caller and person threatened. The defendant's characterization of the call as just a man with a gun falls well short of the information actually available and that St. Sgt. Hermann acted on. The duty performed was highly important to the public good. The 911 system assumes police should be able to rely on the information, which they are expected to respond to in a timely fashion: Clayton, para. 34.

- [88] As mentioned, defence counsel pointed out officers had information from other sources, which he submits should have raised enough doubt in the officer's minds to require them to stop and investigate more. In addition, counsel suggested alternative investigative procedures officers should have employed. For example, counsel submitted officers should have spoken to neighbours and an officer should have knocked on the front door of the residence and asked questions.
- [89] In the circumstances of this case, the suggested option of an officer walking up to the front door and knocking was not one that the police were obligated to do. The officers did not know who was in the house, the whereabouts and wellbeing of the threatened individual was unknown, and the information they had indicated the gun threat had been made within (approximately) the previous 45-60 minutes.
- [90] The information known to the police at the time of the decision to call out the occupants to gather more information on the gun call was, on an objective basis, sufficient to found their actions. All officers at the scene noted the smell of marihuana in the vicinity, a credible observation, given the occupants of the residence were in the midst of harvesting a crop. The possibility of a grow operation was more than mere conjecture. This increased the credibility of the call, and justifiably increased safety concerns. I find the police acted not on the basis of a vague of non-existent concern for safety, or hunches and intuition: *R. v. Mann*, 2004 SCC 52 [Mann], at para. 40.

It is well established police searches must be reasonably necessary "in light of the totality of the circumstances," and it cannot be based upon factors that are merely suspicions: *Mann*, at para. 40. However when police officers respond to credible reports involving gun use, or the potential for gun use, they need to properly protect themselves, and others, against this violence. This is true both in Canada, and in other jurisdictions where 'gun culture' is far more entrenched: Clayton, at para. 111, citing *United States v. Clipper*, 973 F2d 944 (D.C. Cir. 1992).

Call out procedure

- [91] Sgt. Mitchell testified the containment and call-out procedures he directed were standard operating procedures, intended to de-escalate the situation. Counsel for the defendant forcefully argued the police information was too scanty, and submitted that if the police were allowed to respond this way every time a 911 gun call is received by the police, we would taking a step towards a police state. This is a legitimate area of concern. But in the circumstances of this case, the police had a credible report of a serious incident involving a gun at a specific address. Peace officers are expected to be expert in de-escalating scenes that threaten public safety and to develop standard operating procedures to minimize risks; at the same time as they are expected to be knowledgeable of individual Charter rights of citizens. I understand that the containment and call-out procedures are intended to protect officers and, in a case such as the one at bar, occupants of the residence.
- [92] The fact an officer is following a standard operating procedure obviously does not remove any of their actions from Charter scrutiny. The question is whether, considering all the circumstances, the calling out of occupants in the way that occurred in this case was reasonably necessary for the police to carry out their duties.
- [93] The situation was not chaotic, as they are in some 911 situations. In the case at bar, the officers were able to implement their training and proceed according to a plan. Sgt. Mitchell referred to de-escalating and the need to slow the situation down. Given the public good objective that officers carry out their duties in a way that protects both officer and public safety, I find that in this case, considering the totality of the circumstances, the call-out procedure used was intended to protect the safety of the officers, the occupants and public safety generally. To that end, the call-out was both reasonable and necessary and, in the circumstances, a justifiable interference with the rights to privacy of Mr. Purchase and the other occupants.
- [94] As mentioned, although options other than the call-out were available, it was not unreasonable for the police not to have pursued these. As well, I note if an officer had knocked on the door and someone had opened it, most likely the officer would have been confronted with a strong smell of the harvested grow-operation, thus localizing the source beyond any doubt. Tactical alternatives proposed to demonstrate over reacting by the police need to be considered cautiously by the court in 911 situations; especially when uncertainties and outcomes from those suggested alternatives are fraught with risks to officer and public safety. It is well established that police are not required to place themselves in potentially dangerous situations without acknowledging their authority to take steps to ensure their safety. A warrantless entry for the preservation of life and safety of all parties concerned is a prime example of a prevention of physical harm: *R. v. Golub*, 34 O.R. (3d) 734 (C.A.), para. 45-46. The baseline objective in 911 cases is to strongly safeguard individual Charter rights, whilst affording the public the safety and protection an effective and immediate emergency reporting system provides everyone.

Detention and Search

- [95] I turn now to the detention and questioning of Mr. Purchase and the other occupants, as well as the search that followed.
- [96] I accept that when Mr. Purchase was first questioned, he was not a targeted suspect. St. Sgt. Hermann did not know whether Mr. Purchase was a witness, a resident, or had even been present at the time of the alleged incident. He advised Mr. Purchase the police were on scene because of 911 gun threat call. St. Sgt. Hermann recalled he did not go into much detail about the call. He was unsure about specific questions he may have asked, but recalled the 'debriefing' was directed at getting tactical information from Mr. Purchase, such as Mr. Purchase's relationship to the residence and the presence of firearms and other occupants, and was not directed at obtaining evidence in relation to any charges.
- [97] A problematic question stems from St. Sgt. Hermann's conversation with Mr. Purchase and Cst. Durocher overhearing Mr. Purchase say there was a grow-operation inside the residence. Sgt. Mitchell did not mention hearing this in his testimony. St. Sgt. Hermann did not mention hearing this in his evidence either. In St. Sgt. Hermann's case, this might have been an oversight, as St. Sgt. Hermann specifically averted to Mr. Purchase confirming the presence of a grow-operation in the ITO, stating this as one of the grounds of belief. It does seem somewhat odd to think of Mr. Purchase saying there was a grow-op in the house within the context of his having also said during that same conversation that there was nothing going on in the house. However, what is most pertinent here is that all officers recounted Mr. Purchase stating there were firearms inside the house.
- [98] Crown counsel acknowledged that evidence of the three officers, insofar as its admission into evidence as a voluntary statement is concerned, was unsatisfactory. But, he submits, Mr. Purchase's statement about the presence of firearms clearly informed the thinking of St. Sgt. Hermann and his decision to search and clear the residence. I have already accepted Mr. Purchase was not yet a targeted suspect and the police were not gathering evidence against him, but were "debriefing" him to make tactical assessments for officer and public safety.
- [99] As Crown counsel put it, from the perspective of the police, the air was filled with criminality. The possibility of a 'grow-rip' gone bad was more than conjecture and, in the circumstances, even assuming Mr. Purchase had not confirmed the presence of a grow operation inside, remained a reasonable concern. St. Sgt. Hermann was obligated to consider, but not required to accept, the statements of Mr. Purchase and the occupants that no one else was inside: Godoy.
- [100] The officers were adamant the focus of their search was to clear the residence and investigate the 911 call. They were well aware the residence could house a grow-operation; but I have accepted that in this case, clearing the 911 call was the objective. In the circumstances of this case, the officer's evidence in this regard is reasonable and congruent, and distinguishable from the facts before Gropper J. in Mann. [SCBC] I find a

search of the residence to locate the caller's brother was a reasonable interference with the privacy rights of Mr. Purchase and the other occupants.

Scope of Godoy search

- [101] In Godoy, the court emphasized a forced entry into a dwelling to ascertain the health and safety of a 911 caller is limited to those purposes. A 911 call may authorize the police to enter premises to find an individual who may be injured, for example, but not a search of the whole premises for a purpose unrelated to the 911 call. I have found the police were justified in entering the residence for the reasons discussed. As mentioned, the search took over 40 minutes, while Mr. Purchase and the other occupants were detained outside the home. Defence counsel submits 40 minutes was too long and indicates the Godoy search must have been for ulterior purposes that extended beyond the purpose of clearing the premises.
- [102] The search was thorough. Sgt. Mitchell explained that 40 minutes is not unusual for a clearing search. The inexperience of some officers, who required, partly for safety, closer supervision and some instruction, lengthened the search time somewhat. I do not find, as suggested by counsel, that the search was conducted for training purposes, but rather that some training was required to facilitate a safe search. Sgt. Mitchell explained that with grow operations, considerable care has to be taken because electricity is in contact with water and other hazards such as booby traps may be present. The search must be thorough, encompassing every room and every possible hiding space, as well as checking for false walls. This can take considerable time. Further, firearms and open ammunition were strewn throughout the residence.
- [103] I find the search took longer than what one might otherwise expect if firearms, ammunition and a grow operation had not been present. I note everything necessary to justify a warrant was in plain view and required no detailed examination apart from ensuring safety. While I accept 40 minutes is not an unusual amount of time in circumstances involving a grow operation when junior officers are involved in the search, the principle remains that the officers were authorized to conduct a Godoy clearing search only for so long as necessary to satisfy themselves there was no potentially dangerous person with a gun or any injured person anywhere in the residence. No more, no less. Had they not conducted a 911 clearing search, they would not have executed their common law duty to protect life and safety. But anything beyond that would have constituted an illegal search: Brown, para 10. Officers conducting Godoy searches must keep that fully in mind.
- [104] However, for reasons given above, I find the warrantless Godoy search of Mr. Purchase's residence was justified in furtherance of the ancillary police powers to protect life and safety.

[105] I find the officer's interference with Mr. Purchase's individual right to privacy and liberty was necessary to perform the search and that the nature and extent of the interference was reasonable, having regard to the totality of circumstances in this case.

Legality of detention

[106] Mr. Purchase challenges the legality of his detention by the police. He says his detention was arbitrary, contrary to sections 7 and 9 of the Charter, and the police violated his right to counsel contrary to section 10(b) of the Charter. I have concluded Mr. Purchase's initial detention was, in the circumstances of this case, not arbitrary. In the circumstances, I cannot find the police actions unnecessary or excessive.

[107] Evidence regarding what St. Sgt. Hermann discussed with Mr. Purchase is somewhat vague. St. Sgt. Hermann had no notes to go by. However, I am able to accept St. Sgt. Hermann advised Mr. Purchase the police were investigating a 911 call and the complaint a man had been threatened by an occupant of the residence. I accept Mr. Purchase was not a target suspect at that point. Notwithstanding that finding, should St. Sgt. Hermann have immediately advised Mr. Purchase of his s. 10(b) right to instruct counsel without delay?

[108] In *R. v. Grunwald*, 2010 BCCA 288 [Grunwald], our Court of Appeal considered the question whether an officer in similar circumstances must immediately advise a person of their right to counsel.

[27] In *Grant and Suberu*, the Supreme Court of Canada concluded that when a person is detained for investigation, the right to counsel is engaged and there is no limitation on that right pursuant to s. 1 of the Charter. This was an issue which had been left unresolved in *R. v. Mann*, 2004 SCC 52. However, in *Suberu*, McLachlin C.J.C. and Charron J., while finding that the right to counsel is engaged immediately on detention, explicitly held that the immediacy of the s. 10(b) obligation is subject to public safety concerns, other safety concerns, or to reasonable limitations prescribed by law and justified under the s. 1 of the Charter.

[109] In *Grunwald*, the appellant had been stopped at a motor vehicle check. His truck had a canopy with tinted windows. The Constable smelled marijuana as he walked around the truck. When he looked inside the back canopy inside with his flashlight, he saw bags of marijuana in the back. After being told that he was under arrest for possession of marijuana, the appellant drove off, but he was stopped a short distance away. He was arrested, his s. 10(b) right to counsel was read to him, and the truck was searched, producing very large amounts of cash and marihuana. *Grunwald* had submitted that as soon as the Constable started investigating the smell of marijuana, he was obliged to again advise him of his s. 10(b) rights.

[110] In the case at bar, I have found Mr. Purchase's initial detention was related to the police duty to protect life, and the initial restrictions placed on Mr. Purchase's liberty and his initial detention were reasonably necessary. However, after St. Sgt. Hermann learned Mr.

Purchase was a resident and there was a grow-operation in the house, which I assume as a fact in this context of addressing the justifiability of Mr. Purchase's continued detention without being advised of his right to counsel, it should have been obvious he was a potential suspect in relation to a suspected grow operation, without benefit of counsel and at risk of incriminating himself.

- [111] St. Sgt. Hermann explained the exigent circumstances over and above the need to detain him until completion of the Godoy warrantless search. St. Sgt. Hermann testified that: he did not have any basis for arresting Mr. Purchase; Mr. Purchase was not yet a suspect; he was somewhat short-handed; it would have been unsafe to allow Mr. Purchase to use a cell phone because he could alert the residence's occupants of police positions; cell phone communication was very poor; and, it would likely have proven impossible to arrange private communication with counsel in the vicinity. A further exigent consideration was the fact the six other occupants had left the residence at one time, requiring the police to deal with everyone at once instead of individually.
- [112] However, both St. Sgt. Hermann and Sgt. Mitchell confirmed they felt that they had matters under control. The circumstances were not chaotic. Mr. Purchase was led away from the scene to a police car parked in the shade, presumably under escort, and I see no reason why Mr. Purchase could not have been advised of his Charter rights at that point. Approximately 1 hour and 20 minutes elapsed between the time of Mr. Purchase's initial detention and the time he was advised of his rights, at 1719. If cell phone communication was impossible or too unreliable to permit communication with counsel, Mr. Purchase should, at the very least, have been advised of his rights and assured he would have opportunity to speak counsel as soon as possible.

Length of detention

- [113] St. Sgt. Hermann testified he believed he had no grounds for arresting Mr. Purchase at the time of his initial detention and saw no necessity in advising Mr. Purchase of his right to speak to counsel without delay at that point.
- [114] The Crown submits Mr. Purchase's continued detention was justifiable not only under the ancillary police powers for public protection, but also as an investigative detention. He further submits statements made by Mr. Purchase during his initial debriefing about the presence of a grow operation inside the residence had not been led as evidence against the accused at trial but as part of the circumstances informing and justifying officer and occupant safety concerns. In the instance of his statement regarding the marijuana grow operation, he submits this provided grounds to arrest the accused. Accordingly, he submits the voluntariness of the statement is not a relevant consideration in the trial, since the inquiry as to the voluntariness of a statement fundamentally involves an inquiry into whether they were true; a coerced or influenced statement being inherently unreliable: *R. v. White*, [1999] 2 S.C.R. 417. And he submits reliability concerns are addressed by the fact the statements heard by Cst. Durocher were corroborated by her observations during the

subsequent warrantless entry into the house, as well as the fact Mr. Purchase came from a residence that was plainly involved in growing and harvesting marijuana.

- [115] Mann [S.C.C.] confirmed that a common law investigative detention flows from the ancillary power doctrine and the police duty to preserve the peace, prevent crime and protect life and property. Police must have both a reasonable subjective and objective basis for believing the detained person was involved in a crime under investigation. The detention must also be "reasonably necessary" in all the circumstances, which imports the notion that it must be of brief duration and not become a "de facto arrest:" Mann, paras. 22 and 35. In *R. v. Suberu*, 2009 SCC 33 [Suberu], the Supreme Court found that the s. 10(b) right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes.
- [116] In the case at bar, Mr. Purchase was not detained initially as a suspect. The restrictions on his liberty stemmed from the exercise of the police ancillary powers to protect life. His continued detention for a reasonably necessary period following his debriefing was justifiable as well. In addition, because Mr. Purchase stated he was a resident and that there was a grow operation in the residence; he had become a potential suspect in the crime of illegally producing and trafficking in a controlled substance.
- [117] I find the officers had reasonable and probable grounds for Mr. Purchase's continued investigative detention.
- [118] But given Mr. Purchase's statement about the grow operation, the police were obligated to advise him without delay he would be detained on suspicion of production and trafficking in marihuana and to advise him of his right to retain and instruct counsel without delay. Mr. Purchase was now under de facto arrest and a potential suspect in at least one crime. As a consequence, the police were obligated to advise him of his rights without delay.
- [119] As police had reasonable grounds for an investigative detention of Mr. Purchase, his detention, for a brief and reasonable period, was justified: Mann. What is a reasonable period will depend on the totality of the surrounding circumstances.
- [120] In *R. v. Trieu*, 2010 BCCA 540 [Trieu], an investigative detention of 25 minutes while police executed a search warrant was justified because the police were involved in parallel investigations of three other residences on the same block at the same time, and the accused's release could have imperilled all of the investigations and endangered the officers involved in executing search warrants.
- [121] In *R v. Sun News Lal*, Vancouver Registry CA023104, October 22, 1998 (C.A.) [Lal], a suspect was detained without arrest for 15 minutes after a Constable pulled him aside after linking the vehicle licence plate and description to a dispatch that described the occupants of the vehicle as armed and dangerous. The Constable explained he did not want the vehicle to get any closer to a residence, a target in drug war violence. He had been assigned to protect the residence, and he had felt it necessary to stop the suspect vehicle as soon as practical. The

constable detained Lal until a backup constable arrived, approximately 15 minutes later. One of the constables then examined Lal's driver's license while another constable kept his side arm drawn on Lal. A search, precipitated by Mr. Lal's nervous behaviour, revealed a semiautomatic pistol with the magazine loaded and a bullet in the firing chamber.

- [122] In *R. v. Greaves*, 2004 BCCA 484 [Greaves], the accused was initially stopped by police solely to determine his identity in relation to a robbery that had just occurred. Because of misleading answers and suspicious behaviour exhibited by the accused during questioning, his detention was prolonged, and he was searched. As a result of the search, evidence was obtained implicating the accused in criminal offences for which he was then arrested. In sum, forty minutes elapsed between his original detention and his arrest. The court held this was not an unreasonably lengthy detention as the actions of the suspect and the totality of the circumstances were such that the detention was necessary.
- [123] Considering the totality of the circumstances, I find the length of Mr. Purchase's detention at the scene did not exceed the bounds of reasonableness and therefore become arbitrary. In my view, the time Mr. Purchase spent in detention before he was arrested must be placed in context. This time was as brief as the circumstances reasonably permitted.
- [124] I turn again now to the failure of the officers to advise Mr. Purchase of his right to retain and instruct counsel without delay.
- [125] St. Sgt. Hermann testified he was focused on the 911 call, and he did not consider Mr. Purchase to be under arrest. He was concerned about being undermanned due to the unexpected mass exit of the other six occupants nine minutes after Mr. Purchase had exited the residence. I accept his evidence that, from a practical standpoint, Mr. Purchase would most likely be unable to instruct counsel, given the communication problems. I accept officer and occupant safety was a reasonable concern, as it was in *Trieu*, that would have weighed against allowing Mr. Purchase access a cell phone so he could instruct counsel and receive advice.
- [126] That said and acknowledged, as mentioned, both St. Sgt. Hermann and Sgt. Mitchell testified they considered the police had control of the location. While the circumstances warranted serious safety concerns that justified precautionary call-outs and detention, no guns had been fired, the officers had the names of six individuals inside the residence, and Mr. Purchase had been cooperative and had provided information. This was not a confused scene, or a case of overwhelmed officers able to deal only with immediate concerns. It was not necessary to complete the unwarranted search before one officer could advise Mr. Purchase of his rights. He had already become a legitimate suspect.
- [127] In any event, Mr. Purchase did not make any further statements. No evidence was obtained as a result of the failure to advise him of his rights.
- [128] Therefore, I find Mr. Purchase was deprived of his right to be advised promptly of the reasons for his detention and his right to retain and instruct counsel without delay.

[129] With respect to Mr. Purchase's right to instruct counsel without delay and noting Mr. Purchase spoke to counsel at approximately 1755, I find that that delay was not unreasonable, considering the communication challenges, the somewhat remote rural location and the number of arrested individuals. Mr. Purchase was given opportunity to instruct counsel on his arrival at the police station. Identification evidence he gave Cst. Durocher was not protected by the Charter: *R. v. Dupe*, 2010 ONSC 6594.

Warranted Search Issues

The Search

[130] After the clearing search was completed, St. Sgt. Hermann and Sgt. Jack jointly prepared an Information to Obtain a Warrant [ITO]. The warrant was issued at 2012. It granted permission to execute the warrant between 2015 and 2100. Mr. Purchase says the warrant was illegal because it was not executed by 2100 and did not authorize the search and seizure of firearms or weapons that took place.

[131] Relevant portions of the grounds for belief attached to the information to obtain a warrant are as follows:

5. That on May 9th, 2007 approximately 1520 hours, the Abbotsford police were dispatched to a man with a gun call at 4610 Sumas Mountain Road. Sgt. Dafydd HERMANN arrived on scene first and could smell marihuana plant form from his containment location 100 yards to the south. the occupants in the home were called out of the house. The 7 occupants were debriefed to determine dangers to the police. One of the males who identified himself as Jason indicated that it was his residence, that there were guns in the house and that there was a marihuana production inside the house.
6. That on May 9th, 2007, at approximately 1630 hours Cst. Jack arrived on scene to assist in clearing the home to ensure that nobody was injured inside. Upon arrival a strong odour of marihuana was detected as soon as I exited the vehicle. The odour appeared to originate from 4610 Sumas Mountain Road.
7. That on May 9th, 2007, at approximately 1635 hours Cst. Jack was a member of the search team that entered the house located at 4610 Sumas Mountain Road, The residence was cleared and nobody else was located inside the home. Cst. Jack made the following observations inside the house:
 - A) That there was a strong smell of marihuana emanating throughout the house;
 - B) That there was an upstairs bedroom that appeared to be dedicated to clipping the marihuana plants;
 - C) That there was open boxes of ammunition on the floor in one of the bedrooms;
 - D) That there was a gun safe in a bedroom closet;

- E) That there was two rifles sitting outside the gun locker;
- F) That there was marihuana leaves on the floor in the kitchen;
- G) That the basement was entirely dedicated to the production of marihuana. There were two large room containing marihuana plants growing in soil mixture.
8. That on May 9th, 2007, at approximately 1710 hours the house was cleared. While returning back to the police vehicle Cst. Jack observed numerous used rifle rounds in the rear box of the black F350 Ford pick up truck parked in the driveway. On the floor of the driver side backseat Cst. Jack could observe a green military style ammunition box.
 9. That 4610 Sumas Mountain Road have remained under the constant control of the Abbotsford police, and are currently being contained.
 10. That on at approximately 19:15 hours Cst. Jack contacted the Abbotsford court house to determine whether or not there were any local judges or JJP's available to review the warrant request. There was a recording indicating that the courthouse was closed. There are no judges or JJP's available at this time.
 12. THAT based on the foregoing, it is my belief that marihuana is being produced within the residence located at 4610 Sumas Mountain Road, Abbotsford, British Columbia. The purpose of this warrant is to search the residence and the vehicle bearing BC plate # 0796 JN at 4610 Sumas Mountain Road, Abbotsford, British Columbia. Recovery of marihuana, paraphernalia associated to the production of marihuana such as lights, pots, fans, timers, irrigation equipment, fertilizers, nutrients, instruction manuals, growing diaries/logs, and scales. That will afford evidence with respect to the stated offences of:

Section 7(1) of the Controlled Drugs and Substances Act - Production of a Controlled Substance, to wit: Cannabis Marihuana.

Timing of Service of Warranted Search

- [132] Constable Morton assisted in the search and said he arrived at the residence at 2055. He assisted Constable Basaraba and Sgt. Jack with the seizure by ensuring safety and reading out the serial numbers of the guns.
- [133] Sgt. Jack testified that on their arrival at the scene, they immediately walked into the residence, where the three officers discussed their respective roles. He could not recall the details of what was discussed.
- [134] Defence counsel questioned Sgt. Jack closely about the time he actually served the warrant, suggesting it was after 2100. Sgt. Jack said he was aware of the time constraints and testified they commenced the search by 2100. He said the warrant was served at 2058, explaining he had arrived on the property and walked directly to the front door and into the residence. Questioned as to whether he meant the warrant was served by their arriving on the property or when they were walking through the door, he said the best he could say was

they were on the property by 2058 (presumably leaving two minutes to enter the house).

[135] I find the search began by the start time set out in the warrant.

Some Details of the Warranted Search

[136] Cst. Basaraba participated in the search. The search had not yet begun before his arrival. He was aware a warrantless search had taken place before his search. He was exhibit officer. He explained the relationship between the photographs and the sketched floor plan of the residence. In addition to cannabis samples removed from containers and sent for analysis, various other items were identified.

[137] Shown a photograph depicting a gun safe with an open door and two rifles leaning against the door, he testified this was how he found the safe. Constable Basaraba seized all firearms and other weapons, including a samurai sword. When it was pointed out the warrant did not specifically authorize seizure of firearms, he said it was standard policy to seize firearms found in grow operations. He said he seized them pursuant to the Firearms Act, S.C. 1995, c. 39, for unsafe storage of weapons and ammunition, which he described as being strewn throughout the house. Two rifles were not properly registered and others were not safely stored.

[138] Sgt. Jack testified the rifles were seized because a public safety issue was involved. He confirmed he did not ask for a specific warrant for the weapons, as they were focused on marijuana at that time, but said the guns were in plain view, some not safely stored. Section 489 of the Code allows officers to seize anything in plain view that is evidence of a crime. In the circumstances the officers were faced with, a newly discovered grow operation and improperly and unsafely stored firearms and ammunition; the seizure of the firearms was a legal action under s. 489 of the Code.

Section 24 analysis

Law

[139] The focus of s. 24(2) of the Charter is societal, aimed at the broad impact of the admission of evidence on the long term reputation of the justice system. In *R. v. Reddy*, [2010] B.C.J. No. 49 [Reddy], at para. 91, the British Columbia Court of Appeal succinctly summarized the *Grant* (*R. v. Grant*, 2009 SCC 32 [Grant]) factors a judge should consider when deciding whether to omit or exclude evidence:

- (1) Seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
- (2) Impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little); and
- (3) Society's interest in the adjudication of the case on its merits.

- [140] Admitting evidence obtained by deliberate and egregious police conduct in disregard of the accused's rights might lead the public to conclude the court implicitly condones such conduct. However, admission of evidence obtained from a breach committed in good faith would have little adverse affect on the repute of the court process (Grant para. 108). But "ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith" (Grant para. 75).
- [141] As previously stated, an individual's right to privacy within their own home is highly protected. Only in serious, and proscribed, situations will the police be justified in violating this right.
- [142] The seriousness of the offence remains a consideration, but is a far less important factor now than previously [Reddy, supra, at para. 94].

Findings

- [143] A s. 24(2) analysis is highly individualized. It requires consideration of the impact admitting or excluding evidence obtained in contravention of an accused's Charter rights could have on the repute of the justice system. In this case, officers' testimonies and the 911 call and police radio relays confirm the police were responding to an unknown situation that entailed a potentially serious threat to the life of an identified person and also carried implications for officer and public safety.
- [144] I have found the police at all times were acting in utmost good faith, responding appropriately as the situation unfolded, a situation complicated by the smell of marihuana in the immediate vicinity of the residence and their reasonable apprehension the residence housed a grow operation. From their experience, the officers believed firearms used to protect grow operations were commonly found at the site grow operations, and the possibility of a "grow rip" gone wrong was a realistic possibility.
- [145] It is clear from the authorities that police responses to 911 calls must be considered on a case by case basis.
- [146] In this case it is noteworthy that in 2007 the question whether the duty to advise a detained suspect of their Charter rights arose immediately on their detention was not yet settled. In Mann, the Supreme Court of Canada had left open the question whether, or to what extent, a detainee's s. 10 rights could be delayed. This was not settled until the court decided Suberu, which was handed down after the date the 2007 events in this case occurred. As it was unsettled at the time, it cannot be said the police were acting against established law. That said, the police do not have a free hand to do as they will whenever the law is somewhat unsettled. They are required to act in good faith and to follow existing legal principles: as it was, at the time of Mr. Purchase's detention and arrest, Mr. Purchase was entitled to the protection of his Charter rights as soon as was reasonably possible and practical.

- [147] The Charter right to retain and instruct counsel on arrest or detention, and to be informed of that right, is a lynchpin of our legal system. It is clear the one hour, 20 minute delay between Mr. Purchase's detention, evident in his being placed in the back of a police cruiser, and his inability to seek advice of counsel potentially deprived him of his rights. However, in the circumstances of this case, notably the possible danger presented by his potential contacting individuals inside the residence, as in *Trieu*, and the unreliability of communications in the area, were such that the delay in affording Mr. Purchase his right to instruct counsel was not unreasonable. Mr. Purchase was detained initially because of safety concerns relating to the 911 call. When he was subsequently arrested, he was immediately afforded his Charter rights.
- [148] Nonetheless, as discussed earlier, Mr. Purchase could and should have been advised of his right to counsel before 1719. Delays in affording Mr. Purchase opportunity to speak to counsel may have been reasonably justifiable, but an officer should still have advised him of his right to seek advice of counsel and assured him he would be given that opportunity as soon as possible.
- [149] The second branch of the inquiry requires the court to consider the impact of the breach on the interests of the accused. As no information, inculpatory or exculpatory, was obtained from Mr. Purchase during the time he remained in the police cruiser, the impact of the delay in affording Mr. Purchase his right to contact counsel was nil in this case.
- [150] The final branch of the analysis requires consideration of society's interests. Marijuana grow operations are an insidious problem within the lower mainland area, and the associated dangers of fire and violence are well documented: *R. v. Ly*, October 19, 2009, unreported judgment, New Westminster Registry XO70655; *R. v. Wallis*, 2007 BCCA 377. In the case at bar, the evidence obtained by the police is concrete, highly reliable evidence and essential to the Crown's case. Were this evidence to be excluded, the Crown's case would be seriously hampered, and most likely would collapse.
- [151] There is also, as stated previously, a significant public interest in an individual's right to be secure from unreasonable search and seizure, one heightened when the search intrudes into a person's dwelling. Charter protections of individual rights are not easily surmounted.
- [152] These three assessments under each branch of the s. 24(2) analysis must be balanced to determine whether admission of the evidence would bring the administration of justice into disrepute. I am satisfied, having regard to the Grant factors, the reputation of the justice system would not be harmed by admission of the evidence from the warrantless search; and the said breach of the defendant's s. 10 Charter rights does not justify an exclusion of evidence obtained through either the warrantless or warranted search. In my view, exclusion would cause much more harm to the repute of the justice system than would inclusion.
- [153] The s. 24(2) application of Jason Purchase to exclude evidence is dismissed.

"N. Brown J."

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