
CANADA / JUDGMENT

R. v. Rabbitt

2014 BCSC 1381

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1381 R. v. Rabbitt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Rabbitt,

2014 BCSC 1381

Date: 20140723

Docket: 28683-2

Registry: Dawson Creek

Regina

v.

Ryan Lindgrin and Patrick Ryan Rabbitt

Before: The Honourable Madam Justice Fitzpatrick

Ruling on Voir Dires

Counsel for the Crown:

Peter Whyte

Accused Ryan Lindgrin appearing on his own behalf:

Ryan Lindgrin

(appeared on August 27, 2013 only)

Counsel for the Accused Patrick Ryan Rabbitt

Neil L. Cobb

Place and Date of Trial/Hearing:

Dawson Creek, B.C.

August 27-30, 2013

New Westminster, B.C.

November 20-21, 2013

Vancouver, B.C.

April 4, 2014

Place and Date of Judgment:

Dawson Creek, B.C.

July 23, 2014

Introduction

- [1] In November 2012, Ryan Lindgrin and Patrick Ryan Rabbitt were charged with unlawfully possessing cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 (the "CDSA"). In addition, Mr. Rabbitt was charged with possessing proceeds of crime exceeding \$5,000, knowing that such proceeds were obtained by the commission of an indictable offence, contrary to s. 354(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] At the commencement of the trial, Mr. Lindgrin pled guilty and his matter was adjourned for sentencing.
- [3] Mr. Rabbitt pled not guilty and he advanced a number of arguments under the Canadian Charter of Rights and Freedoms (the "Charter"): firstly, that the RCMP conducted a warrantless search of his residence, said by the Crown to be under exigent circumstances; and secondly, that his right to be informed of the reason for his arrest and his right to retain counsel were violated pursuant to ss. 10(a) and (b) of the Charter. In addition, Mr. Rabbit argues that he was denied his right to be brought before a justice within 24 hours of arrest, pursuant to s. 503(1) of the Criminal Code which he argues is a breach of his s. 9 Charter rights. Finally, Mr. Rabbitt challenged the Information to Obtain (ITO) upon which the search warrant was ultimately obtained.
- [4] Hence, two voir dires were declared to determine the above issues. The only evidence comes from the various police officers working at the Dawson Creek RCMP detachment during the relevant time frame from early to mid-July 2010.

Background Facts

- [5] The events in question took place in Dawson Creek, B.C. The RCMP detachment in Dawson Creek is, like the town, a small one. Corporal James Rutledge is the person in charge of the serious crimes unit, being the two person drug squad and the two person general investigation section. In 2010, the detachment also included Constables Michael L'Heureux and Ambie Verbruggen, both of whom were in the general investigation section and whom Cpl. Rutledge indicated were also relatively new to drug investigations.
- [6] Between January and July 2010, the police officers received information from various confidential informants which led them to form the view that Mr. Rabbitt and Wesley Stephenson were dealing drugs in the Dawson Creek area. The RCMP were aware at this time that Mr. Rabbitt and Mr. Stephenson's residence was located at a house on 92nd Avenue in Dawson Creek and the RCMP suspected that these drug operations were taking place to some extent at the residence.
- [7] These confidential informants, as later identified by certain letters in the ITO, disclosed the following:
- a) Informant A: on May 18, 2010, Cpl. Rutledge and Cst. L'Heureux were told by Informant A that a male called "Wes" was supplying multiple ounces of cocaine to another trafficker. They were also told that "Wes" drove a silver or cream SUV.

Cpl Rutledge had known this person for approximately three years as a person associated with users and traffickers of drugs in the Dawson Creek area. Information provided by this person on several occasions in the past had resulted in three search warrants being drafted with positive results and also had been used to locate people with outstanding warrants for arrest. Cpl. Rutledge considered this source credible since this information had been corroborated by other investigations and other informants and he had never found this information to be misleading or false. It was indicated that this person is motivated by financial gain since he or she had previously been paid for information provided. This person had a criminal record, but it is not related to any credibility matters, such as perjury or fraud.

- b) Informant B: on or about June 23, 2010, Cpl. Rutledge and Cst. L'Heureux were told by Informant B: that Mr. Rabbitt trafficked cocaine in Dawson Creek; that Mr. Rabbitt was the main supplier of cocaine in Dawson Creek and that Mr. Rabbit, along with Wes and "Finch" would supply lower level drug dealers; that Mr. Rabbitt and Wes lived together in a house across from the school on 17th Street; that this person had recently been inside Mr. Rabbitt's residence, describing the layout (with Mr. Rabbitt's bedroom upstairs and Wes' bedroom downstairs); that s/he had seen a large quantity of cocaine in a downstairs room; and, that s/he had been supplied with drugs by Mr. Rabbitt.

Cpl. Rutledge had known Informant B for less than one year as a person who associates with users and traffickers of drugs. Information from Informant B had previously been provided but had not been acted upon in the past. This person was said to be motivated by financial gain, but s/

he had never been provided with monetary compensation. S/he also had a criminal record, but not related to any credibility matters, such as perjury or fraud. Cpl. Rutledge indicated that since he had a limited history with Informant B, he considered that he had to be more careful to make sure the information from this person was accurate.

- c) Informant D: on or about July 2, 2010, Cpl. Rutledge and Cst. Verbruggen were told by Informant D: that Mr. Rabbitt was the main supplier of cocaine in Dawson Creek; that Mr. Rabbitt used multiple mid-level drug dealers, including Jory Hambler, Wes Stephenson and Finch, who would then supply lower level dealers; that Informant D had purchased cocaine from Mr. Rabbitt through a mid-level dealer; and, that s/he had been told that Mr. Rabbitt and Wes Stephenson lived together but s/he did not know where.

Cpl. Rutledge had known Informant D for less than one year as a person who associates with users and traffickers of drugs. He had inherited Informant D from another officer who had had a lengthy history with this informant. That officer has used such information over 20 times, resulting in multiple search warrants. This person was said to be motivated by financial gain as s/he had been paid for information in the past. S/he also had a criminal record, but not related to any credibility matters, such as perjury or fraud.

- d) Informant C: on July 12, 2010, Cst L'Heureux was advised by Informant C: that Mr. Rabbitt and Wes sell cocaine; that Mr. Rabbitt and Wes live together in a house off of 17th Street near an elementary school; that Mr. Rabbitt and Wes frequently keep a lot of cocaine at their house and that there was a large quantity of cocaine there within the past week; and that Mr. Rabbitt had been saving up a large quantity of money from drug sales.

Cst. L'Heureux had known Informant C for approximately six months as a person who uses cocaine and who interacts with both users and traffickers of cocaine. Information from Informant C had previously been provided on five separate occasions but had not been acted upon in the past, although it was never proven to be false or misleading. This person was said to be motivated by financial gain, civil service or charge intercession. S/he did not have a criminal record.

- e) Informant E: in January 2010, Cst L'Heureux was advised by Informant E: that Wes Stephenson still lives with Mr. Rabbitt; that Mr. Rabbitt sells large quantities of cocaine and also ecstasy in Dawson Creek; that Mr. Rabbitt and Wes Stephenson live together in a house where cocaine is stored; and that Informant E had purchased cocaine at Mr. Rabbitt and Wes' house within the past month.

In what would later prove to be a significant piece of information, on July 14, 2010, Cst L'Heureux was further advised by Informant E that Mr. Rabbitt was still selling cocaine from his house (usually about one ounce at a time) and that Cody Henderson bought cocaine from Mr. Rabbitt and would be picking up cocaine from Mr. Rabbitt.

Cst. L'Heureux had known Informant E for approximately six months as a person who interacts with users of cocaine. Information had been received from Informant E on three separate occasions on a voluntary basis which led to two arrests and a seizure of cocaine and cash. This information provided had never proven to be false or misleading. This person was said to be motivated by financial gain and charge intercession. S/he did not have a criminal record.

- [8] In the midst of this information flow, Cst. Verbruggen was assigned to conduct surveillance at 1749 92nd Avenue in Dawson Creek (the "residence") and she completed that task in the evening of July 2, 2010. At that time, she observed Mr. Rabbitt arriving at the residence. She also observed numerous persons coming and going from the residence after only short periods of time.
- [9] On July 14, 2010 around 5:20 p.m., Cpl. Rutledge briefed the squad and advised that he had decided that based on all this information, the police would seek a search warrant of the residence. Cst. Verbruggen was assigned the task of preparing the ITO for a search warrant, which Cpl. Rutledge anticipated would take some days to complete. In the meantime, Cst. L'Heureux was assigned the task of continuing the surveillance of the residence.
- [10] Cst. L'Heureux's surveillance of the residence began around 7:30 p.m. on July 14. He observed Mr. Rabbitt leaving the premises. Shortly after, he observed a white pick-up truck arrive with two males, including Mr. Henderson who was in the passenger side. These males entered the residence. Cst. L'Heureux knew Mr. Henderson given his occupation as a bouncer at a local pub and police interactions at the pub. This information was relayed to Cpl. Rutledge. Cst. L'Heureux also observed Mr. Lindgrin arrive at the residence and the two males who had earlier arrived, including Mr. Henderson, departed shortly thereafter, approximately 11 minutes after their arrival.
- [11] At this point, Cpl. Rutledge was required to consider his operational options, particularly in light of what he considered was the significant recent information received. He had in hand information from Informant C that cocaine was in Mr. Rabbitt's residence very recently. In addition, after the briefing he had been advised by Cst. L'Heureux that Informant E had told him that very day that Mr. Henderson was a customer of Mr. Rabbitt. Not surprisingly, Cpl. Rutledge concluded that Mr. Henderson was at the residence to buy cocaine. As a result, he decided to arrange for certain general duty officers, Constables Greg Hall and Glen Edwards, to stop the departing vehicle and search Mr. Henderson on suspicion of cocaine possession.
- [12] At this point, the geographical references need to be discussed. North of the main part or downtown of Dawson Creek is a north/south artery known as 17th Street. The residence was located on 92nd Avenue, which intersects with 17th Street toward the northwest. Nevertheless, anyone wishing to travel from the residence would typically travel to 17th Street and then turn right and south in order to reach the main part of town down the hill. At the bottom of the hill was the pub where Mr. Henderson worked. Given these considerations, Cpl. Rutledge arranged to have the vehicle stopped as it travelled south on 17th Street but before the bottom of the hill. His concern was that if the stop took place at or

near the pub, it would likely be quickly disclosed on social media given that Dawson Creek was a small community.

- [13] During these initial arrangements for the stop, Cpl. Rutledge was supported in his decision to stop the vehicle because Cst. L'Heureux reported that after the vehicle left the residence, it took a very circuitous route to 17th Street which they both concluded was a "red flag" or "heat check" in that the occupants were making efforts to see if they were under police surveillance. Around 7:40 p.m., Cpl. Rutledge called uniformed officers to make the stop of the vehicle.
- [14] Just before 8:00 p.m., Csts. Hall and Edwards stopped the vehicle. The driver, Mr. May, and the passenger, Mr. Henderson, were searched. Mr. Henderson was found to have an ounce of powder cocaine on his person, confirming the suspicions of Cpl. Rutledge. Both were arrested.
- [15] As I will discuss in more detail below, the RCMP were concerned that occupants of the residence may become aware of the public arrest of Mr. Henderson and Mr. May. In the circumstances, Cpl. Rutledge, after discussions with Cst. L'Heureux and Cst. Raylene Rondquist, determined that they needed to secure the residence without a warrant under exigent circumstances in order to preserve evidence from loss, destruction or disappearance at the hands of the occupant(s) of the residence.
- [16] Shortly after the vehicle stop, the RCMP officers, including Cpl Rutledge, Cst. L'Heureux and Cst. Rondquist, attended the residence to secure the premises. Mr. Rabbitt arrived at the residence as the officers were walking up to it and he was placed under arrest for possession of a controlled substance for the purpose of trafficking. Mr. Rabbitt was searched incident to his arrest and a cellular telephone was seized. No issues arise in that respect. Cst. Verbruggen, who was then on her way back to the detachment, was called back to the residence to assist with the securing of the premises and the dealing with the detainees.
- [17] In approximately ten minutes, or by 8:10 p.m., the residence was cleared of other individuals, including Mr. Stephenson. During this process, Mr. Lindgrin, who had been in the back yard, came toward the front of the house, and was placed under arrest for possession for the purpose of trafficking. Mr. Lindgrin was searched incident to his arrest and a cellular telephone was seized. A further search of Mr. Lindgrin at the RCMP Detachment resulted in the seizure of a quantity of cocaine. All three individuals were transported to the detachment arriving around 9:00 p.m.
- [18] Later that evening and into the early hours of July 15, 2010, a search warrant was sought by the RCMP. At 2:32 a.m., a warrant was issued for the residence, outbuildings and property. During a subsequent search of the residence by the RCMP, a substantial quantity of cocaine (approximately 190 grams in various forms) and \$23,000 was found. The police finished their search under the warrant around 5:35 a.m.

Discussion - Voir Dire #1

(a) Exigent search of Mr. Rabbitt's residence

[19] The Crown bears the onus of establishing that the warrantless search of the residence was reasonable pursuant to s. 11(7) of the CDSA:

Where warrant not necessary

11 (7) A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.

[20] Warrantless searches are *prima facie* unreasonable. For a warrantless search to be reasonable, three criteria must be satisfied: the search must be authorized by law; the law must be reasonable; and the search must be conducted in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278; *R. v. Grant*, [1993] 3 S.C.R. 223 at 250.

[21] I agree with the Crown that some "pre-CDSA" cases remain useful in providing examples of what has been determined to be or not be "exigent circumstances", a phrase that is not defined in the CDSA.

[22] In *Grant*, the Supreme Court of Canada stated when the test for exigent circumstances will be satisfied at 243. The court summarized:

Exigent circumstances will generally be held to exist if there is an imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed.

[23] In *R. v. Silveira*, [1995] 2 S.C.R. 297, the Supreme Court of Canada again addressed whether a warrantless entry of a private dwelling could be justified as being under exigent circumstances on the basis of the *Grant* test. *Silveira* was implicated in the street level drug sales to undercover police operatives. The police investigation revealed that *Silveira* would come and go from his residence in Toronto which was believed to be the supply base for the drugs. The police had already made efforts to prepare the documentation to obtain a search warrant to search the residence, which was to include details of the third sale. Immediately after the third sale, *Silveira* was arrested in a public space. After effecting the arrests, the police became concerned that since *Silveira* had been arrested in public and not far from the residence, the arrests would be communicated to the occupants of the residence and that evidence might be destroyed or removed before the warrant might be issued (para. 10).

[24] Accordingly, the police attended the residence and placed a number of relatives of the accused under "house arrest" while they awaited the arrival of a search warrant. A subsequent search of the residence resulted in the seizure of a significant quantity of cocaine and Canadian currency.

[25] The majority of the court analyzed the issues, including exigent circumstances, under the Charter, s. 24(2). Cory J. determined that the evidence should be admitted in spite of the breach of the Charter, s. 8, which had been conceded by the Crown. The evidence seized from the residence as a result of the warranted search was vitally important to the prosecution and could not be said to affect the fairness of the trial. The breach, while serious, was mitigated by the fact that the exigent circumstances did exist:

166 They included the nature of the crime, the public arrests near the dwelling-house and the belief by the police that they needed to enter the house in order to preserve the evidence while they awaited the search warrant which they believed to be on the way. .

[26] L'Heureux-Dubé J. similarly found exigent circumstances were present: paras. 101, 115.

[27] All members of the court agreed in *Silveira* that a warrantless entry and search of a private residence constituted a serious breach where there is a high expectation of privacy (paras. 41, 50, 102, 140, 162), as recently confirmed in *R. v. MacDonald*, 2014 SCC 3 at para. 26. In addition, the Crown concedes here that it is unrealistic to separate the initial warrantless entry into the residence from the later search pursuant to warrant, stating that they were all part of the same search continuum (*Silveira* at paras. 45, 50, 140). As such, an unauthorized initial entry would taint the later search.

[28] For the purposes of the issues in this case, LaForest J.'s dissent in *Silveira* is instructive by which his minority opinion concluded that no exigent circumstances existed. In substance, LaForest, J. found that the exigent circumstances alleged in that case arose solely out of the manner in which the police chose to structure the operation (i.e. by their "strategic takedown", they "created their own exigent circumstances"): paras. 53, 65 and 75. He further stated:

85 the view that the police should not be able to rely on exigent circumstances to permit entry when the exigency complained of is a direct result of the manner in which the police choose to structure their operation (which had been planned in advance)

[29] Further cases have considered whether exigent circumstances exist in the context of the CDSA, s. 11(7).

[30] In *R. v. McCormack*, 2000 BCCA 57, leave to appeal ref'd [2000] S.C.C.A. No. 111, the Court of Appeal considered a case where the police had obtained a warrant to search a residence, but entered the residence before the warrant was delivered in order to clear the residence. The concern arose because while the accused was being arrested, a person unexpectedly drove by and police believed she was the accused's girlfriend who had access to the accused's apartment. The police were concerned that she might destroy evidence. Officers attended the accused's residence to look for people only, and left once they confirmed no one was present. The warrant was obtained, and the residence was searched.

- [31] The trial judge addressed defence submissions that there was no basis for the police officer's belief that the person who drove by was the accused's girlfriend or that she may have been going to the apartment. The court found that the officers were credible and that they had the requisite belief that evidence might be destroyed. The Court of Appeal upheld the trial judge's findings regarding exigent circumstances, and noted that an analysis of this kind requires a court to consider both the police's subjective belief in exigent circumstances, as well as the objective reasonableness of that belief: McCormack at para. 25.
- [32] *R. v. Duong and Tran*, 2002 BCCA 43, leave to appeal ref'd [2002] S.C.C.A. No. 112 is another case involving an unexpected situation faced by the police. The Crown submits that Duong supports the proposition that exigent circumstances can be found in situations where the police play a limited role in creating them.
- [33] In *Duong*, the police were responding to a report of a home invasion and were canvassing homes in the area for witnesses. One of those homes was that of Duong; upon opening the door, the police officer was immediately struck by the odour of marihuana. The officer immediately arrested Duong and then checked the residence for other persons. The police stayed until a warrant was obtained which revealed a marihuana grow operation. The Court of Appeal confirmed the test articulated in *McCormack* that the police must have a subjective belief that evidence will be destroyed or removed and that the belief must be objectively reasonable: paras. 21-31. In that case, the police were found to be legitimately concerned about the destruction of evidence by others who might be in the house.
- [34] The final case referred to by the Crown is *R. v. Crocker*, 2009 BCCA 388, leave to appeal ref'd [2009] S.C.C.A. No. 466. The accused in *Crocker* was stopped by police while driving his vehicle after they witnessed an interaction with known drug users; police were also suspicious that he might be involved in a cheque fraud scheme. During an initial vehicle stop, the police formed a suspicion that the accused was in possession of marihuana. However, the accused sped off during the initial detention. Police attended his residence to arrest him where they learned that he lived with his daughter. Soon after their arrival, the accused was seen exiting his apartment building and entered his vehicle, located in an underground parking lot. He was arrested at gunpoint just after entering his vehicle. Inside the vehicle, officers found drugs, counterfeit money and other contraband.
- [35] Following the arrest, officers were told by Crocker that his daughter was inside the apartment. Citing the possible destruction of evidence by the daughter, the officers entered the apartment under exigent circumstances to clear it and preserve evidence; while there, they searched a padlocked room and eventually found an abandoned marihuana grow operation (*Crocker* at paras. 44-46).
- [36] The trial judge determined exigent circumstances did not exist. By reason of many s. 8 breaches, most of the information in the ITO had to be excised, leaving no basis upon which it could support the later search warrant. The accused was acquitted. The Court of Appeal upheld the finding that no exigent circumstances existed. In assessing the subjective

reasonableness of the officer's grounds, the Court of Appeal noted that, while the arresting officer knew the accused's daughter was in the residence, no civilian had witnessed the arrest who could potentially have communicated that fact to his daughter (Crocker at paras. 93, 97). The officer's concerns were determined to be vague and speculative, and could not support a warrantless entry into the residence: para. 94.

- [37] Crocker is therefore distinguishable from McCormack in that in the latter case, a person was definitely seen to have witnessed the arrest.
- [38] An analysis as to whether exigent circumstances exist requires a meticulous examination of the facts, to be undertaken on a case-by-case basis: *Silveira* at paras. 2, 155.
- [39] Evidence at the voir dire on this issue was given by Cpl. Rutledge and Csts. L'Heureux, Verbruggen and Edwards. Cpl. Rutledge was the police officer who made the decision to enter the residence after a brief discussion with Csts. L'Heureux and Rondquist. He testified that he based his decision on a number of factors:
- a) the police had received information from a number of separate confidential informants implicating Mr. Rabbitt and his associates in the sale of large amounts of cocaine in the Dawson Creek area; three of the confidential informants (B, C and E) specifically stated that Mr. Rabbitt stored cocaine inside his residence;
 - b) surveillance and general police knowledge had established the residence as being Mr. Rabbit's residence;
 - c) Mr. Henderson and Mr. May were seen to arrive at Mr. Rabbitt's residence, stay for a short while then depart using a route that suggested that the occupants were ensuring that they were not being followed. One of the informants (E) had advised Cst. L'Heureux just that day that Mr. Henderson was a customer and that he would be picking up cocaine from Mr. Rabbitt;
 - d) after the stop, Mr. Henderson was arrested and found in possession of approximately one ounce of powder cocaine;
 - e) Mr. Henderson and Mr. May's arrest had been conducted a short distance from the residence by uniformed police officers (Csts. Hall and Edwards), driving a marked police vehicle. Importantly, the arrest was broadcast over regular police radio (as opposed to an encrypted police channel);
 - f) individuals coming from or returning to the residence along 17th Avenue would be able to see the public arrest of Mr. Henderson and Mr. May, and therefore could alert occupants of the residence;
 - g) in Cpl. Rutledge's experience, he had found a substantial number of police scanners during searches of residences for drug investigations which he "conservatively" estimated at 75% of the time;

- h) Mr. Rabbitt had left the residence and his whereabouts were unknown. The police were therefore not sure when he might return. However, the police believed that at least one individual was inside the residence;
 - i) The inherent nature of cocaine as a perishable substance that could be easily flushed or destroyed; and
 - j) in his experience, it would take at least one hour and possibly several hours to obtain a telewarrant.
- [40] At this juncture, I wish to address the substantial arguments by the defence on the reliability of the evidence of Cst. L'Heureux. The Constable was challenged successfully in many respects of his evidence, to the point where I had some doubts about the accuracy of his evidence. I have therefore regarded his evidence with some caution and looked for corroboration from the other officers.
- [41] The defence points out that the key information from Informant E received on July 14 about Mr. Henderson picking up cocaine from Mr. Rabbitt at the residence was not in the ITO and why that is so remains somewhat of a mystery. The ITO does state that Informant E advised that Mr. Henderson buys cocaine from Mr. Rabbitt. Nevertheless, I have considered Cst. L'Heureux's evidence in the context of the overall evidence and have concluded that corroboration was present here in that respect by reason of Cpl. Rutledge's evidence, which I accept. Again, it was Cpl. Rutledge's decision to enter the residence.
- [42] The defence also places considerable reliance on the decision of this court in *R. v. Gauthier and Pleice* (28 September 2012), Dawson Creek 28693 (B.C.S.C.). In that case, involving the same counsel as this case, the court made some extremely negative findings about the actions and evidence of both Cst. L'Heureux and Cpl. Rutledge in the summer of 2010, the same time frame as here. The defence argues that this supports that the Dawson Creek police officers at the time had a "cavalier approach" to respecting constitutional rights. I have serious doubts about the concept of taking credibility findings from one case and blithely applying them to another. Clearly there were issues with the evidence before Leask J. but at least with respect to Cpl. Rutledge on this issue, I do not find the same issues with the evidence.
- [43] The defence also argues that no "urgency" could have been present because the police did not arrive at the scene with lights flashing, sirens blaring and guns trained on the occupants. However, I am satisfied on the basis of the police officers' evidence that the officers acted with appropriate haste in dealing with the situation; this includes calling Cst. Verbruggen to come and assist despite her being on her way back to the detachment at the time.

- [44] In summary, Cpl. Rutledge considered that the vehicle stop and arrest of Mr. May and Mr. Henderson in an open space and on a busy thoroughfare that leads directly to and from the residence to the downtown area, combined with the potential for at least some of the communications to have been heard over a police scanner meant that there was clear potential for the destruction of evidence at the residence, i.e. drugs, if entry was not made to secure the premises before the warrant could be obtained.
- [45] Despite the vigorous cross examination of all the police witnesses on a range of topics relating to this issue, I am satisfied that Cpl. Rutledge had a bona fide subjective belief that there was a significant risk of destruction of evidence if the residence was not secured. Further, the facts outlined above provided a clear basis for a reasonable subjective belief that there was cocaine inside the residence which could be destroyed unless the police made exigent entry to secure it.
- [46] The remaining and more contentious issue is whether that belief was also objectively reasonable.
- [47] The defence places considerable reliance on *R. v. King*, 2006 BCPC 284. In that case, the police had been conducting surveillance on what they considered was the base of a dial-a-dope operation. After certain drug purchases by undercover officers, two individuals (one being Cruz) were arrested after they left the apartment or the apartment building. The police then entered the apartment based on their belief that there may be other people inside the residence and that the absence of the arrested individual(s) might cause alarm to those inside the residence leading to the destruction of evidence. The defence argued, relying on LaForest J.'s comments in *Silveira*, that the police had created the urgency by arresting the individuals when they did.
- [48] Bruce P.C.J. (as she then was), concluded that no exigent circumstances existed because: firstly, there was no need to arrest Cruz at that point in the investigation; secondly, there was no evidence that anyone was left in the apartment that could have become aware of the police presence; and thirdly, obtaining a search warrant was a reasonably practical alternative to Cruz's immediate arrest. Importantly, she distinguished *R. v. Phommaviset*, [2003] B.C.J. No. 123 (S.C.) where an unexpected event caused the arrest (King at paras. 36-44).
- [49] The defence argues that surveillance of Mr. Rabbitt's residence had been taking place for some time before the warrantless entry so that there was no "urgency". That is true. But what is not true is the allegation that the police planned or "engineered" the take down of the vehicle departing from the residence in which Mr. Henderson was found. The evidence was that Mr. Henderson's appearance at the residence was not expected but equally, it had great significance in terms of the investigation given the information from Informant E received just that day, as related above.

- [50] Unlike the facts in McCormack, the trial judge in Crocker found the argument that evidence could be destroyed as speculative, in part, because it was highly unlikely that anyone had witnessed the arrest of the accused, which took place in an underground parking lot. The same consideration arose in King where there was no evidence that anyone else was in the apartment with the drugs. In that regard, the defence argues that there is no "air of reality" to the assertion that Mr. Rabbitt and Mr. Stephenson, who were not thought to be at home, would know about and destroy the evidence.
- [51] In this case, the arrests of Mr. Henderson and Mr. May took place on a busy thoroughfare in Dawson Creek where customers of the drug business and perhaps other associates in the business would be expected to travel. I agree with the Crown that it was far more likely, and thus more objectively reasonable, for the police to conclude that Mr. Henderson's arrest would likely be witnessed by individuals, customers of the drug operation or even just associates of Mr. Rabbitt or Mr. Stephenson who might advise occupants of the residence. The fact that an individual was still in the residence and had been when Mr. Henderson and Mr. May attended, just before their arrest where cocaine was found on Mr. Henderson, established a real link between that individual and the drug dealing.
- [52] These facts are more similar to those in Duong where the police came across an unexpected circumstance and reacted to it, rather than the cases where the police created a situation which led to exigent circumstances. The police in Duong unwittingly contributed to the creation of an exigent circumstance by virtue of their attendance at the residence and proceeded to react quickly to the situation that unfolded in front of them. I consider here that the police did not "manufacture" the arrest of Mr. Henderson so as to create a basis upon which to enter the residence. In fact, up to the time of the results of Mr. Henderson's arrest, the determination of the location of the arrest and the disclosure of the arrest over an open police radio, I find that the officers had every intention of proceeding with their ongoing efforts to prepare the documentation to obtain a search warrant for the residence in the usual fashion.
- [53] As was the case in Silveira, the police had made public arrests close to the residence in question and were concerned that occupants might destroy evidence. While the officers had planned the arrests of the accused, only afterwards did they become aware that the arrests had taken place a short distance from the house where the drugs were believed to be located. I do not consider that the officers here planned the location of the arrests of Mr. Henderson and Mr. May so as to create any "urgency". As the Crown points out, had they taken more time to determine the optimal place to effect a stop of the vehicle, the evidence could have disappeared. It simply happened that way and the issues became more acute by reason of the geographical access to and from the residence in relation to the main parts of Dawson Creek.

- [54] Further, unlike Silveira, the officers in the instant case recovered a significant quantity of cocaine from Mr. Henderson, which supported a reasonable belief that more cocaine was located inside the residence and which might be destroyed.
- [55] I agree with the Crown that objectively assessing the factors that might justify an exigent circumstances search is not necessarily an exact science. In this case, the officers reacted to a rapidly unfolding situation and were required to make quick operational decisions where understandably, not all the facts were known. Assessing the risk of destruction of evidence must include a consideration of what is known, in conjunction with their experience. The police obviously didn't have a crystal ball to determine what exactly was happening. What is required is that the police act reasonably.
- [56] The key consideration in this case is the unexpected nature of the unfolding events. In the instant case, I agree with the Crown that the police did not prepare for the arrival of Mr. Henderson, the discovery of cocaine on him, the vehicle stop and the later police broadcast of the stop. Rather, they were required to react quickly to a circumstance that unfolded in front of them.
- [57] As was the case in Duong, the police were aware that at least one other person was present in the residence. This gave rise to a reasonable concern for the destruction of evidence if that person was made aware of the Henderson arrest. Similarly, the presence of another person in the residence made the destruction of evidence a real possibility, rather than mere conjecture, as was the case in King.
- [58] It is of course the case that before conducting a warrantless search in violation of Charter rights, the police must resort to all reasonable alternatives: Silveira at paras. 70, 163; King at paras. 37, 42. I have already addressed Cpl. Rutledge's evidence that a telewarrant would have taken at least an hour when the real possibility remained that there would be instant communication back to the residence about Mr. May and Mr. Henderson's arrest. The defence also suggests that the police could have simply called the occupants outside the residence and detained them until the search warrant arrived. However, the police did not know who exactly was in the residence and it is possible that someone would not immediately declare themselves to the police at the door and might remain in the residence to destroy the evidence.
- [59] I conclude in all the circumstances that the Dawson Creek police officers had objectively reasonable grounds in deciding to conduct the warrantless search based on exigent circumstances. It was impractical to obtain a warrant in those circumstances so as to prevent loss or destruction of evidence.
- [60] In addition to there being exigent circumstances, Section 11(7) of the CDSA also requires as a pre-condition that "conditions for obtaining a warrant exist". This is not conceded by the defence and in fact, considerable issues are raised in relation to the ITO, as will be discussed below.

(b) The Manner of Clearing and Search

- [61] Both Cst. L'Heureux and Cpl. Rutledge testified that they did not attempt an evidence search of the residence during their initial warrantless entry. No evidence was gathered, although a box of marijuana was noted to be located on a table.
- [62] A warrantless entry into a private residence has a serious impact upon the Charter rights of the accused; however, the impact of such a warrantless search is reduced when the purpose of the search is to clear it of occupants, rather than to conduct a search for evidence. I am satisfied on the evidence that the intent and the action of the police here was simply to clear the residence until a warrant could be obtained.
- [63] I agree with the Crown that in that circumstance, police are not required to simply ignore what comes within view in the course of that exercise, such as the marijuana here. The defence does not argue that there is any basis for exclusion as a result of the identification of this evidence arising from actions of the police acting under exigent circumstances. I conclude that the initial entry and clearing of the residence was "reasonable": Collins at 278.
- [64] Turning to the later search, Mr. Rabbitt submits that the search of the residence pursuant to the warrant went beyond the scope of the warrant in that it included an investigation of the registration numbers of various items in the residence. He argues that this became a search for potentially stolen property, which was not authorized by the warrant, and as such resulted in a breach of his s. 8 Charter rights.
- [65] Cst. Colin Zwicker gave evidence that while assisting in the execution of the warrant, he was instructed by Cpl. Rutledge to record the serial numbers of certain items, such as laptops and TVs. He specifically stated that drugs often lead to stolen property. These items were also in plain view.
- [66] The defence argues that the circumstances in R. v. Nguyen, 2001 BCPC 235 are instructive. In that case, during the execution of a warrant, the police improperly involved a representative of B.C. Hydro in the search for the purpose of investigating the theft of hydro: paras. 23-26.
- [67] In this case, the warrant specifically referred to "offence-related property".
- [68] In addition, Section 489 of the Criminal Code specifically authorizes police, during the execution of a warrant, to seize anything that they believe on reasonable grounds, to have been obtained by the commission of an offence, even if not specifically mentioned in the warrant:

Seizure of things not specified

489. (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds

- (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
- (b) has been used in the commission of an offence against this or any other Act of Parliament; or
- (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[69] In my view, no issue arises from the recording of the serial numbers in these circumstances.

- (c) Charter, s. 10 Rights

[70] The Charter provides:

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right;

[71] Mr. Rabbit alleges multiples breaches of his Charter rights by the police in two respects: firstly, that the initial Charter warning by Cst. L'Heureux was deficient; and secondly, that he was not provided with a telephone to contact his counsel of choice immediately upon arrest.

[72] As the police were approaching the residence to secure it, Mr. Rabbitt unexpectedly pulled up in a vehicle in the driveway. His presence added to the complexity of the situation in securing the premises. Mr. Rabbit was arrested by Cst. L'Heureux at approximately 8:01 p.m.

[73] Cst. L'Heureux says that when he gave the Charter warning to Mr. Rabbitt he did not pull out his card, but rather gave him a "shorter version" based on his memory. Cst. L'Heureux specifically stated he told Mr. Rabbit that he was being arrested for possession for the purpose of trafficking; that he had a right to speak with counsel; that he had no obligation to speak to the police; and that anything he said could be used against him. Cst. L'Heureux made no notes of what he specifically told Mr. Rabbitt. He also advised Mr. Rabbitt afterwards that everything would be explained to him shortly.

[74] In fact, Cpl. Rutledge also gave a Charter warning from memory to Mr. Stephenson at the time with the intention that it would be shortly followed up with a Charter warning from the card. Upon her arrival at the residence, Cst. Verbruggen was immediately assigned the task of giving these follow up Charter warnings from the card to Mr. Rabbitt and Mr. Stephenson. She did so in respect of Mr. Rabbitt beginning at 8:13 p.m. and finishing at 8:18 p.m. when Mr. Rabbitt was asked if he understood, to which he replied in the affirmative.

[75] The rationale of the s. 10(a) Charter right is that the accused is entitled to be advised as to the reasons for being detained. In *R. v. Evans*, [1991] 1 S.C.R. 869, McLachlin J. (as she then was) stated at 886, 888:

The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the Charter is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it: ... A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the Charter. As Wilson J. stated for the Court in *R. v. Black*, [1989] 2 S.C.R. 138 ... "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right.

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

To similar effect, see also the comments of Sopinka J. in *Evans* at 875.

- [76] The police are not required to use formulaic language or to recite the wording of the Charter. The key is that detained persons be informed of every aspect of the right to counsel in a manner comprehensible to them: *R. v. Jarvis*, 2012 ABQB 602 at para. 56.
- [77] The Crown concedes that there was a Charter violation under s. 10(a) arising from Cst. L'Heureux's warning.
- [78] In any event, the later warning by Cst. Verbruggen was proven in evidence and in fact, the card from which she read was marked as an exhibit. No issues arise in that respect and accordingly, no breach under s. 10(a) occurred at that time.
- [79] Turning to s. 10(b), I am equally satisfied that the police discharged their informational duties pursuant to section 10(b) of the Charter when Cst. L'Heureux provided the Charter warning to Mr. Rabbitt from memory. Specifically, Mr. Rabbitt was advised of his right to speak to a lawyer. In addition, having been advised of this right, Mr. Rabbitt did indeed immediately ask to speak to his lawyer.
- [80] Accordingly, the more substantive issue is whether in this case the police discharged their implementational duties pursuant to s. 10(b) of the Charter.
- [81] In *R. v. Smith*, 2011 BCSC 1695, Ker J. summarized the applicable principles under s. 10(b):
- [162] The purpose of s. 10(b) of the Charter, as noted in numerous authorities from all levels of court throughout this country, is to provide detainees with an opportunity to contact counsel to obtain legal advice on their rights and obligations, where they find themselves in circumstances deprived of their liberty, in the control of the state, vulnerable to the exercise of the state's power, and in a position of potential legal jeopardy. The right to counsel as enshrined in s. 10(b) of the Charter is the means by which detainees are provided an opportunity to mitigate their legal disadvantage through obtaining legal advice:

see *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429 [Willier], at para. 28.

[163] In *R. v. Bartle*, [1994] 3 S.C.R. 173, [1994] S.C.J. No. 74 [Bartle], Chief Justice Lamer, writing for the majority of the Court, outlined the purpose of the right to counsel protected by s. 10(b) of the Charter, stating at para. 16:

The purpose of the right to counsel guaranteed by s. 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations: *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: *Brydges*, at p. 206; *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp. 176-77; and *Prosper*. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.

[164] Immediate access to counsel, who can advise a detainee about their rights and obligations in the context of their legal situation, ensures that detainees understand from the outset their right to choose whether to cooperate with the police and engage in conduct that may result in self incrimination, such as participating in a custodial interview: see *Sinclair* at paras. 24 to 26, and *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460 [Suberu], at para. 2.

[165] The examination of any claim that an accused's s. 10(b) Charter rights have been breached must be done in a contextual manner, bearing in mind, as stated by Mr. Justice Doherty in *R. v. Sawatsky*, [1997] O.J. No. 3561, 35 O.R. (3d) 767 (C.A.) [Sawatsky], at para. 25, that "[t]he noble purposes underlying s. 10(b) ... must animate any consideration of its application to a given fact situation. A s. 10(b) claim cannot be approached as if it were an attempt to place a technical obstacle in the way of effective law enforcement."

[166] Section 10(b) places certain obligations on the police. Foremost amongst these is the duty to tell a detainee without delay of their right to speak with a lawyer: *Sawatsky* at para. 26. It also requires that the police facilitate access immediately once a detainee expresses a desire to contact counsel. The obligations on the police include both an informational and an implementational component which requires the police:

- (i) to inform the detainee of his or her right to retain and instruct counsel without delay, and of the existence and availability of legal aid and duty counsel;
- (ii) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and

(iii) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[167] In Willier, the informational and implementational duties were described at para. 30 as follows:

[30] The first duty is an informational duty, while the second and third duties are implementational in nature and are not triggered until detainees indicate a desire to exercise their right to counsel. As explained in *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, these duties are triggered immediately upon an individual's arrest or detention, as "the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected" (para. 41).

[168] The informational duty imposed on the police is relatively straightforward. Detainees who choose to exercise their s. 10(b) right by contacting a lawyer trigger the implementational duties of the police. These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided: Willier at paras. 31 and 33.

[82] In this case, Mr. Rabbitt triggered the implementational duties of the police immediately upon being first warned by Cst. L'Heureux upon arrest. He asked to speak to a lawyer. However, Cst. L'Heureux then placed Mr. Rabbitt in the back of the police vehicle while he went to join the other officers in the search of the residence.

[83] Cst. L'Heureux explained that Mr. Rabbitt was not allowed to call counsel at the scene because he did not have a phone that he felt comfortable allowing Mr. Rabbitt to use.

[84] Firstly, Mr. Rabbitt's cell phone had been seized upon his arrest. Cst. L'Heureux believed it might afford evidence of an offence. He took the view that if Mr. Rabbitt were granted access to his own cellular telephone, he would have an opportunity to erase contents or otherwise destroy potential evidence.

[85] Secondly, Cst. L'Heureux stated that he did not consider it appropriate to allow Mr. Rabbitt access to the residence for the purpose of the provision of access to counsel even if a land line was there (there was no evidence as to whether or not there was a land line). The officers could not afford any of them privacy for a telephone call in the residence which may have tainted the advice altogether: Jarvis at para. 59. Further, given the exigent circumstances supporting the entry to preserve evidence, the Crown argues with some justification that even if there was a telephone in the residence, attendance in the residence by the police for a purpose other than the exigent circumstances could have supported an allegation of a violation of Mr. Rabbitt's Charter rights.

[86] Finally, Cst. L'Heureux was in possession of his own cellular phone. However, Cst. L'Heureux testified that his cellular telephone contained sensitive information relating to informants and personal information that made it inappropriate for use by Mr. Rabbitt.

- [87] When Cst. Verbruggen gave the further Charter warning to Mr. Rabbitt some 12-17 minutes after the first, Mr. Rabbitt again asked to speak to a lawyer and specified a name and phone numbers where the lawyer could be reached. Cst. Verbruggen had no recollection of doing anything to facilitate Mr. Rabbitt's access to counsel.
- [88] Accordingly, Mr. Rabbitt was transported to the detachment. It was a busy time at the detachment with arrival of Mr. Rabbitt, Mr. Stephenson, Mr. Lindgrin, Mr. Henderson and Mr. May, who were all searched. Eventually, Mr. Rabbitt was placed in a room at 9:10 p.m. to place a call which was finished around nine minutes later.
- [89] The Crown submits that Mr. Rabbit's right to retain and instruct counsel without delay was not breached in these circumstances, despite the delay of approximately one hour and nine minutes between his arrest and the time he was allowed to call counsel. Two main points drive this submission.
- [90] In the first instance, The Crown argues that once the duty is triggered by the detainee requesting the right to retain and instruct counsel, s. 10(b) requires that the detainee be provided with a reasonable opportunity to exercise the right (except in urgent or dangerous circumstances): *R. v. Bartle*, [1994] 3 S.C.R. 173, as quoted in *R. v. Willier*, 2010 SCC 37 at para. 29.
- [91] In the very recent decision in *R. v. Taylor*, 2014 SCC 50, the Supreme Court of Canada has confirmed that the obligation of the police is to provide phone access at the first reasonable opportunity: para. 28.
- [92] The Crown says that circumstances surrounding the arrests of Mr. Rabbitt, Mr. Lindgrin, Mr. Stephenson, Mr. Henderson and Mr. May created a condition of urgency which made it impractical for officers to arrange access to counsel prior to arrival at the RCMP detachment. It is said that there was no planned, measured arrest procedure. Cpl. Rutledge would describe the scene as "chaos". The Crown further says that this was a rapidly developing, dynamic environment akin to an "urgent" situation that, by necessity, precluded the immediate provision of access to counsel for Mr. Rabbitt where the officers were suddenly and unexpectedly faced with the simultaneous arrests of five individuals.
- [93] The Crown relies on *R. v. Montgomery*, 2009 BCCA 41, cited in *R. v. Ashby*, 2013 BCCA 334 at para. 71, in support of its contention that access to counsel was granted as soon as reasonably possible in the circumstances.
- [94] The accused in *Montgomery* was one of four individuals placed under arrest for possession for the purpose of trafficking. Despite asking to speak with a lawyer upon arrest, he was not allowed access to counsel until he arrived at the police detachment. Due to the number of individuals that had been arrested, several hours passed before he spoke with a lawyer. The Court of Appeal did not view this as a breach of his s. 10(b) rights, noting that it was "neither reasonable nor practical" to allow him to use a cellular telephone at the scene of his arrest. The Court noted that it would have been difficult for the police to ensure that a cellular

telephone was not used for an improper purpose and to provide the accused with privacy at the scene while ensuring he was secure: para. 35. Further, the detachment had only one private telephone and the police had to deal with other persons who had been arrested: para. 36.

- [95] Similarly, in *Ashby*, the court upheld a 30 minute delay between arrest and access to counsel while the police transported the accused back to the detachment. Frankel J.A. stated that the police were not obligated to allow an accused to use her own cellular telephone: para. 68. Citing *R. v. Nelson*, 2010 ABCA 349, the court discussed that the exigencies of an arrest situation and "practical considerations" can excuse immediate compliance: *Ashby* at para. 72.
- [96] The defence submits that the circumstances found in *R. v. Camacho*, 2011 BCSC 175 and *R. v. Givens*, 2009 BCSC 1439 are on all fours with this case and dictate that there was a breach of Mr. Rabbitt's s. 10(b) Charter rights.
- [97] In *Givens*, a four minute delay between a demand for a breath sample and a Charter warning was held sufficient to establish a breach: para. 20. However, in that case it was of vital importance that during the four minute delay, the accused had made certain statements which were alleged by the Crown to establish a refusal to provide a breath sample.
- [98] The Crown also argues that the authorities establish that while not a complete answer to such a Charter breach where there is delay, an ameliorating factor is whether the police have continued to question the accused before such advice is obtained. One of the stated rationales for the right is to avoid the possibility that the state will obtain incriminating evidence: *Bartle* at 191; *R. v. Suberu*, 2009 SCC 33 at paras. 40-41. Further questioning by the police after expressing a desire to contact counsel is a violation of an accused's Charter rights: *R. v. Manninen*, [1987] 1 S.C.R. 1233 at 1242-44; *Jarvis* at para. 59. This factor was highlighted further in *Givens*, that such statements were made and expressly relied upon by the Crown.
- [99] In this case, neither Mr. Rabbitt nor any of the other detainees were subject to an interview before the provision of access to counsel. The police made no attempt to elicit a statement from Mr. Rabbitt, nor of course did he voluntarily provide one.
- [100] In *Manninen*, the court stated that it was not necessary for an accused to ask the police to use a telephone; rather, save in urgent situations, the police had a positive obligation to facilitate contact with counsel which included the duty to offer the use of a telephone: at 1242. In that case, a telephone was immediately at hand.
- [101] The court in *Camacho* addressed many of the above issues in finding that various s. 10(b) breaches had occurred: paras. 40-47. In addition to failing to immediately advise of the reasons for detention and of the right to counsel, the officers asked the accused questions before either of those occurred. There was a delay of 11-14 minutes between the time of

arrest and the advice of right to counsel. There was also a failure to advise the accused regarding an available cell phone at the scene. The officer advised that he could use a cell phone but that he wouldn't necessarily have privacy. The accused said he would not call in those circumstances. However, the officer also stated in evidence that he would have allowed the accused to use his cell phone if he wished to call a lawyer from the scene and that the call could be made from the backseat of the police vehicle. The accused was not so advised. Only back at the detachment was a further offer made to speak to a lawyer.

- [102] In Smith, the decision of the court that there was an unreasonable delay in affording the accused a right to speak to counsel was driven by the fact that no evidence supported that it was impractical to do so. In that case, the accused had been arrested in a remote area of B.C. where there was no cell phone coverage and he was then transported for some two hours back to the Prince George detachment at which point the offer of a phone was made. However, the court found that there was no evidence that the police checked the coverage on the way back and made no effort to stop in the event of coverage and offer the accused the ability to use the phone.
- [103] In this case, the exigencies of the situation were exacerbated by a number of factors - the chaotic scene at the residence in gaining entry to secure the premises, including; dealing with Mr. Rabbitt's unexpected arrival at the time of the officers' arrival; the actual clearing of the premises; the arrest of Mr. Stephenson; the location of Mr. Lindgrin on the property at which time he was also arrested; the later transport of these individuals back to the detachment; and the processing and searching of these individuals at the detachment along with Mr. Henderson and Mr. May. In simple terms, the police in this small detachment had their hands full dealing with numerous individuals and securing the premises.
- [104] I also accept the evidence from Cst. L'Heureux that there were valid reasons why both his and Mr. Rabbitt's phones were not appropriate to be used by Mr. Rabbitt in the circumstances. This case is distinguishable from the circumstances faced in Camacho and Smith. This conclusion as it related to the police officers' phones is supported by Frankel J.A.'s comments in Ashby at para. 68, which have recently been confirmed in Abella J. in Taylor:
- [27] I agree that in light of privacy and safety issues, the police are under no legal duty to provide their own cell phone to a detained individual.
- [105] I am not convinced, as submitted by the defence, that the delay in affording Mr. Rabbitt access to counsel was as a result of a purposeful strategy to breach Mr. Rabbitt's rights in that regard. Again, I was referred to the comments of the court in Gauthier and Pleice that it was the "policy" or "common practice" of the Dawson Creek detachment to not allow phone calls to lawyers before returning to the detachment: paras. 53, 59. No such evidence was adduced at this voir dire that would support such a finding here.

[106] In my view, the circumstances and reasoning in *Montgomery* ring truer here in that allowing Mr. Rabbitt to use a phone at the scene was neither reasonable nor practical. Again, an important consideration here is that the police made absolutely no attempt to ask Mr. Rabbitt any questions until he had an opportunity to exercise his right to speak to counsel. I conclude that no breach under s. 10(b) arises.

(d) Right to be brought before a Justice

[107] The defence submits that Mr. Rabbitt's s. 9 Charter rights were violated by the failure of the police to comply with s. 503 of the Criminal Code, the applicable portions of which are:

503. (1) A peace officer who arrests a person with or without warrant shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law:

(a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period

[108] The key considerations are that the detained person is to be brought before a justice "without unreasonable delay", with an outside time limit of 24 hours. It is of course the case that there could be unreasonable delay even before the expiry of the 24 hour period: *R. v. Simpson*, [1994] N.J. No. 69 (C.A.) at para. 24, rev'd [1995] 1 S.C.R. 449.

[109] In *Simpson*, the accused was not brought before a justice of the peace until just under 48 hours after her arrest. The Court of Appeal stated that the requirements under s. 503 are a particularly important procedural safeguard for the rights of a detainee:

36 Section 503 may be one of the most important procedural provisions of the Criminal Code. The liberty of the subject is dominant. A person not convicted of an offence should never be held in custody except in accordance with constitutionally valid provisions of the Criminal Code or other legislation. In some jurisdictions, even during the sitting week, the police will bring an arrested person before a justice, as soon as the various tasks that generally follow an arrest are completed, for hearing as to whether the person should be released or detained. If necessary, a trial will be interrupted for this purpose.

37 The paramountcy of the liberty of the subject has been recognized in English law from the earliest times. Freedom is a fundamental right. It is not to be taken away except in strict accordance with the law.

38 The prerogative writ of habeas corpus was developed as a remedy for unlawful detention. The superior courts are entrusted with the function of ensuring that any person improperly detained shall be released.

39 Where a person is arrested with or without a warrant, it is the duty of the arresting officer to ensure that that person is not detained any longer than is absolutely necessary and that, if he or she is not authorized by law to bring about the release, the person is brought before a justice of the peace who may determine whether the detention should continue or not and, if it is not to continue, what lawful conditions should be attached to the release.

[Emphasis added.]

- [110] In *R. v. Donnelly*, 2010 BCSC 1296, Schultes J. addressed various allegations of Charter breaches, including under s. 503. In that case, the accused was arrested and then interviewed and eventually put before a justice of the peace close to the 24 hour mark. Schultes J. excluded a statement that was temporally and contextually relating to the s. 9 breach. He stated:
- [49] It is clear that this section establishes the outside limit of the time that is permitted before an arrested suspect must be brought before a justice. It does not give the police an unqualified right to keep a person in custody for investigation for 24 hours. The critical aspect of this section is the police duty to bring the suspect before the justice without unreasonable delay (*R. v. Koszulap* (1974), 27 C.R. (N.S.) 226 (Ont. C.A.)). A delay to facilitate steps that are essential to the investigation, such as bringing in a witness from a distant location to identify the suspect as the actual offender, is not unreasonable (*R. v. Storrey* [1990] 1 S.C.R. 241).
- [50] On the evidence in this voir dire I have concluded that the delay in bringing Mr. Donnelly before a justice was unreasonable, as that term is used in s. 503(1)(a) of the Code.
- [51] While there is no question that attempting to obtain a statement from a suspect is an important investigative action, one that can potentially justify some delay in a suspect's appearance before the justice, or that it is legitimate to involve specially trained interviewers, in this case the police appear to have devoted an unreasonable amount of time preparing for the interview, having regard to the actual amount of material that had to be assembled and reviewed, and to have considered the 24 hours provided in s. 503(1)(a) as being entirely theirs to dispose of for the needs of the investigation, rather than as the outside limit that the authorities describe.
- [52] This was after all a pre-planned search, one that carried with it the strong likelihood of arresting and then attempting to interview Mr. Donnelly and I can see no reason why the services of the Interview Team, as well as all of the material that the lead interviewer would need to look at to prepare, could not have been organized in advance.
- [53] I contrast this situation to those in which there is an unforeseen arrest, or where the investigation continues to develop in a major way after the suspect has been taken into custody. In such cases significant post-arrest organization and preparation might well be required in order to conduct an interview effectively and a longer period of delay in starting the interview after arrest would not be unreasonable.

- .
- [57] In concluding that the delay here was unreasonable, it should not be understood as establishing a standard of perfection for the police in these situations or holding them to any rigid or specific time limits in complying with their duties pursuant to s. 503(1)(a), beyond the language of the section itself. What is reasonable or unreasonable delay will vary with the facts of each case.
- [58] In addition to the unplanned arrests and breaking investigations that I have already referred to, there are numerous other situations connected with the taking of a statement that could justify some delay. Difficulties in the suspect exercising his or her right to counsel, such as when a specific counsel of choice is not initially available, are a common example. Sometimes the interview itself will be lengthy, such as when a significant amount of evidence needs to be presented to the suspect or the interviewers need to engage in appropriate efforts to persuade the suspect to speak. Nor is there inherently anything improper about bringing an accused before a justice of the peace if the legitimate demands of the investigation have caused applicable cut-off times for bringing prisoners to provincial court to be missed.
- [59] The point is that the police must demonstrate a commitment to getting a suspect in front of a justice as promptly as the actual demands of their investigation, including the need to attempt to obtain a statement, will permit. Absent any such factors justifying a delay, they should normally be in a position to begin an interview promptly upon the completion of the suspect's proper exercise of his right to counsel.

[Emphasis added.]

- [111] Finally, in *R. v. Ansari*, 2008 BCSC 1492, McEwan J. found that the police had not fulfilled their duty in bringing the accused before the court and only facilitating a telephone appearance before the Judicial Justice of the Peace ("JJJ") 25 hours after arrest. The result was the exclusion of a statement obtained after such breach:
- [31] It is clear that if the police had organized matters appropriately, the accused could have been brought before a sitting provincial court judge in North Vancouver, comfortably within the 24-hour period. The failure of the police to do so at all was, on the face of it, in breach of s. 503(a).
- .
- [65] I am further of the view that, in any case, there was a serious breach of s. 9 of the Charter in the circumstances. The police failed to comply with s. 503, with no lawful excuse. The accused was arbitrarily (i.e. unlawfully) detained, that is, kept under the investigative control of the police beyond the point at which he should have come under judicial supervision

- [67] Reception of evidence obtained in the aftermath of such an obvious series of breaches of the rights of the accused, and of the form and substance of the protection afforded the accused by sections 503 and 515(2.2) of the Code, would manifestly bring the administration of justice into disrepute.
- [112] In this case, Mr. Rabbitt was arrested at 8:01 p.m. on July 14, 2010. He was taken before a JJP only slightly outside of the 24 hour timeframe. Cst. Verbruggen was tasked with preparing for and conducting the bail hearings for Mr. Rabbitt and Mr. Stephenson. She testified that the documents were completed by 6:29 p.m. on July 15 and after review by her supervisor, she faxed the package of documents to the JJP Centre for Mr. Rabbitt's bail hearing at approximately 7:13 p.m. and received confirmation of their receipt at 7:20 p.m. According to Cst. Verbruggen, the JJP hearing ended at approximately 8:20 p.m.
- [113] When asked about why Mr. Rabbitt's bail hearing did not take place earlier, Cpl. Rutledge stated that the search of the residence had concluded about 5:30 a.m. but the police were not in a position to ask for the bail hearing until the Justice Centre opened later that morning. However, at that time the investigators were fatigued since they had been working through the night. Accordingly, his team went home until the afternoon shift began at 3:00 p.m. the next day at which time their investigation continued.
- [114] Cpl. Rutledge knew about the 24 hour limit and considered that as long as the request for a hearing went out within 24 hours, the police had complied even if some delay might be entered within the Justice Centre. He recalls instructing Cst. Verbruggen to seek conditions for discharge at Mr. Rabbitt's bail hearing particularly relating to a curfew, a condition which he did not consider the police had authority to impose if they released the person.
- [115] Cst. Verbruggen was extensively cross examined on the circumstances of Mr. Rabbitt's release. It appears that July 15 was a weekday but she had no recollection of making efforts to see if there was a court sitting in Dawson Creek on that day when Mr. Rabbitt's release might have been addressed. Nor were any efforts made to ask the officers who would have been working in the morning of July 15 to facilitate Mr. Rabbitt's bail hearing as soon as reasonably possible. She, like Cpl. Rutledge, was aware of the 24 hour time limit, but said that she was not aware of the obligation to release Mr. Rabbitt as soon as reasonably possible.
- [116] The above circumstances demonstrate that the police have not shown any excuse or reason why Mr. Rabbitt was not brought before the JJP when the Justice Centre opened in the morning of July 15, 2010 or before the court if that was available.
- [117] I agree with the defence that the police gave little regard here to their obligations to address Mr. Rabbitt's detention as soon as reasonably possible. Both Cst. Verbruggen and more seriously, her supervisor Cpl. Rutledge, seemed to have little or no knowledge of this very important requirement. I do appreciate that the search of the residence took place in the early hours of July 15 and that the executing officers were tired and needed some rest. However, needless to say, it cannot seriously be suggested that such circumstances trump

the constitutional rights of Mr. Rabbitt, who remained in jail, not to be detained save in accordance with the Charter and the Criminal Code.

[118] It is abundantly clear that other officers remained on duty when these officers went home and it has not been suggested that these other officers could not have been briefed on the task so that efforts could have taken place earlier than when Cst. Verbruggen came back on duty at 3:00 p.m. Further, it has not been suggested that, as in Donnelly, further interviews needed to be conducted by the same officers who were on duty the night before.

[119] I agree that this was a serious violation of Mr. Rabbitt's s. 9 Charter rights. Appropriately, the Crown concedes such a violation of Mr. Rabbitt's s. 9 rights.

(e) Charter, s. 24(2)

[120] Where "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute": the Charter, s. 24(2).

[121] At the outset of these proceedings, Mr. Rabbitt alleged that his Charter rights had been breached in numerous ways. Many of the arguments (for example, the arrest, the search incident to arrest and the cellular phone search) were abandoned during the course of the hearing. In addition, I have found no violation of those rights arising from the exigent entry of the residence and s. 10, save for the deficiencies of the initial Charter warning by Cst. L'Heureux that raise s. 10(a) issues. I will therefore address the s. 24(2) analysis in relation to this breach and the breach of the Charter, s. 9 and the Criminal Code, s. 503, as both conceded by the Crown.

[122] The Crown submits that these breaches were of a minor, technical nature that did not lead to the discovery or production of evidence against Mr. Rabbitt.

[123] The leading case is *R. v. Grant*, 2009 SCC 32 which sets out the test to be used when determining whether a judge is to admit evidence that is obtained in a manner that violates the Charter rights of the accused. In applying that test, the overarching consideration is whether the admission of the evidence will bring the administration of justice into disrepute. At para. 71, the majority stated that this court's task is to assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to three lines of inquiry:

- (1) the seriousness of the Charter-infringing state conduct;
- (2) the impact of the breach on the Charter-protected interests of the accused; and
- (3) society's interest in the adjudication of the case on its merits.

- [124] It is somewhat difficult to discern exactly what evidence the defence wants excluded, save for obviously the cocaine and cash that was found at the residence after execution of the warrant.
- [125] The Crown notes that very little information was obtained from the initial, "pre-warrant" stage of the investigation, and thus there is little that would ordinarily be considered for exclusion in the wake of a breach. That evidence would include Mr. Rabbitt's cellular phone and the noting of marijuana on a table inside the residence. The latter evidence was included in the ITO that later ground the issuance of the search warrant.
- [126] However, many cases have held that evidence may be excluded if it is temporally linked or related, as opposed to simply casually related, to the breaches: see for example, *R. v. Bohn*, 2000 BCCA 239 at paras. 37-41; *Donnelly* at para. 72; *R. v. Lauriente*, 2010 BCCA 72 at paras. 35-54. *Bohn* is an example of breaches of s. 8 and 10(b) which led to the exclusion of evidence gathered at a later search even though those breaches did not directly result in the obtaining of such evidence: para. 41.
- [127] In addition, evidence of a pattern of disregard of Charter rights by police during an investigation may be deemed to have a cumulative effect on the repute of the administration of justice such that exclusion of temporally related evidence is warranted: *Grant* at para. 75; *Bohn* at para. 47.
- [128] Mr. Rabbitt alleges here that the s. 9 violation was one of several which overlapped one another and constituted a pattern of disregard for Charter rights. I will therefore take the defence's submissions to be that all evidence pertaining to Mr. Rabbitt should be excluded.
- [129] Needless to say, the Crown contends that no pattern of disregard for Charter rights existed in this case. Further, the Crown submits that there was no evidence of wilful or flagrant disregard, or evidence of deliberate police action against Mr. Rabbitt that would warrant a wholesale exclusion of the evidence. The Crown submits that the evidence, regardless of how it is related to the breach, should nonetheless be admitted, and in doing so shall not bring the administration of justice into disrepute.
- [130] At para. 44 of *Lauriente*, the court cited *R. v. Strachan*, [1988] 2 S.C.R. 980 on the preliminary issue of determining whether a sufficient nexus between the breach (or breaches) and the evidence exists:

... Ordinarily only a few Charter rights, ss. 8, 9 and 10, will be relevant to the gathering of evidence and therefore to the remedy of exclusion under s. 24(2). So long as a violation of one of these rights precedes the discovery of evidence, for the purposes of the first stage of s. 24(2) it makes little sense to draw distinctions based on the circumstances surrounding the violation or the type of evidence recovered. A better approach, in my view, would be to consider all evidence gathered following a violation of a Charter right, including the right to counsel, as within the scope of s. 24(2).

In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24(2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence figures prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a Charter rights will be too remote from the violation to be "obtained in a manner" that infringed the Charter. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of Charter right becomes too remote.

[Emphasis in Lauriente.]

[131] In this case, there was a continuum of events leading to the evidence being obtained: Mr. Rabbitt's arrest and the seizure of his cellular phone (which included the s. 10(a) breach); the search of the residence by which the marijuana was seen; the delayed detention of Mr. Rabbitt (which included the s. 9 breach); the obtaining of the search warrant and the later discovery of the cocaine and cash in the residence. In my view, there is a sufficient nexus between these two breaches and the evidence obtained, to trigger the remainder of the analysis in s. 24(2): Lauriente at para. 36. But perhaps for the inadequate Charter warning of Cst. L'Heureux, I do not understand the Crown to seriously suggest otherwise; although it emphasizes here that the extent of such a nexus remains relevant.

[132] I turn to the considerations under s. 24(2).

Seriousness of the Charter-Infringing State Conduct

[133] The first inquiry under the Grant test focuses upon the nature and severity of the state conduct that gave rise to the Charter breach; the more severe the conduct, the greater the breach, and therefore the greater likelihood that the evidence will be excluded. A willful or reckless disregard for Charter rights shall inevitably erode public confidence in the rule of law; in such cases, exclusion of evidence is more likely: Grant at paras. 72-74.

[134] Good faith on the part of an officer will reduce the need to disassociate from the police conduct. As such, there is a need to evaluate the degree of state misconduct giving rise to the Charter breach: Grant at para. 75.

[135] In *R. v. Caron*, 2011 BCCA 56, Frankel J.A. stated that "[t]he absence of bad faith does not equate to good faith, nor does the absence of good faith equate to bad faith": para. 38. Further, the court noted what "good faith" must involve:

[41] The specific portions of the Supreme Court's previous decisions referred to in Grant reflect the fact that, for a Charter breach to have been committed in good faith, the police officers (or other state agents) involved must, at the time the breach occurred, have honestly and reasonably believed they were acting lawfully. In those decisions the Court held, in brief, that:

- While the police are not expected to have a detailed knowledge of search-warrant law, they are expected to be aware of those requirements that the courts have held are essential for the validity of a warrant: *R. v. Genest*, [1989] 1 S.C.R. 59 at 87;
- While the police are not expected to have an immediate understanding of judicial decisions affecting their powers, they will not have acted in good faith when they either knew, or ought to have known, their actions were unlawful: *Kokesch* at 32, 33; and
- "Good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority": *Buhay* at para. 59, citing *Sopinka, Lederman and Bryant, The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999 at 450.

[136] Turning to the s. 10(a) violation, Mr. Rabbitt was provided with his Charter rights from memory, immediately upon his arrest by Cst. L'Heureux. Some 12-15 minutes later, a thorough and correct version of those rights was given by Cst. Verbruggen from her police-issued Charter card. In that interim period of time, no police officer made any attempt to obtain a statement from Mr. Rabbitt. Further, I accept Cst. L'Heureux's evidence that he gave the "shortened" version as best he could and in an effort to free himself to assist in the active securing of the premises. He was also aware that Cst. Verbruggen would give a further warning from the card after he turned Mr. Rabbitt over to her.

[137] While there were deficiencies in the initial warning provided by Cst. L'Heureux, I agree with the Crown that those deficiencies can only be described as minor and technical in nature. This is particularly so given that no statement was either taken or attempted to be taken from Mr. Rabbitt.

[138] The defence relies on the conclusions of Wedge J. in *R. v. Huynh*, 2010 BCSC 1553. In that case, there were numerous Charter violations, including under s. 10(b), which led the court to exclude evidence. The accused was not read his rights upon arrest due to language issues and a translator was not obtained until some hours later. The court found that the actions of the police displayed "indifference" and "a pattern of carelessness": para. 135.

[139] I cannot conclude the same here. Given the substance of the Charter warning by Cst. L'Heureux, I conclude that he was acting in good faith and not wilfully or recklessly disregarding the rights of Mr. Rabbitt. Accordingly, I consider this s. 10(a) breach to be at the low end of the spectrum and not one that would erode public confidence in the rule of law.

- [140] Turning to the violation under s. 503 of the Criminal Code and s. 9 of the Charter, the Crown argues that unlike the situation in *Donnelly*, this was not a planned arrest. The Crown highlights para. 53 of that decision where Shultes J. comments that he would "contrast this situation to those in which there is an unforeseen arrest, or where the investigation continues to develop in a major way after the suspect has been taken into custody".
- [141] I agree that the arrest of Mr. Rabbitt was unplanned and that four other individuals were taken into custody at the same time. I also accept that this created a significant strain upon the limited resources of the small Dawson Creek detachment. However, as I have noted above, the major delay appears to have arisen from the decision of the police officers to go home and in doing so, literally suspend their attention to the rights of Mr. Rabbitt, who remained in cells. I do not accept that there was no other officer at the detachment between the time that these officers booked off and when Cst. Verbruggen came back at 3:00 p.m. who could have advanced the process to the point of arranging and convening a bail hearing for Mr. Rabbitt.
- [142] I do not consider that this amounted to "bad faith" although it does not rise to the level of "good faith" either.
- [143] In these circumstances, I consider the breach to be a serious one as it does indicate a certain degree of indifference, or at best, a lack of appreciation of the very basics of the duty of the police under the Charter in this respect. Neither is acceptable. A similar finding was made in *Ansari* at para. 65, although I would describe the police actions in that case as being more egregious than those here.

Impact of the Breach on the Accused's Charter-Protected Interests

- [144] The second inquiry under the Grant test assesses how an accused was affected by the state conduct, that is, the extent to which the breach actually undermined the interests protected by the infringed right: Grant at para. 76.
- [145] This part of the test looks at the interests engaged by the right and examines the degree to which the violation impacted those interests. The inquiry includes an analysis of the intrusiveness into a person's privacy and the effect on personal dignity. An unreasonable search in which the individual enjoys a high expectation of privacy or that demeans his or her dignity is more serious than one that does not: Grant at para. 78.
- [146] Technical breaches are the least intrusive; if an individual is clearly informed of his/her choice to speak to the police, but compliance with s. 10(b) is technically defective, the impact on the liberty and autonomy interests of the accused in making an informed choice may be reduced: Grant at para. 96.

- [147] In this case, Mr. Rabbitt was clearly informed upon arrest as to the reason for his detention, his right to remain silent and his right to speak with counsel. He was subsequently provided with a full Charter warning within minutes of his arrest. If the initial provision of his 10(a) rights were defective, such a defect can only be construed as minimal or technical in nature. The police made no attempt to obtain any statement from Mr. Rabbitt prior to providing him access to counsel.
- [148] In these circumstances, I consider the intrusion to be minimal.
- [149] Turning to the s. 503 violation, the Crown submits that the detention (24 hours plus some minutes) in custody must be viewed as having had a minimal impact upon Mr. Rabbitt's s. 9 Charter rights. I disagree.
- [150] A s. 9 breach will generally be considered serious given the consequences to the accused. In Huynh, such a breach was found to have had a "serious" or "significant" impact on the accused: paras. 136-139. To similar effect, see Donnelly at para. 77:
- [77] The impact on Mr. Donnelly's Charter's protected rights was also quite serious. Self-evidently, s. 503(1)(a) exists to restrain the unsupervised detention of a suspect to a reasonable minimum and to cap its absolute length at 24 hours. This distinguishes our society from less free ones, in which detention without judicial supervision can be as feared as the serving of an actual sentence. As such, it is a core constitutional right, one whose breach should be quite vigilantly enforced by the courts. I think this weighs in favour of exclusion as well.
- [151] While some delay in release on serious charges must be expected, it is clear from the evidence here that the investigation had come to a stop by the time that the arresting officers booked off to go home. While the officers had the luxury of returning to their homes, Mr. Rabbitt did not and was required to wait beyond the time when arranging for his release would have been feasible.
- [152] I agree with the Crown in that the circumstances here are different than those found in Donnelly; however, what does resonate here are the comments of the court in that case that the detention was "in effect structured to make maximum use of the 24-hour period, in a more or less complete misunderstanding of the police duties under s. 503, mak[ing] it fair and accurate to characterize it as arbitrary, in the sense that it lacked any correspondence to the statutory authority and duties that nominally permitted it": para. 62.
- [153] A further factor that impacts this analysis is discoverability. In Grant, the court said:
- [122] Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the Charter-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where

it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry.

- [154] The majority of the Supreme Court of Canada in *R. v. Côté*, 2011 SCC 46, stated that discoverability remains a relevant factor under the second inquiry of s. 24(2) (and also the first inquiry) in appropriate circumstances even where the interest at stake is one other than self-incrimination: paras. 65-74.
- [155] The Crown argues that the evidence was inherently discoverable and that there was no causal connection between the inadequate Charter warning, the delay in releasing Mr. Rabbitt and the obtaining of this evidence. Indeed, the cellular phone had been obtained by the arrest and the grounds for that arrest are not challenged. In addition, I have held that there were exigent circumstances even before Mr. Rabbitt's arrest, to justify the entry of the residence to secure any evidence. Further, the evidence later seized pursuant to the ITO was done pursuant to a search warrant issued as a result of steps taken to obtain it well before Mr. Rabbitt was arrested; although I acknowledge that it was supplemented by reason of the exigent entry. Of course, the validity of the search warrant remains to be addressed in the reasons below.
- [156] I conclude that the intrusion to Mr. Rabbitt's right was serious although it is attenuated by the inevitable discoverability of the evidence, as discussed above.

Society's Interest in Adjudication of the Case on its Merits

- [157] The final inquiry under the Grant test relates to the truth-seeking function of the criminal court and whether that function is better served by admission of the evidence or by its exclusion. The analysis requires a broad inquiry into all the circumstances, including the reliability of the evidence: Grant at paras. 79-80. The importance of the evidence to the prosecution's case is also assessed; the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution: Grant at para. 83.
- [158] The seriousness of the crime remains a relevant factor; however, courts have commented per Grant at para. 84, that factor may "cut both ways" in that while the public expects successful prosecution of serious crimes, they also expect law enforcement officers to respect the rights and freedoms we all enjoy by prosecuting within the limits of their lawful authority: *R. v. Reddy*, 2010 BCCA 11 at paras. 94, 107; *R. v. Phengchanh*, 2011 BCSC 484 at paras. 54-56.
- [159] Both the Crown and defence agree that the charges are serious. Trafficking in Schedule 1 substances, including cocaine, is unquestionably a blight on our society and results in untold death and misery in our communities. It is in that sense that the balancing of interests must be considered.

- [160] The defence refers to *R. v. Godbout*, 2011 BCSC 1722. In that case, the court found that there were no reasonable and probable grounds to arrest the accused. Upon arrest, a search of the accused revealed drugs which would later be said to support the charge of possession for the purpose of trafficking. Ballance J. concluded that despite the reliability of the evidence seized upon arrest, admitting it would have an adverse effect on the administration of justice in the long term: paras. 64-65.
- [161] The Crown submits that the societal interest in adjudication of the case on its merits weighs heavily in favour of admission of all of the evidence obtained pursuant to this investigation. I have no doubt that the evidence seized, particularly the cocaine and the cash, is critical to the prosecution. In that sense, the exclusion of this highly reliable evidence is essential to the effective prosecution of this serious crime.
- [162] I do not consider that the evidence establishes any "pattern" of disregard for Charter rights. The most serious breach here is that under s. 503; however, I do not consider the minor breach under s. 10(a) to significantly advance the argument to a conclusion that there existed a concerted approach or actions on the part of the police to act in a manner that disregarded Charter rights. I consider it more likely than not that these breaches arose from a lack of proper training, something that was also noted by this court in relation to the Dawson Creek detachment in *Gauthier and Pleice* at para. 37.
- [163] As the Crown notes, the evidence discovered in the initial stages of the investigation was obtained absent any coercion, or even the assistance of the accused. It is also the case that although temporally related, the evidence obtained by the police did not directly or causally arise from either the inadequate warning or the detention. This is distinguishable from *Donnelly*, where the s. 503 detention was not only temporally but directly related to the statement that was later excluded. In that sense, the extent of the nexus is greatly reduced.
- [164] In this case, the s. 503 breach was a serious one and had a significant impact on Mr. Rabbitt's rights, although the extent of such breach in relation to the obtaining of the evidence is attenuated. I conclude that the truth seeking function of the court would be best served by the admission of this highly relevant and probative evidence which if not admitted would, as the Crown submits, result in an end to the prosecution of this serious offence.
- [165] In my view, this matter is one close to the line but is slightly skewed toward the admission of the evidence after considering the balancing of the various interests, as dictated by *Grant*. In considering the totality of all the circumstances here, I do not consider that the admission of the evidence will bring the administration of justice into disrepute.

Discussion - Voir Dire #2

- (a) the ITO
- (i) Background

- [166] In this voir dire, Mr. Rabbitt challenges the ITO, being the basis upon which the warrant was obtained. The only evidence on this voir dire was that of Cst. Verbruggen who was allowed to be cross examined on the ITO and the warrant.
- [167] Mr. Rabbit bears the onus of proving, on a balance of probabilities that the warrant should be set aside.
- [168] As stated above, Cst. Verbruggen was tasked with the job of completing the ITO at the briefing in the afternoon of July 14. It was her first time preparing an ITO and she was supervised in that respect by Cpl. Rutledge.
- [169] After returning from the residence after the exigent search, Cst. Verbruggen continued her efforts and finished the ITO in the early hours of July 15 and faxed it to the Justice Centre. In that document, she sought permission to search the residence, outbuildings, property and vehicles of Mr. Rabbitt and Mr. Stephenson located on 92nd Avenue.
- [170] As a result of the ITO, the JJP issued a warrant at 2:32 a.m. on July 15, 2010 which was received by the detachment some minutes later. Permission was granted to search all the areas requested, save for the vehicles which was denied. In accordance with the warrant, the officers immediately commenced their search of the premises and concluded their search at 5:35 a.m. that same day.
- [171] As a result of that search, the police seized the following items from Mr. Rabbitt's residence: two bags of cocaine weighing 86.5 and 84 grams each, a bag of crack cocaine weighing 21.6 grams; and over \$23,000.

(ii) Applicable Law

- [172] There is no dispute on the applicable law that governs the task of reviewing the issuance of the search warrant. I will not undertake an extensive review of the authorities here as they are handily summarized by our Court of Appeal in the recent decision in *R. v. Liu*, 2014 BCCA 166 (*Liu* 2014), as below:
- [34] In *R. v. Scott*, 2012 BCCA 99, Madam Justice Neilson, writing for the Court, said:
- [39] Before turning to the appellant's arguments, I find it useful to set out the principles governing the review of whether a search warrant was properly issued, established in *Garofoli* and *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992. I adopt Mr. Justice Donald's statement of these in *R. v. Bacon*, 2010 BCCA 135 at para. 25, 285 B.C.A.C. 108, leave to appeal ref'd [2010] S.C.C.A. No. 213:

The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant. While evidence of fraud, material non-disclosure, or misleading information are all relevant to this enquiry, their sole impact is to determine whether there is a continuing basis to support the warrant: ...

- [35] Neilson J.A. continued to describe the test for reviewing the sufficiency of an ITO in the following way:
- [42] Ultimately, the reviewing judge must examine the record submitted to the authorizing justice, including any exclusions and additions arising from proper amplification on review, and decide whether on a "practical, non-technical, and common sense basis" the totality of the circumstances demonstrate reasonable grounds for the belief the appellant was committing the stated offences, and could support the issuance of a warrant: *R. v. Wilson*, 2011 BCCA 252 at para. 52, 272 C.C.C. (3d) 269; *R. v. Saunders*, 2003 NLCA 63, 181 C.C.C. (3d) 268 at para. 15, *aff'd* [2004] 3 S.C.R. 505.
- [36] In *R. v. MacNeil*, 2013 BCCA 162, Ryan J.A. discussed the role of a reviewing judge and the reasonable grounds standard:
- [50] As the trial judge noted, the reviewing judge does not stand in the place of the justice who issued the authorization. The question is not whether the reviewing judge would have granted the order, but whether there was any basis on which the issuing justice could have done so: *Garofoli* at 188; *R. v. Araujo* at para. 51. In other words, the reviewing judge should only set aside the authorization if satisfied, on the whole of the material presented, that there was no basis on which it could be sustained: *Garofoli* at 188.
- [51] In performing his or her task on review the trial judge is not to assess the evidence piecemeal but to examine the "totality of the circumstances". As Frankel J.A. explained in *R. v. Whitaker*, 2008 BCCA 174, 254 B.C.A.C. 234 at paras. 39-40, leave to appeal *ref'd* [2008] S.C.C.A. No. 296:
- [39] The "reasonable grounds" standard is well-known. The Supreme Court of Canada said this about it in *Mugesera v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40:
- 114 The first issue raised by s. 19(1)(j) of the Immigration Act is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm.L.R. (3d) 61 (F.C.T.D.)
- [40] The judgment of Madam Justice Wilson in *R. v. Debot*, [1989] 2 S.C.R. 1140 (at 1166), is also apt:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.

- [41] A determination with respect to whether reasonable grounds exist requires a consideration of the "totality of the circumstances": *R. v. Bracchi*, 2005 BCCA 461, 201 C.C.C. (3d) 35 at para. 20; *Re Church of Scientology & The Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) at 502. This means that, "it is important that the Information be examined as a whole and not one piece of evidence at a time, because each piece of evidence colours other pieces of evidence and a fuller picture emerges by considering all of the evidence together": *R. v. Lam*, 2002 BCCA 99, 172 B.C.A.C. 161 at para. 10.
- [42] Further, the assessment of the facts relied upon to establish reasonable grounds is made on a practical, non-technical, and common sense basis: *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont.Ct.)(G.D.) at 367. As Mr. Justice Cumming observed in *R. v. Charlton* (1992), 15 B.C.A.C. 272, the person deciding whether the reasonable grounds standard has been met is entitled to "put two and two together": para. 34.

[Emphasis added in MacNeil.]

- [37] In *R. v. Vu*, 2011 BCCA 536 affirmed in S.C.C. on this point 2013 SCC 60 at paras. 9-18, Frankel J.A. again discussed the reasonable grounds standard:
- [39] The reasonable-grounds standard is well known. As discussed by Madam Justice Deschamps in *Morelli* at paras. 127-129 (dissenting, but not on this point), quoting the leading decision of *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 167, reasonable grounds "is the point at which credibly-based probability replaces suspicion". Determining whether that standard has been met involves "a practical, non-technical, and common-sense assessment of the totality of the circumstances": *R. v. Ballendine*, 2011 BCCA 221, 271 C.C.C. (3d) 418 at para. 53.

[Emphasis in Liu 2014.]

- [38] In applying that standard to the question of whether a warrant could have been issued to search for documentation inside a residence in order to determine who was in control of the residence, Frankel J.A. stated in *Vu*:
- [41] Returning to the case at bar, I agree with the Crown that it was open to the justice of the peace to draw the inference that there would likely be documentation inside the residence that would assist the police in determining who was in control of the 84th Avenue premises. I do not accept Mr. Vu's submission that such an inference would amount to a "quantum leap of logic".

[42] What the ITO disclosed is that the place to be searched was a residence (i.e., a place in which it is usual for persons to live either permanently or temporarily) and that municipal records indicated that the property was registered to a person of that address. In addition, another person had subscribed for electrical service to that property approximately one month before. Lastly, there was information that a substantial portion of the electricity being used inside the residence was being stolen, which strongly suggested that someone was carrying on activity there.

[43] The totality of the circumstances was such that it was open to the justice of the peace to reasonably infer that it was likely that documents that would assist the police in determining who was in control of the 84th Avenue premises would be found there. A residence, even one used for criminal activity, is a place in which such documentation can be expected to be found. Although, as the trial judge observed in para. 58 of her ruling, persons involved in theft of electricity at a residence have an incentive not to leave any identifying documents in the premises, experience shows they often act otherwise: e.g., *R. v. Vo*, 2009 BCPC 399 at para. 18; *R. v. Tong*, 2006 BCPC 662 at para. 22; *R. v. Lam*, 2005 BCPC 436 at paras. 9-16; *R. v. Hoang*, 2005 BCPC 216 at paras. 15-17.

[39] I would summarize the main points from this jurisprudence in the following way:

- The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant.
- The trial judge should examine the information in its totality, not on a piece meal basis, in a "practical, non-technical, and common sense basis".
- The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so.
- The appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.
- Reasonable grounds may be said to exist at "the point at which credibly-based probability replaces suspicion".

[Emphasis in Liu 2014.)

[173] The task then is to assess the evidence before the JJP, in light of the further evidence at trial that might amplify the record, in order to determine whether, after expunging any misleading or erroneous information, and considering any new evidence, sufficient reliable information remained that "could" support the warrant: *R. v. Monroe*, [1997] B.C.J. No. 1002 at para. 15 (C.A.).

[174] In seeking a search warrant, the police are obliged to make full, fair and frank disclosure of all material facts, whether supportive of the warrant or not: *R. v. Ling*, 2009 BCCA 70 at paras. 37-43, leave to appeal ref'd [2009] S.C.C.A. No. 165.

(iii) Redaction of the ITO

[175] Mr. Rabbitt argues that the ITO was redacted improperly and that in any event, the redactions are so extensive that the remaining information is insufficient to support an authorization. The Crown relies only upon the redacted version of the ITO in arguing that there remains sufficient information in the redacted version such that the warrant could have been issued.

[176] In respect of these "deficiencies", the defence argues that the Crown should have applied to implement the sixth step outlined in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1461. By that step, the Crown may apply to have the court consider the excised material, after the judge ensures that the accused is sufficiently aware of the nature of the excised material so as to be able to challenge it in argument or by evidence. However, the Crown is content to rely on the ITO, as redacted, and in that event, I see no basis upon which this step is necessary.

[177] Nor did the defence make any application to challenge the editing process in any concrete way under the Garofoli steps that perhaps would have provided a basis upon which to invalidate the ITO: *R. v. Blake*, 2010 ONCA 1 at paras. 14-17.

[178] The Crown refers to *R. v. Eftekhari*, 2012 ONSC 5140, a decision addressing the effect of redactions upon the overall sufficiency of an ITO:

[5] First, the facial validity of the search warrant may be assessed solely on the basis of the information revealed by the redacted Information to Obtain. In such circumstances, however, if the Information has been so heavily redacted that the reviewing judge cannot conclude that the remaining information was sufficient to justify the issuance of the search warrant, the warrant must be set aside... Second, if the editing process renders the search warrant unsupportable, the Crown may apply to have the trial judge consider so much of the redacted information as is necessary to support the search warrant.

[179] Accordingly, at this stage at least, the ITO is to be considered based on the present document, including the redactions, which is before the court, as amplified by Cst. Verbruggen's evidence on the voir dire.

(iv) Boilerplate Language

[180] As the defence argues, the courts generally take a dim view of the use of boilerplate language: see *R. v. Araujo*, 2000 SCC 65 at para. 47 which stated that at best, it added extra verbiage and seldom anything of meaning.

[181] However, use of a precedent can be appropriate depending on the circumstances. In *R. v. Chan et al*, 2001 BCSC 831, the court stated.

[45] As to the use of boiler plate language and the admonition in the dicta of Araujo regarding its use, I am satisfied that in preparing his affidavit, Constable Dunlop used the precedent given to him in an appropriate manner. The dicta in Araujo is surely to be interpreted as an admonition against the use of boiler plate language in that it may lead to an affiant swearing to information not available to him/her, or using language which he/she does not understand, thereby adversely affecting his/her credibility. Constable Dunlop did not use the precedent and its "boiler plate" in that way. In fact, the opposite is true. He testified that he referred to certain paragraphs of the precedent, considered what was suggested in the precedent and asked himself whether what was suggested applied to his particular situation and investigation. If it did, he looked at the language and adopted some of it. If it did not, he moved on. I accept his explanation. It must be noted that the affidavit is long and its contents dense. I am satisfied that Constable Dunlop's use of the precedent and its boiler plate language did not mislead the authorizing justice.

[182] Cst. Verbruggen testified that, while she relied upon a template from a search warrant course, she was aware of the concerns of the use of "boilerplate language", and as such drafted the lion's share of the ITO herself. She specifically testified that she did not "cut and paste" portions of her template document into the ITO.

[183] The defence specifically argues that Cst. Verbruggen used such language when describing the criminal records of the Informants. The language, which is contended to be "coy, misleading and incomplete" was (to use Informant B as an example):

Informant "B" has a criminal record in Canada however, He/She does not have any convictions for Fraud, Perjury, Obstruction or any other offence which would cast doubt as to his/her truthfulness.

[184] The allegation of incompleteness arises from the fact that the actual records were not attached to the ITO and therefore not before the JJP. It was the practice of the detachment not to attach such records but rather use a description of the records.

[185] I agree with the Crown that some use of boilerplate language is virtually inevitable. It is clear to me that Cst. Verbruggen was aware of the risks of using a precedent and that she approached her task carefully with that concern in mind. I considered that Cst. Verbruggen was shown to be a diligent police officer. She referred to being "responsible" for certain portions of the ITO and I accept that she was mindful not to blindly follow the precedent and ensure, as the affiant, that she had the requisite knowledge to swear the ITO. As in Chan, I am satisfied that no concerns arise here from the limited use of "boilerplate language" contained in the ITO.

- [186] Dealing with the Informant's criminal records, while it may be described as "boilerplate", it does deal specifically with the state of those records and can be considered a succinct and accurate way of describing those records. Whether that is sufficient to establish the reliability of the informant's information may be another matter: *R v. Rocha*, 2012 ONCA 707 at para. 33.
- [187] Mr. Rabbitt also takes issue with the fact that Cst. Verbruggen "cut and pasted" information found in her colleague's Task Action Reports for some of the information to which she deposed in the ITO. This relates to those portions of the ITO where she was specifically relying on information received from the other police officers.
- [188] It has been suggested that she should have asked questions of Cst. L'Heureux and Cpl. Rutledge regarding the source and timeliness of the information provided by them, rather than accepting wholesale what the officers had written in their reports. It has been suggested that Cst. Verbruggen was nothing more than a "straw affiant" without the requisite knowledge of the information contained therein, and this should limit the reliability of the information to which she deposed in the ITO.
- [189] The Crown argues and I agree that police officers may rely on hearsay information received from other officers; for example, for the purposes of determining whether reasonable and probable grounds for an arrest exist, it is not required that the officer research the source or credibility of the information, so as to form his or her own grounds for arrest. The Crown relies in that respect on *R v. Debot* (1986), 30 C.C.C. (3d) 207 at 221 (O.N.C.A.) (Debot); *aff'd* [1989] 2 S.C.R. 1140 (Debot SCC).
- [190] In my view, there is nothing wrong with the practice of an affiant gathering information from her colleagues in this fashion for the purpose of insertion into an ITO. As noted in *Debot*, it would be unrealistic and incompatible with law enforcement to consider that one officer would have personal information about all aspects of an investigation or that she should have to independently research the information received from others. Nor do I have any concerns about "cutting and pasting" from the Task Action Reports to the extent that Cst. Verbruggen was relying on the information gathered by others. In these circumstances where accuracy is key, what better way to be accurate than following this process? She would have copied over the exact information recorded by the other officers in such reports.
- [191] Further, I agree with the Crown that Cst. Verbruggen was far from a "straw affiant" as she was characterized by the defence. She was actively engaged in surveillance of the residence and other aspects of the investigation, including reading the Charter rights to Mr. Rabbitt and the others.
- [192] In conclusion, I have no concerns about the reliability of Cst. Verbruggen's evidence in the ITO being undermined by any use of "boilerplate" language in the ITO or by her use of any precedent, including certain portions of the Task Action Reports.

(v) Source Information

[193] The ITO relies to a large degree on information received by the RCMP from five confidential Informants, named A through E. This confidential information was supplemented by police surveillance; a vehicle stop of Mr. May and Mr. Henderson who were seen leaving the residence just before their arrest and the discovery of cocaine on Mr. Henderson; and information obtained as a result of an exigent entry into the residence to preserve evidence from destruction.

[194] The defence raises substantial issues concerning the reliability of the information from the Informants as contained in the ITO.

[195] The leading cases on reliability of informant information are *Debot* and *Garofoli*. In *Garofoli*, the court found at 1456 to 1457:

- a) hearsay statements of an informant can provide reasonable and probable grounds to support the issuance of a warrant; however, evidence of a tip, by itself, is insufficient to establish reasonable and probable grounds;
- b) the reliability of a tip is to be assessed by recourse to the "totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors, including;
 - i. the degree of detail of the "tip";
 - ii. the informer's source of knowledge; and
 - iii. indicia of the informer's reliability such as past performance or confirmation from other investigative sources
- c) the results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

[196] In *Debot* SCC, Wilson J. at 1168, suggested an approach that considered whether the information was compelling, credible and corroborated:

First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin, J.A.'s views that the "totality of the circumstances" must meet the standard of reasonableness. Weaknesses in one area, to some extent, be compensated by strengths in the other two.

[197] The Crown has referred to me two decisions which discuss this issue.

- [198] In *R. v. McLellan*, 2012 BCSC 39, the court dealt with circumstances which are similar to those at issue here. In that case, the court considered source information that the accused was selling crack cocaine and heroin out of a specific address. The tip included the accused's phone number. The court found the tip to be: compelling because it was "sufficiently specific to warrant [the officer's] attention and did not take the form of bald conclusory statements or 'mere rumour or gossip', it related to a serious offence, and was very recent; credible because the source had been known for a year, had provided information which had led to previous arrests, and had never provided unreliable information; and corroborated by a subsequent police investigation: paras. 5-7.
- [199] In *R. v. Plant*, [1993] 3 S.C.R. 281, the court applied the compelling/credible/corroboration factors. There, the police received an anonymous Crime Stoppers tip that marijuana was being grown in the basement of a "cute house' beside a house with a lot of windows on 26th Street between two consecutive cross avenues in Calgary" (at 285). Police attended to the area, determined the address and applied for Hydro consumption records (which were found to be several times the consumption of similar sized houses). The tip, though anonymous, was found to be sufficiently reliable to form part of the reasonable grounds for the ITO because it was compelling (identifying the location of the operation in a fairly specific geographic region, but without specifying an exact street address), corroborated (by police reconnaissance) and credible because it was corroborated.
- [200] The defence has referred to me *R. v. Fagerlund*, 2011 BCPC 154 at paras. 31-39; *Rocha* at paras. 19-20, 33-34; *R. v. Lewis*, [1998] O.J. No. 376 at paras. 15-19 (C.A.); and *R. v. Wing*, [2009] Y.J. No. 190 at paras. 25-28 (Terr. Ct.); and *R. v. Liu*, 2011 BCSC 1266 (Liu 2011). *Fagerlund* and *Lewis* are particular helpful at para. 39 in stating that the confidential information must be assessed in the context of the entirety of the information available.
- [201] In particular, in *Liu* 2011, Romilly J. found the quality of the informant's information to be lacking in many respects. The court held:
- [75] In summary, the information received from Informants "A" and "B" does not reveal a sufficient degree of detail and specificity, nor does it reveal their source knowledge. While I acknowledge that these police informants are "proven reliable sources whose information has been previously corroborated," and that their statements are described as "consistent with one another in stating that [the Applicant] deals cocaine and heroin" from his residence as expressed in the ITO, I am not satisfied that this information justified a search of the Applicant's residence according to the threshold test for informants as articulated in *Garofoli*.
- [202] Here, Mr. Rabbitt contends that there is not a single fact purporting to ground any of the informant's identification of Mr. Rabbitt and that much of the information has the "obvious ring of rumour or gossip" to it.

Is the information compelling?

- [203] Three of the informants (B, D and C) supplied information that both Mr. Rabbitt and Mr. Stephenson were engaged in the sale of cocaine in the Dawson Creek area. Further, Informants B, C, D, and E named "Pat Rabbitt" as an individual who sold large quantities of cocaine in Dawson Creek. Informants B and D described him as the "main supplier of cocaine in Dawson Creek".
- [204] The defence argues that Informant B's information is deficient in that he does not identify his source of knowledge of Mr. Rabbitt's criminal activities or how he knows "Pat Rabbitt". Yet, Informant B states specifically that s/he has purchased directly from Mr. Rabbitt and that Informant B has been inside Mr. Rabbitt's residence where a large quantity of cocaine was seen. Informant B was able to describe the layout of the residence in some detail.
- [205] The defence argues that Informant C is silent as to the source of his or her knowledge, particularly as to large quantities of cocaine at the residence within the last week. I agree with the submissions that it is unclear whether this tipster is reporting personal observations, hearsay, or mere rumour or gossip. Yet, this information is consistent with that of Informant B, who did make personal observations of large quantities of cocaine inside the residence on June 23, 2010. The information from both is therefore in the same time frame as Informant C's information was received later on July 12, 2010.
- [206] The defence argues that Informant D's information is deficient in that he does not identify his source of knowledge so as to make clear whether this is hearsay or firsthand knowledge. This person states that he purchases cocaine through a mid-level dealer and I agree that it is not clear whether the source of his knowledge is firsthand or not. This person does not identify the individuals who are mid-level dealers whom Mr. Rabbitt supplies nor who is this person's dealer.
- [207] The defence argues that Informant E's information is deficient in that s/he does not identify his/her source of knowledge with respect to Mr. Rabbitt's criminal activities. Yet, Informant E states specifically that s/he has purchased cocaine at Mr. Rabbitt and Mr. Stephenson's house within the last month although that information was received on January 23, 2010 so it would have been somewhat dated by July. In addition, I agree that this information is somewhat deficient in that it is not stated who actually supplied the cocaine for the purchase. The later information received on July 14, 2010 is also somewhat deficient in that the source of knowledge about the selling of cocaine from the residence is not set out.
- [208] However, what overlays all of the above information is significant information from the Informants about the residence being the place where this trafficking was occurring. Mr. Rabbitt argues, unsuccessfully in my view, that neither the ITO nor the amplified record suggests that the tipsters identified 1749 92nd Avenue as his residential address.
- [209] As stated above, Informant B was able to describe the layout of the residence in some detail. Informant B indicated that Mr. Rabbitt lived across the street from the school on 17th Street in Dawson Creek. This was not true as the residence is not located across the street from a school on that street. Informant C provided information that Mr. Rabbitt's

residence was a "white and blue house off of 17th Street to the left near an elementary school". What emerges is consistency between these two tips, as it relates to the location of the residence, in the references to the residence being close to 17th Street and to a school. The evidence on the voir dire establishes that the residence is a blue colour and is located within two blocks of 17th Street and that an elementary school is located on the east side of 17th Street, just south of 92nd Avenue and close to the residence.

- [210] The police were well aware of Mr. Rabbitt's residential address as they had attended there previously on numerous occasions. I agree with the Crown that police are able to make common sense deductions regarding information received from informants, and consider that information within the context of their own knowledge of a suspect. Reference to a particular residential address is not required for the information to be compelling: see Plant discussed above.
- [211] To an extent, the evidence of each tipster stands to be considered on its own and I agree with the defence that each has its limitations. Some are more compelling than others, although arguably Informant B stands above the others in terms of his/her observations of the cocaine at the residence, the actual purchase of cocaine from Mr. Rabbitt and the degree of detail in that information. I conclude that Informants C, D and E are less compelling, given the lack of detail of the source of their knowledge.
- [212] In my view, this information has to be looked at in its totality. In that sense, this constellation of informant information, while recognizing the deficiencies of some of the information, is such that there was compelling evidence that Mr. Rabbitt was trafficking in cocaine and that this activity was taking place at the residence. I would also note that the information supplied by Informants B, C and D all took place between the period from June 23 to July 14, 2010. A portion of Informant E's information was also supplied during that period while another portion was supplied in January 2010.

Is the information corroborated?

- [213] I agree with the Crown that there is a large degree of consistency between the information from the various Informants by which it can be said that the information supplied by Informants B-E is internally corroborated.
- [214] Each provided information regarding the alleged sale of large amounts of cocaine: on June 23, Informant B advised that Mr. Rabbitt supplies large quantities of cocaine and that he is the main supplier of cocaine in Dawson Creek; on July 12, Informant C stated that Mr. Rabbitt and Mr. Stephenson frequently keep a lot of cocaine at their house; on July 2, Informant D described Mr. Rabbitt as being the main supplier of cocaine to Dawson Creek; and on January 23, Informant E indicated that Mr. Rabbitt sells large quantities of cocaine and later on July 14, that Mr. Rabbitt is "still selling cocaine from his house".
- [215] Both Informants B and D provided the name "Finch" as a lower level drug trafficker who worked for Mr. Rabbitt.

- [216] Each of Informants B, C and E supplied information that linked the residence to the location of large amounts of cocaine: Informant B advised that s/he had observed a large quantity of cocaine at the residence; Informant C indicated that Mr. Rabbitt and Mr. Stephenson frequently keep a lot of cocaine at their house; and Informant E had purchased cocaine from the Rabbitt residence within the past month before January 23, 2010.
- [217] Further corroboration came in the form of the vehicle stop of Mr. May and Mr. Henderson and the seizure of approximately one ounce of cocaine from Mr. Henderson, all of which was specifically addressed in the ITO. The Crown contends that this was particularly significant taking into account the information from Informant E on July 14 that Mr. Henderson buys cocaine from Mr. Rabbitt. That information was received the morning of July 14 by Cst. L'Heureux and was disclosed in the ITO. What was not in the ITO was the further information from Informant E, received by Cst. L'Heureux that day, that s/he believed that Mr. Henderson would be picking up cocaine from Mr. Rabbitt. This was not addressed by Cst. Verbruggen as part of her amplification of the evidence on review and again, I conclude that the omission arose from inadvertence and not as a deliberate attempt to mislead the JJP. If anything, it would have further supported the application for the warrant.
- [218] I agree that the vehicle stop does, however, remain as corroboration of the information from the Informants. Simply, the JJP was able to draw an inference from the seizure of the cocaine from Mr. Henderson that it came about as a result of Mr. Henderson's attendance at the residence only a short while before, in the context of the other information outlined in the ITO, including that Mr. Rabbitt had substantial quantities of cocaine in the residence.
- [219] Further corroboration that Mr. Rabbitt and Mr. Stephenson lived together at the residence is found in the police surveillance conducted on July 2 and July 14, all of which is recounted in the ITO. I disagree with the defence that this was devoid of evidentiary value but agree that the surveillance itself did not establish any overt drug trafficking. The Crown does not contend otherwise.

Is the information credible?

- [220] This is undoubtedly the issue that raises the most concerns here.
- [221] I agree with the Crown that some degree of credibility is established by way of the corroboration of information as amongst Informants and corroboration with the police investigation, despite the fact that the degree of detail of much of the information provided by the Informants was limited. As I noted above, Informant B advised that s/he had purchased cocaine from Mr. Rabbitt and that large amounts of cocaine were seen at his residence. Informant E indicated that s/he had purchased cocaine at Mr. Rabbitt and Mr. Stephenson's residence. Therefore, both of them had a direct and personal interaction with Mr. Rabbitt - or with respect to Informant E, perhaps it was someone else at Mr. Rabbitt's house who sold the cocaine to Informant E.

- [222] The source of information of Informants A and C is less clear. Considering the nature of information provided by individuals like these Informants, who associate with users and traffickers of cocaine, it is unsurprising that they may be reticent to provide a great deal of detail. Despite the best efforts of police, especially in a smaller community, even the slightest detail in a tip could identify the Informant.
- [223] The Crown candidly admits that, particularly in smaller communities, setting out the source of an informant's means of knowledge may, by its very nature, tend to identify the source. The Crown also submits that the means of knowledge of a confidential source should rarely be viewed as the most important indicia of reliability, because it can never be set fully set out in an ITO in sufficient detail so as to be analyzed on its merits.
- [224] This submission has some merit but must be viewed in the context of balancing the interests of law enforcement as against the right to make full answer and defence: Garofoli at 1460. Depending on the circumstances and the need to rely on such sources, it may be the case that the Crown must choose between revealing its informant or abandoning the application for the warrant, in which case it would likely choose the former if the identity could not be protected in some manner. It remains the case that if the Crown wishes to rely on such informants, the information contained in the ITO must satisfy the Garofoli and Debot requirements.
- [225] Where there are shortcomings in either the detail of the information or disclosure of the source, the Court may look at other indicia which supports that the information is credible. In Debot SCC, Wilson J. stated at 1170-72:

The informant whose credibility is most critical, of course, is the one who provided the details of the anticipated transaction. At trial, Constable Gutteridge testified that this source was not paid for his information and had no outstanding charges or investigation pending against him. The officer stated that he had received information in the past from this source about the activities of traffickers in general in Wallaceburg which the police had corroborated through surveillance. Information from this source had once led to a search warrant's being executed on an apartment at which a quantity of speed (less than anticipated) and marijuana were located along with scales and debt lists. Moreover, Constable Gutteridge testified that he had seen the informant and Carpenter together on at least three or four occasions which lends some support to the informant's claim that he received the information about the anticipated transaction directly from Carpenter. These pieces of evidence tend to validate the decision to treat the informant as credible. Different considerations would, of course, apply in situations where the police rely on an anonymous tip or on an untried informant. In such circumstances the quality of the information and corroborative evidence may have to be such as to compensate for the inability to assess the credibility of the source.

In my opinion, it should not be necessary for the police to confirm each detail in an informant's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. As I noted earlier, however, the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater.

- [226] In this case, the evidence was that Informants A, B, C, D and E associate with users and/or traffickers of both cocaine and/or marijuana. The defence argues that this undermines the reliability of such information but it is hard to understand where such information would be obtained save from such people.
- [227] Information from Informant A, which identified "Wes" as a supplier of cocaine, had in the past resulted in successful executions of warrants and the information proved accurate. This was the person who had the longest relationship with the police officers, having known Cpl. Rutledge for over three years. Information from Informants B and C had never been acted upon but information from Informant C received in the past had proved to be accurate. Information from Informant D in the past had resulted in successful executions of warrants and the information proved accurate. Information from Informant E had led to two arrests and the seizure of cocaine and cash.
- [228] Financial gain was also indicated to be a motivation for all of the Informants but only A and D had been paid in the past for information. With respect to Informants B and E, who had direct cocaine purchases from Mr. Rabbit or at his residence, this information was given voluntarily.
- [229] Mr. Rabbitt also argues that concerns are raised as to the motivation of Informant D, as s/he is an admitted trafficker in cocaine. It is suggested that Informant D might be compelled to provide false information, in the form of rumour or gossip, designed to harm a rival in the "tiny Dawson Creek community". However, I accept the response of the Crown in that this in fact would suggest some reliability of the information. Wouldn't a drug trafficker only wish to harm a "true" rival, i.e. one who similarly traffics drugs in the same area? Why would such a person wish to falsely accuse an innocent person unrelated to the drug trade?
- [230] Finally, there is the matter of the criminal records of the Informants. Informants A, B and D all had criminal records in Canada. I agree that some level of criticism could be leveled at the police for the non-disclosure of these records. However, the reference to the types of convictions where credibility would be more centrally addressed (such as fraud, perjury, obstruction, etc.) is addressed in the ITO. In my view, the JJP was entitled to consider this evidence in support of a determination as to the reliability of the information.

(vi) Full, Fair and Frank Disclosure

- [231] Mr. Rabbitt contends that there were numerous failures on the part of the police, including the omission of material facts and the inclusion of improper evidence, in the drafting of the ITO.
- [232] Firstly, the defence argues that there is no mention in the ITO that when interviewed after his arrest, Mr. Henderson denied that the cocaine had come from the residence. However, Cst. Verbruggen stated that she was not aware of that fact. This would have been a material fact that should have been put before the JJP in the ITO. It related to the strength of the inference to be drawn about the seizure of the cocaine on Mr. Henderson after his brief stop at the residence, particularly as it might be seen as corroborating the information provided by Informants C and E only two days before and on that very day. Despite the forceful submissions of the defence, I am not convinced that this omission was anything other than inadvertent. Nor was there any intention to mislead the JJP.
- [233] However, even if such information had been before the JJP, it would have still clearly been open to the JJP to draw the inference that Mr. Henderson had obtained the cocaine from the residence. As the Crown points out, this was simply a denial by Mr. Henderson that he had obtained the cocaine from the residence. He did not provide any alternate explanation as to where he obtained the cocaine, such as in *R. v. Watt*, [1987] B.C.J. No. 2740 (Co. Ct.), where the accused told the police he had acquired drugs at a different address.
- [234] Secondly, the defence criticizes the manner in which the surveillance information was set out. Cst. Verbruggen sets out her surveillance at the residence over a two hour period. She recounts the coming and goings at the residence; it is true that no overt evidence of drug trafficking is evident. The same can be said for the surveillance by Cst. L'Heureux on July 14. The defence contends that this information was misleading because it was an attempt to portray the short visits observed as evidence of drug trafficking to drug purchasers. I do not accept this submission. There is no suggestion that the facts outlined in the ITO regarding their observations were untrue. The JJP was entitled to place whatever weight he or she chose upon that evidence in assessing whether the grounds had been established for the warrant. Indeed, I suspect that if the details of the surveillance had not been included, the defence would definitely have argued, perhaps with some justification, that there was a lack of full, fair or frank disclosure.
- [235] Thirdly, the defence states that the results of the warrantless entry should have been noted. In fact, it was detailed in the ITO that marijuana was observed in a wood box in the kitchen. The point made by the defence is that no cocaine, weapons or drug paraphernalia was found and reported to the JJP. This is a curious argument in that the police did not, as the defence suggests "search" the residence at that time. Accordingly, no such report was even appropriate nor indeed were any actions taken to search so as to create that report. That no cocaine was observed is evident from the ITO and was a fact that could have been considered by the JJP.

- [236] Fourthly, Mr. Rabbit argues that the inclusion of his youth convictions in the ITO was inappropriate and misleading. While youth convictions do not form part of an individual's permanent criminal record, the Crown concedes that these were improperly included and should be excised from the ITO.
- [237] Fifthly, Mr. Rabbitt argues that the ITO improperly references that Mr. Rabbitt was currently charged with possession for the purpose of trafficking in August 2009. A similar issue arose in *R. v. Nguyen* (26 July 2010), New Westminster X072814 (B.C.S.C.) and the reference to outstanding charges was found to have been improperly included as prejudicial as no reasonable inference could have been made from that information: paras. 16-21. This was improperly included in the ITO.
- [238] Finally, Mr. Rabbitt argues that the inclusion of his adult criminal record relating to "unrelated" charges was improper. In *Criminal Code (Re)*, [1997] O.J. No. 4393 (C.J. Gen. Div.), Hill J. stated at para. 22 that "[c]ertainly a prior criminal record, where relevant, can assist as a factor contributing to the existence of reasonable grounds". See also *R. v. MacDonald*, [2005] O.J. No. 551 (S.C.J.) at para. 54. These authorities are persuasive, but in this case, I am not convinced that the reference to the other charges (break and enter, possession of property obtained by crime, assault, theft, mischief and failures to comply) are entirely unrelated to the current charges. It is well known that drug activities can and often do involve such crimes.
- [239] In summary, I have found that Mr. Rabbitt's youth record and his outstanding charge was improperly referenced in the ITO and that the ITO should have referenced that Mr. Henderson denied that the cocaine found on him came from the residence.
- [240] Evidence of fraud, material non-disclosure, misleading information in the ITO or new evidence, while relevant, does not automatically lead the warrant to be deemed invalid. The Garofoli test dictates that the proper approach is to examine what remains in the ITO, as amplified upon review, to determine whether there continues to be a sufficient basis upon which the warrant could have been issued: 1452. See also *R. v. Bisson*, [1994] 3 S.C.R. 1097 at 1098.
- [241] An intentional misleading of the JJP has proven in the past to be sufficient to set aside a search warrant. In *R. v. Sismey* (1990), 55 C.C.C. (3d) 281 (B.C.C.A.), the court set aside a warrant on the basis that allowing it to stand in the face of an intention to mislead could lead to the corruption of the judicial process. Similarly, in *R. v. Maton*, 2005 BCSC 330, Romilly J. declined to uphold a warrant where the ITO was phrased in such a way (called "strategic omissions") so as to paint a highly prejudicial picture of the accused. The lack of candour was found to be subversive of the authorization process: paras. 50-51.
- [242] In addition, omissions must be considered even if there is no intention to mislead. The question is whether the JJP was misled: *R. v. Morelli*, 2010 SCC 8 at paras. 58-60.

- [243] In R. v. Bacon, 2010 BCCA 135, leave to appeal ref'd [2010] S.C.C.A. No. 213, the court noted that the approach of the court in Sismey has been overtaken by the Garofoli test where process is an issue. The court rejecting the reasoning and findings of the trial judge (who relied on Maton):
- [26] What the judge was obliged to do was strip away the objectionable features and examine the sufficiency of what remained. He did not engage in this exercise and thereby committed reversible error.
- [27] There may be, as the respondents propose, a residual discretion to strike down a warrant for abuse of process. If, in this case, the affiant in the Information to Obtain made some mistakes (I do not agree with all the judge's criticisms), they are a long way from an abuse of process.

(vi) Validity of the Warrant

- [244] I have found improper inclusions in the ITO, such as Mr. Rabbitt's youth record and the outstanding charge. Those should be excised.
- [245] With respect to the omission of Mr. Henderson's denial, as I have stated above, I consider that it was inadvertent and there was no intention to mislead the JJP on this point. I reject the defence's contention that this was a strategic omission designed to mislead the JJP. Nor do I consider that it would have misled the JJP in that it simply would have affected the strength of the inference to be drawn from the discovery of cocaine on Mr. Henderson. I conclude that even with the inclusion of this information, it would still have been open to the JJP to draw that inference in support of the issuance of the warrant.
- [246] Overall I find that the defence's contentions - that the police officers here, in particular, Cst. Verbruggen, acted in a subversive manner in preparing the ITO - to be entirely unsubstantiated. In fact, I considered that Cst. Verbruggen displayed diligence in her task in drafting the ITO. Nor did any "cutting or pasting" or the use of boilerplate language affect the reliability of the ITO.
- [247] The crux of this issue, as agreed by both the Crown and defence, is whether the inclusion of the informant information meets the Debot and Garofoli test.
- [248] Looking at the totality of the information from the Informants and also the other information in the ITO, I consider that there was sufficient compelling and credible information which was corroborated by the investigations of the police and the traffic stop of Mr. Henderson to establish a reliable basis for the issuance of the warrant. Again, I appreciate that some of the Informant's details were limited and that the sources of the information were not always disclosed. Despite these failings, I am of the view that the constellation of the information from all these Informants was sufficient to substantiate a credibility based probability that Mr. Rabbitt was trafficking in cocaine and that cocaine would likely be found at his residence.

- [249] I would emphasize that there was substantial consistency between the information from the various Informants: in January 2010, Informant E said that Mr. Rabbitt and Mr. Stephenson keep cocaine at their house and that s/he had purchased cocaine at their residence within the past month; on July 14, the very day in issue, Informant E said that Mr. Rabbitt is selling cocaine from his house; on July 12, just two days before, Informant C said that there was a large quantity of cocaine at Mr. Rabbitt and Mr. Stephenson's residence within the past week; finally, just three weeks before, on June 23, Informant B said s/he observed a large quantity of cocaine at Mr. Rabbitt and Mr. Stephenson's residence.
- [250] Looking at the evidence before the JJP, as amplified on review, and after disregarding the items above, in my view, there remains sufficient evidence upon which the JJP could have concluded that there were reasonable grounds to believe that cocaine was located within the residence.
- [251] In summary, after considering the totality of the circumstances - including the information provided by the five Informants; police knowledge of the location of Mr. Rabbitt's residence; police surveillance at the residence; the arrest of Mr. Henderson soon after his attendance at the residence and the seizure of cocaine from him; and the sighting of a box with marijuana in it inside the residence - I have concluded that these factors all support that there is a reasonable basis upon which the warrant could have been issued. While some portions of the ITO have been excised, and other information such as Mr. Henderson's denial should have been included, they do not undermine what remains.

(vii) The Outbuildings

- [252] I will briefly address another issue that arose during the course of the second voir dire. In the execution of the warrant, the police searched the outbuildings on the property. It is conceded by the Crown that there was no underlying evidence before the JJP to support that any evidence of criminal activity might be found there. Accordingly, there was no basis for a search of the outbuildings on the property and it constituted a breach of Mr. Rabbitt's s. 8 Charter rights. Nevertheless, unlike the striking of "vehicles" from the warrant as sought by the police, the JJP did not similarly strike "outbuildings" from the warrant.
- [253] In applying the Grant factors, I have no hesitation in finding that the admission of the evidence would not bring the administration of justice into disrepute by reason of this breach: the breach was not serious in the sense that the police were acting in good faith on the basis of a warrant they considered was validly issued (see Caron at para. 42); the police did not mislead the JJP concerning what was or was not taking place in the outbuildings; although the breach of privacy of a private residence is normally serious, no evidence was obtained as a result of this search; and finally, the public has a legitimate interest in the prosecution of this serious offence, as noted above. Nor do I find that this provides any support for the defence's argument that this is part of a pattern of disregard for Charter rights.

Conclusion

[254] In conclusion, I find that the warrantless entry of Mr. Rabbit's residence based on exigent circumstances has been proven by the Crown as justified in this case. I also find that no issues arise with the manner of the entry.

[255] Breaches of the Charter, s. 8 (the outbuildings), s. 9 (the detention) and s. 10(a) (the initial Charter warning) have been proven by the defence. However, after an analysis of the factors under the Charter, s. 24(2), I find that the exclusion of the evidence is not thereby justified.

[256] Finally, I have upheld the issuance of the warrant based on the ITO, as amplified and excised on review.

"Fitzpatrick J."

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