
CANADA / JUDGMENT

R. v. Sekhon

2020 BCSC 2180

COURT

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2020 BCSC 2180 R. v. Sekhon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sekhon,

2020 BCSC 2180

Date: 20201022

Docket: 69059-2

Registry: Chilliwack

Regina

v.

Sukhdev Singh Sekhon

Before: The Honourable Madam Justice Sharma

Oral Ruling on Voir Dire

Counsel for the Crown:

S.J.K. Gill

Counsel for the Accused:

A. Sidhu

Place and Date of Trial/Hearing:

Chilliwack, B.C.

September 21-25, 30, 2020

October 19 & 20, 2020

Place and Date of Judgment:

Chilliwack, B.C.

October 22, 2020

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- [1] This is the written version of an oral ruling I delivered on October 22, 2020. In addition to minor editing done for grammar and style, I have made edits to comply with a publication ban imposed on a case I referred to in my ruling (at paras. 112-114). I confirm there are no substantive changes in this version from what I read out.

I. INTRODUCTION

- [2] This ruling addresses a number of Charter challenges brought by the accused, Mr. Sekhon. He is charged with three counts under the Controlled Drugs and Substances Act, S.C. 1996, c. 19, arising out of his activities in Abbotsford on September 7, 2018. Specifically, he is charged with unlawful possession of the following controlled substances for the purpose of trafficking in violation of s. 5(2) of that statute: heroin, fentanyl, cocaine, and methamphetamine.
- [3] He filed an application dated September 10, 2020 alleging breaches of his rights as guaranteed by ss. 8, 9, and 10(b) of the Charter. The parties agreed the evidence relating to all allegations would be heard together as one voir dire.

A. The Witnesses

- [4] The following witnesses testified at the voir dire:
- a) Constable Burrridge, who has been with the Vancouver Police Department since 2000. He has been seconded to the RCMP as a tactical flight officer for the past six years, and liaises with a number of police departments providing air support and surveillance from the police helicopter called Air One. The helicopter has equipment that records video and audio, including the capacity to use and record thermal imaging. The audio records everything said in the helicopter, so it picks up radio chatter amongst the officers. However, the audio recording can be switched off for investigative or other reasons. Cst. Burrridge introduced into evidence surveillance video from Air One from September 7, 2018. He answered questions and provided clarification about the video. The video ran for about an hour.
 - b) Sergeant Kneebone, who is with the Abbotsford Police Department ("APD"), also testified. He was the jail sergeant on the day in question. The jail sergeant is the officer in charge of booking prisoners and authorizing strip searches at the police station. His regular duty is a supervisor of the patrol section.
 - c) Cst. Mark Frendo has been a member of the APD for 14 years and has been a member of the Gang Crime Unit ("GCU") since 2017. He conducted ground surveillance and undercover on September 7, 2018. He was also the exhibits officer for the investigation. He conducted a search of the accused's vehicle.
 - d) Cst. John Janela has been with the APD for 17 years. He was seconded to the GCU on the day of the accused's arrest and was part of the surveillance team.

- e) Cst. Paul Walker has been with the APD for almost 10 years. He is a former member of the GCU, but at the time, he was part of the patrol unit. He was in uniform in a marked vehicle. He detained the van, arrested the driver, and transported him to the station. While there, he acted as the second or the cover for another officer who conducted a strip search of Mr. Sekhon.
- f) Sgt. Maitland Smith has been with the APD for 27 years. He is the supervisor of the GCU. He, too, was in uniform and in a marked police vehicle on that day. Therefore, he was not directly involved in surveillance in terms of making observations himself. However, he was in radio contact in his supervisory capacity. He arrested the accused and took him to the detachment. He also conducted the strip search.
- g) Cst. Sukhvir Dhaliwal of the APD was the lead investigator who made the decision to arrest the accused. He has been an officer since 2011 and a member of the GCU since April 2018. He also assisted Sgt. Smith in the arrest at the scene.

B. Factual Background

- [5] Members of the APD's GCU were involved in a drug investigation on September 7, 2018. Cst. Dhaliwal was located in a parking lot near 2777 Gladwin Road (the "Gladwin Location"), which is located at the intersection of Gladwin Road and South Fraser Way in Abbotsford. He was looking for a suspect unrelated to this matter.
- [6] While parked at the Gladwin Location, Cst. Dhaliwal saw a vehicle, which he knew was associated with a known drug user, park in the parking lot. He saw the driver get out and walk towards a methadone clinic, which he was aware was nearby.
- [7] About three or four minutes later, he saw a grey Chevrolet van come from the direction of the methadone clinic, circle around the parking lot, and stop near the known drug user's vehicle. He saw a person get out of the van, get into the known drug user's vehicle, and drive over to the far end of the lot, away from pedestrian and vehicle traffic. He believed that the person purchased drugs from the van, was dropped off at his vehicle, and drove to a secluded area in order to consume those drugs.
- [8] He did not see the licence plate of the van. However, knowing other APD officers were in the vicinity, he broadcast where he saw the van leave and the direction in which he believed it was going, asking if someone could retrieve the licence plate.
- [9] Cst. Janela happened to be nearby and heard that request. He saw the van he believed that Cst. Dhaliwal identified, and broadcast the licence plate. Cst. Dhaliwal did a search and recognized the registered owner's name as someone he believed was associated with the drug trade. The van was registered to Mr. Sekhon.

- [10] A decision was made to conduct surveillance on that van. By this point, the team involved in the same investigation as Cst. Dhaliwal was able to engage Air One, which was in the area. Other officers were also involved in following the van. Eventually the van ended up in a parking lot near Ellwood Park in Abbotsford where it remained for about an hour.
- [11] Cst. Frendo was able to get to the same vicinity at about the same time as the van. He was in his car and at times on foot. He made observations, some of which were broadcast and recorded by the Air One video. In addition, Air One circled above and made observations broadcast over the radio.
- [12] After a period of time during which there were a number of interactions with other vehicles, as described below, the van left the parking lot. Cst. Dhaliwal directed Cst. Walker to detain the van and arrest the occupants. Cst. Walker engaged police lights and the vehicle stopped without incident. He arrested the driver.
- [13] Sgt. Smith arrived at the scene very shortly thereafter and arrested Mr. Sekhon. Cst. Dhaliwal arrived shortly after that, assisted Sgt. Smith, and took custody of Mr. Sekhon's phone, which Sgt. Smith had seized. Cst. Frendo arrived, took control of the van, did a cursory search of it, and made arrangements for the van to be transported to the APD. Cst. Walker transported the driver, and within a minute or so of his arrival at the detachment, Sgt. Smith arrived with Mr. Sekhon. Events after that are described in more detail below.

II. REASONABLE GROUNDS FOR ARREST

- [14] Mr. Sekhon alleges that Cst. Dhaliwal did not have reasonable and probable grounds to arrest him and therefore his s. 9 rights were violated. Section 9 of the Charter protects everyone from arbitrary detention or imprisonment. Section 495(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, authorizes police officers to arrest a person without warrant when that officer has reasonable grounds to believe that the person has committed an indictable offence.

A. Legal Framework

- [15] The test for determining whether an officer had reasonable and probable grounds to arrest the accused without a warrant is set out in the leading case of *R. v. Storrey* [1990], 1 S.C.R. 241 at 250:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

- [16] The test is twofold: first, I must be satisfied that Cst. Dhaliwal subjectively believed he had reasonable grounds on which to base the arrest of Mr. Sekhon and second, I must be satisfied that those grounds were objectively justifiable.
- [17] With regard to the subjective element, there has been little judicial commentary.
- [18] In *R. v. Juan*, 2007 BCCA 351, the trial judge concluded that reasonable and probable grounds did not exist. The Court of Appeal overturned that conclusion. In doing so, it noted that regardless of the area of the law or legal test being considered, "the judicial consensus is that 'The subjective element is the party's own belief'": *Juan* at para. 16, quoting from *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 FCA 378 at para. 22. The court went on to quote from *R. v. Grotheim*, 2001 SKCA 116 at para. 30, where the Saskatchewan Court of Appeal (in commenting on *Storrey*), stated that "reasonable and probable grounds requires that police officers personally believe they have reasonable and probable grounds for an arrest".
- [19] As noted by Justice Sopinka in *R. v. Feeney*, [1997] 2 S.C.R. 13 at para. 34, "the lack of subjective belief on the part of the officer ought to suggest, the requirement that, objectively speaking, reasonable and probable grounds for an arrest exist is not met".
- [20] The second step requires the court to determine if the arresting officer's subjective belief that reasonable and probable grounds exist is objectively reasonable. A number of principles discussing the objective step of the test are discussed in *R. v. Emery*, 2019 BCSC 702 at paras. 81-82, some of which are set out below, as are principles from other cases:
- a) To assess whether objective grounds exist, the trial judge first looks to observations of the officer through the "lens of someone who has the same experience, training, knowledge and skills as the officer who is making the observations, and then [decides] if a reasonable person with the same lens would come to the same conclusion as the police officer": *R. v. Luong*, 2010 BCCA 158 at 24.
 - b) Reasonable grounds and "reasonable and probable grounds" (the term used in earlier versions of s. 495(1)) are functionally equivalent terms: *R. v. Glendinning*, 2019 BCCA 365 at 2.
 - c) The standard is one of: "reasonable probability", and not proof beyond a reasonable doubt, or proof of a *prima facie* case: *R. v. MacCannell*, 2014 BCCA 254 at para. 45 (referring to *R. v. Jir*, 2010 BCCA 497 at para. 27, which quoted *Wilson J.* from *R. v. Debot*, [1989] 2 SCR 13).
 - d) The standard requires "something more than mere suspicion, but less than the standard applicable in civil matters on proof on the balance of probabilities. In essence reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (para 4 of *Glendinning*, quoting from *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 141

- e) Frankel J.A. in Jir quoted of Justice Hill in R. v. Sanchez, (1994) 93 C.C.C. (3d) 357 (Ont. Ct. (G.D.) at page 367: "The appropriate standard of "reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of facts and inferences".
- f) Also, "objectively reasonable" was explained in R. v. Boyd, 2013 BCCA 19 at para. 6 as "sensible reason for believing an offence was being committed by person arrested".
- g) The court must find that it was objectively reasonable to believe an offence was being committed but not that it was probable or certain: R. v. Loewen, 2010 ABCA 255 at para. 32; aff'd 2011 SCC 21 (cited in Glendinning at 3).
- h) An officer not required to rule out innocent explanations for behaviour observed: MacCannell, 2014 BCCA 254 at 46.
- i) The focus is not on what the officer did not see. For example, the fact that an officer did not see the actual hand-to-hand exchange of drugs does not negate the other legitimate inferences an officer may make based on what he or she did see. To this end, a balance must be struck for police in that they "must not take a cynical or highly suspicious approach to what they see, neither should they be naïve or overly cautious in enforcing the laws of the land": Glendinning at para. 36.
- j) The objective requirement is "highly fact sensitive": R. v. Acosta, 2014 BCCA 218 at para. 13.

B. Subjective Belief

1. Alleged Inconsistencies in the Officers' Testimony

- [21] Cases do not often turn on questioning the arresting officer's subjective belief. However, as I understood Mr. Sekhon's argument, he submits it is open to the court in this case to make that finding.
- [22] The defence submits that because the first step is subjective, the court is bound to the quality and content of Cst. Dhaliwal's evidence. Specifically, he argues it would be improper to speculate whether some, but not all, of the grounds identified by Cst. Dhaliwal were sufficient. What matters is what Cst. Dhaliwal believed at the time of the arrest and not what he might believe in hindsight. It is on this very point that the accused's arrest is challenged, because he submits that on a review of Cst. Dhaliwal's evidence and testimony at court, I could find that he embellished his stated subjective grounds for arrest at trial.
- [23] I start by noting that Cst. Dhaliwal testified that he did formulate the grounds for arrest and that he did so on his own, without influence or advice from others.
- [24] Both Sgt. Smith and Cst. Frendo testified that they, too, held the view at the time that there were reasonable and probable grounds to arrest Mr. Sekhon, but they confirmed Cst. Dhaliwal's evidence that a decision about whether those grounds existed and so to make the arrest was in fact Cst. Dhaliwal's alone and that he did make it alone.

- [25] I found Cst. Dhaliwal to be a sincere witness who did his best to be forthright with the court. However, I do have some concerns with the reliability of portions of his testimony. Therefore, it is important to scrutinize his testimony that he subjectively believed he had reasonable and probable grounds for arresting the occupants of the van when he directed Officer Walker to do so. I stress at this point the difference between credibility and reliability. Both are necessary for me to accept as true a witness's testimony. I emphasize, however, that I am not impugning the character or integrity of Cst. Dhaliwal. The reality is that--despite one's best efforts--human memory can be flawed, which impairs the reliability and weight that I can place on that witness's testimony.
- [26] Counsel suggests that viewing Cst. Dhaliwal's evidence as a whole demonstrates that even while he was on the stand, he was still trying to articulate what his subjective belief was at the time. Defence points to inconsistencies in his evidence in support of that position. Specifically, counsel submits that discrepancies between his evidence at the preliminary inquiry and at trial, as well as internal inconsistencies within his trial testimony, should compel me to find that his statement that he had a subjective belief was unreliable.
- a) Knowledge of Mr. Sekhon's Previous Interaction with Police
- [27] The first discrepancy is between Cst. Dhaliwal's evidence at the preliminary inquiry and at trial with respect to whether his knowledge of a past arrest of Mr. Sekhon formed part of his reasonable and probable grounds.
- [28] Mr. Sekhon and another man were arrested in July 2018 for possession for the purpose of trafficking, but released without charge. Cst. Dhaliwal witnessed that arrest and Cst. Frendo was involved and interviewed Mr. Sekhon at that time.
- [29] At the preliminary inquiry, Cst. Dhaliwal recounted the following as forming the basis for his subjective belief that he had reasonable and probable grounds to arrest: the activity of the van at the Gladwin Location, the interaction of people from three vehicles with the van that took place within an hour at Ellwood Park, and his own knowledge and experience as to the type of behaviour and activity typically associated with trafficking.
- [30] Cst. Dhaliwal denied that his knowledge of Mr. Sekhon's arrest in July formed any part of the reasonable and probable grounds when he was asked about it during cross-examination at the preliminary inquiry. While he acknowledged that the previous interaction assisted him with the identification of Mr. Sekhon, it did not form part of his grounds for arrest.
- [31] However, at trial, both in direct and in cross-examination, Cst. Dhaliwal specifically relied on his prior knowledge of Mr. Sekhon as forming part of his grounds for arrest. This knowledge included not only the July arrest, but also that a vehicle registered to Mr. Sekhon was the subject of a complaint from a member of the public that it may be involved in the drug trade, although it was not followed up on. He was also aware that a vehicle stopped in Ellwood Park involved in drug trafficking was previously owned by Mr. Sekhon.

- [32] When it was pointed out during cross-examination that he did not mention any of these previous allegations of drug activity at the preliminary inquiry, Cst. Dhaliwal noted that his report to Crown counsel does mention that background. However, he did agree that he did not give that evidence at the preliminary inquiry.
- [33] Cst. Dhaliwal was candid when faced with this contradiction, saying he had no idea why that was his response at the time, noting that it must have been a mistake. However, he also agreed that he was questioned carefully about it at the preliminary inquiry and asked more than once and that his answer was not in the nature of something that he blurted out. Defence counsel submits this acknowledgement is not consistent with Cst. Dhaliwal's explanation that it must have been a mistake.
- b) Number of Vehicles at Elwood Park
- [34] The second discrepancy in Cst. Dhaliwal's evidence at the preliminary inquiry and at trial is with regard to the number of vehicle interactions that occurred at Ellwood Park, which formed part of his grounds for the arrest. However, regardless of the exact number of interactions, Cst. Dhaliwal confirmed the nature of those interactions and the fact that there was more than one. Taken together, these formed a pattern which, based on his knowledge and experience, was consistent with drug trafficking. He believed them to be a form of "dial-a-dope" drug transactions.
- [35] The video surveillance confirmed by Cst. Burrridge provided objective evidence of what happened that day; however, that cannot be used to fill in gaps in Cst. Dhaliwal's evidence with respect to his personal belief. While he was running the investigation, he was not in a position to have personal observations of the events at Ellwood Park. He was on the radio and heard everything that would have been broadcast from Air One, as well as anything other officers would have said on the radio which was not broadcast. The Crown agreed that only what Cst. Dhaliwal heard or was told at that time could form part of his grounds for arrest.
- [36] Cst. Frendo was undercover near the park and able to make some observations from his vehicle and for a time when he was on foot. His evidence confirmed the nature of the interactions which were captured by the Air One broadcast.
- [37] Constables Burrridge and Frendo confirmed that their identification of the makes of vehicles on the audio of the helicopter surveillance did change. For instance, what was later referred to as an Audi was first identified as a Chrysler and, on occasions, they simply mentioned the first vehicle or the second vehicle. I do not find those misidentifications to be material. It was established and I accept that during the investigation the team identified three vehicles that interacted with the van in a similar fashion, namely an Audi, a Honda, and a Mazda, in that order.

- [38] Based on the evidence adduced at trial, both on the video and broadcast audio and confirmed by Cst. Burrridge and Cst. Frendo, the three vehicles interacted with the van at Ellwood Park in the same manner. The vehicle would pull into the same parking lot as the van, which was otherwise generally empty. The driver would get out of the vehicle, walk to the van, enter the van from the passenger's side, stay for a time, exit, and then return to their vehicle. The vehicle would then drive away while the van remained.
- [39] There was a fourth interaction which was different. A Toyota drove up by the park and parked on the main road, rather than in the parking lot. The driver from the van walked over and got into the Toyota. The Toyota then drove around for a short distance, returned to the same place, and dropped off the driver of the van, who then exited the vehicle out and returned to the van. It was not disputed that Mr. Sekhon was most likely not the driver of the van.
- [40] Cst. Dhaliwal's testimony at the preliminary inquiry about the vehicle interactions differed both from his testimony at trial and the evidence on the video surveillance played at trial. At the preliminary inquiry, he identified the relevant vehicle interactions at Ellwood Park as involving an Audi, a Honda, and a Toyota. He did not mention a Mazda.
- [41] Cst. Dhaliwal confirmed at trial that he was mistaken at the preliminary inquiry and explained that he mixed up the Mazda and Toyota. Nevertheless, he confirmed in cross-examination at trial that the interaction with the Toyota was different than the interaction with the Mazda, and therefore confirmed it did not form part of his grounds for Mr. Sekhon's arrest.
- [42] The defence says this is problematic, because during the early part of the cross-examination on day five of trial, just before court adjourned, Cst. Dhaliwal agreed that the Toyota interaction was included in his grounds for arrest when counsel put the question to him. However, on the next day of trial, during the continuation of his cross-examination, he was clear that the Toyota interaction was not part of his grounds for arrest. In fact, he did not initially remember his testimony to the contrary that he had given on the previous trial date.
- [43] Combined with his preliminary inquiry testimony, the defence argues this internal discrepancy is in fact significant.

2. Analysis

- [44] The defence submits that the inconsistencies between Cst. Dhaliwal's preliminary inquiry testimony and trial testimony regarding his grounds for arrest is significant and material. He submits it is open to this court to find it was unclear in Cst. Dhaliwal's mind at the time of the arrest what in fact the grounds were, and as such, I could infer he did not subjectively believe he had sufficient grounds for arrest.

- [45] Considering the evidence as a whole, with due regard to the circumstances of the events in question and the context in which they took place, I am satisfied that Cst. Dhaliwal personally believed he had sufficient grounds when he directed Cst. Walker to detain the van.
- [46] I agree with the Crown that it is important to remember that this was a dynamic situation. On the day in question, the members of the GCU were engaged in a different investigation of a different target. Upon seeing suspicious activity and being told the vehicle at the Gladwin Location was registered to Mr. Sekhon, Cst. Dhaliwal made the decision to conduct surveillance of that van. This investigation was not planned; it was initiated on that day and conducted on the fly. It involved the surveillance by a number of officers, including the helicopter, of a moving vehicle. It is important to recognize that presumably there is no test that must be met for a police officer to conduct non-invasive surveillance in a public area. In other words, the decision to conduct the surveillance cannot be challenged.
- [47] It is also significant that, other than the events at the Gladwin Location, Cst. Dhaliwal had only one personal observation at Ellwood Park. He testified that he drove by the park after the van had arrived there, saw the van, and confirmed on the radio that it was the same van he had seen at the Gladwin Location and that he had asked the team to pay attention to.
- [48] Therefore, in terms of what happened that day, Cst. Dhaliwal was relying on the team's observations as broadcast from Air One and communications that may have taken place amongst the team members that was not broadcast. Some, but not all, of Cst. Frendo's observations from his ground surveillance to which he testified at court was broadcast or conveyed to Cst. Dhaliwal. This is also true of Sgt. Smith. Still, their testimony does help me understand what Cst. Dhaliwal would have been told that day in addition to the audio from the Air One that was played in court.
- a) Knowledge of Mr. Sekhon's Previous Interaction with Police
- [49] Taking all of that into account, I find that Cst. Dhaliwal's preliminary inquiry evidence about whether the July arrest or anything else in terms of the history of Mr. Sekhon formed part of his grounds for arrest is probably closer to the truth than his trial testimony on that point. The preliminary inquiry occurred closer in time to the events of the day and it is more likely his actual recall would have been stronger. That testimony also fits better with the other evidence.
- [50] Sgt. Smith testified about how he got involved in the investigation that day. He was working with another unit when he heard Cst. Dhaliwal communicate on the radio that he had located a vehicle at the Gladwin Location which was registered to a person that he knew had been recently arrested for possession for the purpose of trafficking. The decision was made at that point to conduct surveillance of the van.

- [51] This conforms with Cst. Dhaliwal's testimony, namely that his familiarity with Mr. Sekhon was relevant to his decision to surveil the van after his observations at the Gladwin Location. At the preliminary inquiry, I find that he characterized this prior knowledge as only being relevant to his identification of Mr. Sekhon. At that point, it was not suggested that he possessed reasonable and probable grounds for an arrest.
- [52] This conforms with Cst. D. that his familiarity of Mr. Sekhon was relevant to the decision to surveil his van, after he saw activity at Gladwyn Location. But at that point, no one suggested anything close to RAP existed.
- [53] I note that Cst. Dhaliwal was quick to confirm in his trial testimony that he was aware at the time that while Mr. Sekhon was arrested in July, he was not charged, and he added that was because there was insufficient evidence to support the charge. From other evidence given at trial, I infer that no drugs were found on Mr. Sekhon at that July arrest.
- [54] I add also that Cst. Frendo testified that he recognized Mr. Sekhon as a passenger in the van, but he admitted that he stated the wrong name when he broadcast that he recognized the passenger. He mentioned the name of the other person who was arrested with Mr. Sekhon in July. He admitted on the broadcast that he may have said the wrong name, but to my recollection he did not correct that misidentification by mentioning Mr. Sekhon's name on that particular audio.
- [55] Thus, even though Cst. Frendo testified he was sure it was Mr. Sekhon, I am not satisfied that this information was available to Cst. Dhaliwal at the time. What Cst. Dhaliwal knew was that the van under surveillance was registered to Mr. Sekhon and that Cst. Frendo identified the passenger as being involved in a previous arrest for drug trafficking that did not result in charges being laid.
- [56] For these reasons, I am not persuaded that the July arrest was part of Cst. Dhaliwal's subjective belief that he had reasonable grounds to arrest. In other words, I prefer his preliminary inquiry testimony about his subjective belief to his trial testimony.
- b) Number of Vehicles at Ellwood Park
- [57] As to the discrepancy about the number of cars and whether the Toyota interaction was part of his grounds, I do not regard that discrepancy to be anything other than an honest mistake in his testimony.
- [58] On September 7, 2018, Cst. Dhaliwal was only able to hear what was being broadcast. Unlike Constables Frendo and Burrridge, he was not able to see anything. That video was played in court. As Cst. Burrridge confirmed on the stand, the audio quality of the video was poor. Indeed, at times I found it difficult to follow what was being said.
- [59] Cst. Frendo was candid in saying that he only added what he needed to because he was acting undercover. He was aware that Air One essentially had the eyes and that in order to keep the observations available to all, he needed to keep the line open as much as possible.

Events were happening quickly. In addition to listening to the broadcast, Cst. Dhaliwal most likely had separate communications over the radio with other members of the team, although this was not confirmed. As noted earlier, in the video broadcast the specific identification of the makes or models of the vehicle was not consistent.

- [60] I accept Cst. Dhaliwal's fair admission at trial that he obviously mixed up the Toyota and Mazda in his mind when he testified at the preliminary inquiry. He made no excuses for that and he readily owned up to it. He was not defensive or evasive about it. I accept that it was an honest mistake.
- [61] I also do not find that that mistake impairs the significance of his evidence about what he observed as it relates to reasonable and probable grounds. The identification of the make of the vehicle was not an important detail because each time there was only one vehicle interacting with the van. Rather, the critical information was the nature of that interaction, the number of the interactions, and their timing.
- [62] More importantly, Cst. Dhaliwal was consistent in saying that believed the three interactions established a pattern to be consistent with a dial-a-dope operation. Even if he misremembered the vehicle, I do not find that to be a material mistake.
- [63] The defence also pointed out that at the end of day five of cross-examination, Cst. Dhaliwal agreed that the Toyota was included, but he later resiled from that. I am persuaded that it was simply a misstatement. During questioning, he was given a long list of questions by defence counsel that he responded to. It was late in the day and I believe him that when he testified on the next day of trial, he did not recall that he included the Toyota and that he was simply mistaken in his prior statement. He was clear and firm in the rest of his cross-examination that the Toyota did not form part of his grounds for arrest and I accept that.
- [64] Accordingly, I conclude that Cst. Dhaliwal did subjectively believe that he had reasonable grounds for the arrest and that his grounds comprised the events that took place at the Gladwin Location and the three interactions with other vehicles at Ellwood Park, as well as his knowledge, based on his experience, as to what typically constitutes a drug transaction.
- [65] I do not accept that Cst. Dhaliwal relied on his knowledge of Mr. Sekhon's July arrest or other interactions with police in forming his grounds for arrest.
- [66] While there is obviously a concern with his testimony at trial that this knowledge did form part of his grounds for arrest, this concern does not rise to a level where I cannot rely on his subjective belief.

C. Objective Reasonableness

- [67] In assessing the objective reasonableness of Cst. Dhaliwal's grounds for arrest, I must take into account the totality of the circumstances, remembering that "a decision to arrest may have been made quickly based on available information which may be less than exact or complete": *R. v. Harms*, 2020 BCCA 242 at para. 44, citing *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.).
- [68] I must be satisfied that another officer with similar experience, training, knowledge, and skills would conclude, based on the information available to Cst. Dhaliwal, that there was a reasonable probability that Mr. Sekhon had committed an indictable offence. As noted in case law above, the standard is higher than that of a mere suspicion, but lower than the civil standard of a balance of probabilities. The approach is one of common sense and practicality.
- [69] As noted, I must consider Cst. Dhaliwal's experience. Because this was a team effort, the evidence of the more experienced police officers is also relevant, but only insofar as it was conveyed to Cst. Dhaliwal when he made his decision to arrest Mr. Sekhon. In other words, as I understand the law, the evidence of the more experienced police officers cannot be used to fill in gaps in the arresting officer's grounds for arrest, unless it was specifically communicated to him and relied upon by him at the time.
- [70] Cst. Dhaliwal has been a police officer since 2011; however, he testified that as of September 2018, he had only been involved in six to eight drug investigations and had only once been the lead investigator as a patrol officer in a drug investigation. He had only been in the GCU for about five months and agreed this could have been the first time he was the lead investigator and so had to make the decision as to whether reasonable grounds existed with respect to an arrest.
- [71] However, in terms of experience, he confirmed that as a patrol officer and in other roles, he had observed drug transactions, including those that he said amounted to dial-a-dope, and he listed a number of common elements of these transaction. There would be some kind of a meeting, whether in a car, outside, or perhaps sometimes even at a house. A person would typically approach the suspected drug trafficker and then leave shortly after, a pattern which may be repeated multiple times by other purchasers.
- [72] It is important to remember that the test is not whether it was probable that a crime was committed in the sense of the civil standard of a balance of probabilities. There has to be more than a suspicion, but the information does not have to tip the scales such that it is more likely than not that a crime occurred.
- [73] In many cases, the extensive experience of an officer carries significant weight for the court, because the courts are able to rely on that experience to conclude that the grounds were objectively reasonable. Equally, the experience of other officers may be relevant, if it is conveyed to and relied on by the officer who makes the decision to arrest.

- [74] The case law does not really articulate how the officer's experience is factored into the test when the officer forming the grounds for arrest has little experience. However, logic dictates that the inverse of the above point must be true, namely that where the officer has limited experience, the court must apply greater scrutiny in assessing the objective reasonableness of the officer's grounds for arrest. This concern applies in this case as I do not consider Cst. Dhaliwal's level of experience to be extensive.
- [75] Therefore, the issue for me is whether a person with the same level of experience--having seen the Gladwin Location activity and heard about the three interactions with the van at Ellwood--would also have found there were reasonable grounds for arrest.
- [76] The accused's submissions focused on what the accused said were deficiencies in the stated grounds for arrest. For instance, the accused points out that at the Gladwin Location, Cst. Dhaliwal said he saw a vehicle that was associated with a known drug user, the driver exit that vehicle, and walk towards the building. Shortly after this, he saw a van pull up next to the vehicle, the driver of the vehicle get out of the van, return to his vehicle, and then drive to a more secluded area of the parking lot. Cst. Dhaliwal said he concluded from this that the person had bought drugs and was using them, partly because they were in the vicinity of a methadone clinic and because of the behaviour of the van and where the person parked after. The accused pointed out that Cst. Dhaliwal could not name or identify the known drug user associated with the vehicle or the person he saw driving the vehicle and that he did not run the plates to confirm that. He also did not see the person going into the van.
- [77] With respect to the interactions at Ellwood Park, defence emphasized that the length of time that suspected purchasers stayed in the van was considered to be long. On one occasion it was ten minutes, and another was about six and a half minutes. The officers' evidence and testimony was relatively consistent that this is on the long end of the spectrum of typical dial-a-dope behaviour.
- [78] The defence also submits that there were instances when Air One did not have eyes on the van and, therefore, there may have been some loss of continuity in the surveillance of the van's travels. However, I do not find this to be a concern because Cst. Dhaliwal confirmed that he saw the van at Ellwood Park and that it was the same van that he saw at the Gladwin Location and asked the team to conduct surveillance of.
- [79] I return to the facts of this case and reiterate that looking at the totality and constellation of factors, I find that the factors do meet the test of objective reasonability.
- [80] I agree that the behaviour of three vehicles at Ellwood Park was consistent with one another and formed a pattern. The police are not required to come up with an innocent explanation for this. It is enough for them to say that the pattern they observed was consistent across those interactions and was consistent with drug activity.

- [81] As to the time that the persons spent in the van, I accept that it was not typical. However, the evidence was also consistent that the relatively long period of time spent in the van did not discount the possibility that it was a dial-a-dope operation.
- [82] As I understand the accused's argument, this is where Cst. Dhaliwal's experience becomes particularly problematic, because it impairs the objective reasonability of those grounds. The argument is that only an experienced officer would have experienced or been aware of dial-a-dope operations with such lengthy interactions. I do not agree that the evidence supports this. I agree that most of the officers did say that dial-a-dope typically involved short interactions, but they also all agreed that it was also possible to have longer interactions and that the length of time was not determinative; rather, one had to look at the totality of the circumstances.
- [83] For those reasons, I do not accept that in this particular case the ten-minute and six-and-a-half-minute times spent in the van could be seen as something that renders the grounds for arrest objectively unreasonable.
- [84] Both parties referred to a number of cases which can offer some guidance, but are of limited assistance, because my analysis of the facts has to be highly case specific.
- [85] The Crown relies on *R. v. Ha*, 2018 ABCA 233 as an example of case where a single transaction that was sufficient to meet the objective reasonable test. I distinguish that case, however, because the officer saw two cars involved in what he thought was a drug transaction and got their licence plate. The officer then put a call out to ask specifically if anyone else knew if the registered owners were involved in the drug trade. A senior officer confirmed that one of the registered owners was a high-level dealer and probably the supplier in the suspected drug transaction the officer had witnessed. There is no parallel here because, at most, Cst. Frendo mentioned the wrong person as the passenger of the van and did not correct it. Therefore, to the extent this case was meant to establish that one interaction is sufficient, I am not sure that assists the Crown in this case.
- [86] In *Juan*, the Court of Appeal found that the trial judge erred in overlooking the experience and knowledge of the officers in finding that they did not have objectively reasonable grounds for arrest. The trial judge characterized the officers' grounds for arrest as being merely that the accused was a passenger in a vehicle where the driver had sold drugs to an undercover officer. In doing so, the Court of Appeal found that the trial judge did not pay sufficient heed to the officers' knowledge and experience that in a drug transaction, principals typically do not take innocents along with them in a vehicle: *Juan* at para. 28. This reasoning is somewhat helpful here as the more senior officers testified that the unusually long period of time spent in the van still fits in the general pattern of dial-a-dope transactions.

- [87] R. v. Messina, 2013 BCCA 499 deals with a similar issue. The officer in that case was also less-experienced, but the court accepted that the officer's grounds for arrest were objectively reasonable because he conferred with and got confirmation from a senior officer: see also R. v. Tran, 2007 BCCA 491.
- [88] Although Cst. Dhaliwal did not seek approval from a more senior officer, Sgt. Smith testified that he was in communication with him and while he left it to him to make the call, he was satisfied that reasonable grounds existed.
- [89] Defence refers to a number of cases, all of which held that the grounds for arrest were not objectively reasonable: R. v. Sohi, 2018 BCSC 2145; R. v. Pope, 2015 BCSC 2391; and R. v. Lahtinen, 2011 BCPC 490. I do not find any of these directly applicable.
- [90] In R. v. Mutneja, 2019 BCSC 2191, Justice Crabtree found it was impossible for the officer to have known at the time that the woman seen interacting with the target vehicle was in fact an identifiable known drug user. Although another officer had identified the woman as such, this was not known to the officer forming the grounds at the time. The officer had also made the mistaken assumption about the woman's activity at a bank, because based on the evidence he never actually saw the woman getting out of the vehicle at the time.
- [91] The deficiencies in the officers' grounds for arrest in the other cases cited by defence are not similar enough to be of any assistance to this case.
- [92] Overall, I do not agree that the deficiencies identified by defence counsel in this case are such that Cst. Dhaliwal's grounds for arrest were objectively unreasonable. For those reasons, I am satisfied that Cst. Dhaliwal subjectively believed he had reasonable grounds to arrest and that those grounds were objectively reasonable. Therefore, the arrest was lawful.

III. RIGHT TO COUNSEL

- [93] Mr. Sekhon submits his right to access to counsel, as guaranteed by s. 10(b) of the Charter, was also violated. He asserts that the 53-minute delay between his detention and speaking with his lawyer was unreasonable.
- [94] The Crown's position is that the delay was reasonable and justified. The Crown points out Sgt. Smith turned his mind to whether he could facilitate Mr. Sekhon's calling his lawyer at the scene of the arrest, but appropriately concluded he was unable to guarantee a private conversation. In light of this and his knowledge that the detachment was only a 10-minute drive away, the Crown says there was no breach in not facilitating the call at roadside and also argues that the rest of the delay is explained by police taking appropriate investigative steps.

A. Legal Framework

[95] In *R. v. Taylor*, 2014 SCC 50, para. 23, the Court repeated Chief Justice Lamer's identification of the three duties imposed on police by Section 10(b) of the Charter in *R. v. Bartle*, [1994] 3 S.C.R. 173 at 192:

[96] Chief Justice Lamer then identified:

- (1) 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;
- (2) 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
- (3) 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).

[97] The first step of the above test is often referred to as the "informational" component of s. 10(b), while the second is referred to as the "implementational" component.

[98] The Court also quoted the Chief Justice's explanation in *Bartle* at 191, of the need for immediacy (*Taylor*, para. 22):

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 . Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request . [T]he 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.

[99] A person's s. 10(b) rights arise immediately upon detention or arrest: *R. v. Suberu*, 2009 SCC 33, at para. 37. In *Suberu*, Chief Justice McLachlin and Justice Charron, for the majority, explained that the words "without delay" in s. 10(b) must be interpreted as "immediately" because of the vulnerability of a person relative to the state upon detention (at paras. 41-42). That vulnerability arises from the legal disadvantage and legal jeopardy faced by the detained person, and the reality that their liberty has been restricted.

[100] The majority further stated:

[42] to allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of

immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police.

[101] As the Court notes in *Taylor* at para. 24, "[t]he arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity" and the burden is on the Crown to demonstrate that any given delay is reasonable in the circumstances. However, that immediacy can be limited in urgent or dangerous circumstances" (*Taylor* at para. 31), but those concerns do not exist and were not asserted to exist the facts before me.

[102] Ultimately, what constitutes a "reasonable" delay varies according to the facts of each case. In *R. v. Rover*, 2018 ONCA 745, Justice Doherty notes at para. 27:

The police may delay access only after turning their mind to the specifics of the circumstances and concluding, on some reasonable basis, that police or public safety, or the need to preserve evidence, justifies some delay in granting access to counsel. Even when those circumstances exist, the police must also take reasonable steps to minimize the delay in granting access to counsel: [cites omitted].

[103] Among other things, Justice Doherty in *Rover* commented on that the right to counsel is a "lifeline" for the detainee not only to "obtain legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained" (para. 45). Therefore, the "psychological value of access to counsel without delay should not be underestimated (para. 46): see also *R. v. Noel*, 2019 ONCA 860 at 26 as to the "reassurance" that immediate access to counsel can provide.

[104] At the same time, "[c]onstitutional rights cannot be displaced by assumptions of impracticality" and "[b]arriers to access must be proven, not assumed, and proactive steps are required to turn the right to counsel into access to counsel": *Taylor* at para. 33 (emphasis in original). Of course, delays are necessarily justified in urgent or dangerous circumstances: *Taylor* at para. 31. However, those concerns do not exist here.

[105] Justice Wilson also commented on the importance of s. 10(b), namely that it is "the main safeguard to the citizen that his or her other rights will be respected": *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1173, quoting *R. v. Jacoy*, [1988] 2 S.C.R. 548 at 563.

[106] And further (at 1163), Justice Wilson stated her view that it is "no answer to an alleged breach of the s. 10(b) right that counsel could not have prevented the search in any event". That is because value of having counsel is broader than just receiving advice it extends to inherent benefit of knowing one's legal rights and obligations, even if it is clear a search is valid, such as where warrant is obtained. Thus, nothing about s. 10(b) is contingent of a hypothetical assessment of the utility of counsel. She continued:

Section 10(b) also instruct the police to inform a detainee of his or her rights to counsel "without delay". As I have stated elsewhere, the phrase "without delay" does not permit of internal qualifications: [cites omitted] the phrase does not mean "at the earliest possible convenience" or 'after police 'get matters under control"', or even "without reasonable delay"; to which I add here that "without delay" likewise does not mean "after police have had a chance to search the suspect".

[107] Justices Lamer, Dickson, and Cory agreed with Wilson J.'s analysis and disposition of the appeal, except on one point. Justice Wilson held that the denial of right to counsel should be considered a factor in the reasonability of any subsequent search. However, in their view, the denial of the right under s. 10(b) could not automatically make a contemporaneous or subsequent search unreasonable.

[108] Despite the need for immediacy, a detainee's opportunity to contact counsel generally may be delayed in order to allow the police to conduct a search incident to arrest. Justice Lamer explains this general rule in *Debot* at 1146:

The right to search incident to arrest derives from the fact of arrest or detention of the person. The right to retain and instruct counsel derives from the arrest or detention, not from the fact of being searched. Therefore immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel. There are, in my view, exceptions to this general rule.

[109] With regard to the second step of implementing the right to counsel, the police are obliged to provide the detainee with access to a phone. Although they are not required to offer their own cellphone, the police nonetheless must provide the detainee with phone access as soon as practical to reduce the possibility of accidental self-incrimination. In the meantime, officers must refrain from eliciting evidence from the detainee until they have facilitated access to counsel.

[110] Once the accused has established there was a delay, the Crown bears the burden of demonstrating that it was reasonable. This is a question of fact.

[111] In terms of length of time that constitutes an unreasonable delay, a two-hour delay to facilitate access to counsel was found to be excessive and incapable of justification in *R. v. Deschamps*, 2017 BCSC 1989. In *R. v. Huete*, 2018 BCSC 637, although circumstances did allow for some delay, the delay of an hour and a half to two hours was found to be unreasonable.

[112] The Crown relies on a case subject to a publication ban indexed as 2020 BCSC 319, which also involved the APD. There was a delay about 40 minutes between the accused being informed of his s. 10(b) right and being given the opportunity to exercise it.

- [113] The officer in that case testified as to what occupied the time between his arrival at the scene and the call to counsel, which included: getting the accused into the transport vehicle; driving to the station; possibly waiting at the station in a vehicle bay while another prisoner was being processed, and; conducting a further weapons search once the accused is in the cell. The officer attempted to call the accused's lawyer twice, but was unsuccessful. The officer also called the lawyer's office and provided details of the arrest.
- [114] At para. 40, Justice Brown analyzed whether the delay was reasonable and she concluded it was. She specifically noted that the officer was not required to turn over his own cellphone for the accused to use and that a private cellphone was not otherwise available at the scene at the time. She found the delay from driving back to the police station was minimal, as it was a short drive away. Moreover, she found that it was appropriate to conduct a more thorough search of the accused at the station prior to making a call to counsel.
- [115] The defence relies on Justice Crabtree's decision in *Mutneja*. In that case, the delay was about 57 minutes. A portion of that had to do with informational delay, but I do not find that to be significant. The Crown in that case acknowledged that there was a delay in the implementation of the right to counsel, but argued that officer safety justified that delay in that case. Justice Crabtree disagreed. Specifically, the court held that the accused was held in a police car for 34 minutes, while the officers attended to securing the vehicle and waited for a tow truck. The trial judge was not satisfied with the explanation that officer safety was the reason for that delay. Instead, he held that they were attending to other business and that there were no clear safety concerns.
- [116] As he specifically noted, the accused could have been given a cellphone. The officer could have dialled it for him, given it to the accused, even with handcuffs, to facilitate a call in the 34 minutes he was in the car. Justice Crabtree ultimately concluded that insufficient attention was paid to ensuring that the accused's right to speak to counsel was addressed upon arrival at the detachment.

B. Timeline of Events

- [117] The following is a timeline I have compiled regarding the delay to Mr. Sekhon's access to counsel, based on the testimonies of Sgt. Smith and Constables Burrridge, Walker, and Dhaliwal.
- a) 16:13 - Cst. Dhaliwal asks Cst. Walker to detain the vehicle and arrest occupants.
 - b) 16:14 - Cst. Walker detains the van at Valdes Drive and Link Court by engaging the police lights on his vehicle. The van stops without incident. Cst. Walker leaves his vehicle and directs the driver to leave the car, informing him that he was being arrested for possession for the purpose of trafficking.
 - c) 16:14 - Sgt. Smith arrives on scene and sees Cst. Walker dealing with the driver of the van.

- d) 16:15 - Cst. Walker has driver in custody. Sgt. Smith approaches van, realizing door is closed and he cannot see inside. He slides open door, sees Mr. Sekhon with a headset, manipulating a phone. He directs him to get out of the van, which he fails to do. Sgt. Smith reaches in and guides him out. In process, Mr. Sekhon drops phone in van. Mr. Sekhon is then placed in handcuffs and Sgt. Smith conducts pat-down search.
 - e) 16:17 - Sgt. Smith informs Mr. Sekhon that he is under arrest for possession for the purpose of trafficking and advises him of his right to retain and instruct counsel. Mr. Sekhon immediately states he wants to call his lawyer, although it is unclear if he provided his lawyer's name at this point; he certainly did later. He is then put in the back of Sgt. Smith's car where he remains until he is transported to the APD.
 - f) 16:27 - Cst. Walker leaves the scene with the driver and arrives at the APD at 16:37.
 - g) 16:38 - Sgt. Smith arrives at the APD with Mr. Sekhon approximately a minute after Cst. Walker. Mr. Sekhon is held in the car until they are ready to process him, as they can only process one prisoner at a time.
 - h) 16:47 - the driver of the van calls his lawyer.
 - i) 16:52 - Sgt. Smith takes photo of Mr. Sekhon and then conducts a more thorough pat-down search of him. Sgt. Smith finds certain items on Mr. Sekhon's person, which are seized. Immediately after this pat-down search, Sgt. Smith seeks authorization to conduct strip search, which is granted.
 - j) 16:57 - Sgt. Smith conducts a strip search of Mr. Sekhon, with Cst. Walker assisting him.
 - k) 16:59 - Sgt. Smith completes the strip search, having found drugs around Mr. Sekhon's waist.
 - l) 17:07 - Mr. Sekhon is given access to phone to call counsel
- [118] The accused submits there is a dispute in the evidence about timing of certain events, which is relevant to the nature of the delay. Cst. Dhaliwal's recollection and testimony was that he arrived on scene at 16:38. He testified that he saw that the driver was already in custody, so he went immediately to assist Sgt. Smith. As such, Sgt. Smith must have left with Mr. Sekhon to drive to the detachment some time after 16:38.
- [119] Given that this timing differs from both Sgt. Smith and Cst. Walker's evidence, I find it more probable than not that Cst. Dhaliwal is mistaken in his recollection. Sgt. Smith's and Cst. Walker's timings are more consistent with the video from Air One. As I recall, the video ends at about 16:13, but it shows a second police vehicle pulling up just before it ends. I also note my previous comments about some concerns with the reliability of Cst. Dhaliwal's evidence and, in light of that, I prefer the timing as indicated by Sgt. Smith and Cst. Walker.

C. Analysis

- [120] While it is tempting to evaluate the reasonableness of the delay by simply comparing the length of the delay with the range of delays permitted in the case law, it would not be the correct approach. The issue is not merely how long the delay was and whether that amount of time was reasonable. Access to counsel must be facilitated immediately. It is up to the Crown to persuade me that any delay is reasonable. This requires considering not only the length of the delay, but also what was happening during the delay.
- [121] Sgt. Smith testified that after putting the accused in the back of his vehicle, he did not leave the scene right away because he was taking notes and organizing tasks at the scene. He said he turned his mind to whether he could facilitate access to counsel roadside, but concluded he could not, because he could not guarantee privacy. He testified that he had to maintain visual contact of the accused at roadside. Specifically, he commented in his experience he was aware that people arrested for trafficking had a strong incentive to discard the drugs. Therefore, it was important that he keep a constant watch on Mr. Sekhon in order to preserve the continuity of any evidence.
- [122] In any event, he said there was no phone available for Mr. Sekhon to use while at the roadside. Sgt. Smith did not want to give Mr. Sekhon his own phone because of the potential that he might interfere with the contents, including evidence needed for the investigation. He also did not want to give his own phone because it was a smartphone and contained other confidential information.
- [123] The accused says that privacy was not a genuine or real concern and, at the very least, it could easily have been mitigated. Defence counsel suggests that Sgt. Smith could have dialled counsel's number on his phone and handed it to Mr. Sekhon on speaker with the window closed, such that Sgt. Smith could have kept an eye on him. Justice Crabtree made a similar suggestion at para. 80 in *Mutneja*.
- [124] However, a notable fact in this case is that Mr. Sekhon was wearing a Bluetooth headset. Defence counsel points out it would have been relatively easy for him to connect the headset to Sgt. Smith's phone and so enable him to call counsel that way. Sgt. Smith could dial counsel's phone number and Mr. Sekhon could speak to counsel privately in the police car without having to handle Sgt. Smith's phone.
- [125] Mr. Sekhon also argues that it was inappropriate to prioritize the administrative investigative tasks at the scene over facilitating his phone call to his lawyer. The Crown emphasized that the situation was dynamic, not planned in advance, and took place on a public street where there was a lot was going on.
- [126] Still, the defence argues that this was different from a routine traffic stop, in that there were a number of police officers on the scene and it was a team investigation. Given the number of people present at the scene, there could have been better attention paid to facilitating counsel.

- [127] I find that the delay in this case was not reasonable. The primary--although not exclusive--reason for my conclusion is because I find that the officers made the decision to prioritize, among other things, a strip search over facilitating Mr. Sekhon's express desire to call counsel. There was no reason why Mr. Sekhon was not allowed to call counsel before the strip search because the driver of the van, Mr. Sidhu, had already been booked and had completed his call to counsel before Mr. Sekhon was taken out of the vehicle at the detachment. The APD has a dedicated room to facilitate calls to lawyers and Mr. Sekhon could have used it right after was booked and before he was strip searched.
- [128] I also find defence counsel's submission that Mr. Sekhon could have called counsel via his Bluetooth headset compelling, although it is not, in and of itself, determinative.
- [129] The only reason given why Mr. Sekhon could not call counsel prior to being strip searched was the concern that he might discard or dispose of drugs while alone in the room for calling counsel. I accept that there may be a legitimate concern that an accused might discard or dispose of evidence while at the scene of the arrest, as there may be a lot going on. However, I do not agree that there is a similar level of concern in the controlled environment of the police detachment.
- [130] Moreover, there was a dedicated room to call counsel, with a small window and a table and bench that were attached to the walls. It would have been easy enough for an officer to do a visual sweep of the room before and after Mr. Sekhon used it, in order to address the concern regarding the disposal of evidence.
- [131] In my view, Justice Baird's comments in Deschamps at para. 38 are quite apt:
- The manner in which these defendants were handled strongly suggests that lawyer calls ranked lower in priority than other routine tasks which, in my view, should have been taken care of later. In particular, workaday booking-in procedures should not take precedence over constitutional obligations.
- See also, *R. v. Huete*, 2018 BCSC 637.
- [132] I cannot see, on the facts of this case, why it was necessary to wait until after a strip search was conducted before facilitating Mr. Sekhon's stated desire to call his lawyer when the phone dedicated for that very purpose was available. As such, I find that Mr. Sekhon's s. 10(b) rights were breached.

IV. STRIP SEARCH

[133] The accused was strip searched after being brought into the police detachment and processed. He argues it did not comply with the requirements articulated in *R v. Golden*, 2001 SCC 83, and therefore was unreasonable and a violation of s. 8 rights. The Crown's position is that the strip search was incidental to arrest for the purpose of discovering evidence and, for the reasons articulated by Sgt. Smith, falls within the acceptable guidelines.

A. Legal Framework

[134] *Golden* is the leading case regarding the use of strip searches incident to arrest. The Court starts the analysis, noting that the law is very clear that a warrantless search is *prima facie* unreasonable under s. 8 of the Charter. However, the Court continued (para. 84).

Searches of the person incident to arrest are an established exception to the general rule that warrantless searches are *prima facie* unreasonable. In considering the constitutionality of strip searches carried out as an incident to arrest, it is still important to bear in mind that warrantless searches are the exception and not the norm in Canadian law. While characterized as an exception to the normal rule that a search warrant is required for a lawful search, however, warrantless personal searches incident to arrest are an exception whose importance should not be underestimated. The practical reality is that warrantless searches of persons incident to arrest constitute the majority of searches conducted by police [cites omitted].

[135] It is well established that the common law must be interpreted in a way consistent with Charter values (para. 86). The Court note that the scope of the common law power to conduct a warrantless search is less clear, citing *Caslake* case. Thus, its task in *Golden* was to "delineate scope of common law power as it pertains to warrantless strip searches carried out as an incident to lawful arrest" so it is consistent with Charter (para. 87). The court's responsibility is to set clear boundaries so the state can pursue legitimate interests while vigorously protecting right to privacy.

[136] The court also emphasized that the court's approach should view it as a means of preventing unjustified searches before they occur, rather than simply determining after the fact that they should not have occurred, and that that is particularly acute with a strip search because of its intrusive nature (para. 89). Specifically, strip searches are inherently humiliating and degrading, regardless of how they are carried out (para. 90). Therefore, just because it is carried out in a manner that is reasonable under the *Golden* test does not detract from that inherent humiliation and degrading experience. That is the reason why it is inappropriate for a strip search to be carried out simply as a matter of routine policy.

[137] Another requirement is that it must be "incident" to the arrest (92). That is, it must be related to the reason for the arrest itself, so an arrest for drug trafficking, the purpose must be to discover illegal drugs that may be hidden on a person.

[138] In terms of the test, that was set out by Justices Iacobucci and Arbour, as follows:

99 In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the Charter. [Emphasis added]

[139] With regard to strip searches conducted for the purpose of preserving evidence, the Court observes:

93 The reasonableness of a search for evidence is governed by the need to preserve the evidence and to prevent its disposal by the arrestee. Where arresting officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in the circumstances. For instance, in the present case, it was suggested that the appellant might have dropped the drugs on the sidewalk or in the police cruiser on the way to the station and that it was therefore necessary to search him in the field. As we discuss below, however, the risk of his disposing of the evidence on the way to the police station was low and, had the evidence been dropped in the police cruiser on the way to the station, circumstantial evidence could easily link it back to the accused.

[140] Finally, strip searches are not to be conducted as a matter of routine policy: Golden at para. 90. Strip searches are highly intrusive and degrading. They should only be resorted to where there are specific, reasonable grounds for thinking the person is concealing a weapon or evidence related to the reason for their arrest.

[141] The court also referred to the importance of allowing for strip searches to ensure safety (96), but that concern does not arise in this case. The court emphasized it is important that just because police have reasonable and probable grounds to arrest does not confer on them automatically the authority to carry out a strip search. Even when it is incidental to arrest, there must be additional grounds pertaining to the purpose of the strip search.

[142] A strip search is much more intrusive and the risk is higher, and therefore a higher degree of justification is required to meet the constitutional standard. Therefore, a strip search incidental to arrest is only valid at common law for the purpose of discovering weapons or evidence related to the reasons for arrest that are stated in a way that is additional to the grounds that were stated to the arrest itself.

B. Evidence

- [143] The APD's practice is that before a strip search is conducted, the officer seeking to conduct it must get approval from the officer assigned at the booking area to give that authorization. Prior to this policy, it is my understanding that it was considered routine at the APD to strip search individuals brought in on suspicion of trafficking.
- [144] Sgt. Kneebone was the supervisor in charge of the cells that day. He had responsibility for the booking of prisoners and all associated administrative duties that come with that. He was present when the accused was brought in by Sgt. Smith.
- [145] Sgt. Kneebone kept notes of the information conveyed to him when the request was made to strip search and confirmed he would have written down what was important in his mind to deciding whether to authorize that strip search.
- [146] He testified that Sgt. Smith sought the approval based on the following:
- a) the accused had been arrested for possession for the purpose of trafficking;
 - b) he was in the vehicle that the surveillance team had observed was involved in drug activity; and
 - c) he was not the first person to exit the vehicle, so he had an opportunity to conceal evidence.
- [147] Sgt. Kneebone indicated that he authorized the search based on those factors, as well as his experience and knowledge that people arrested for drug trafficking do try to hide drugs.
- [148] Sgt. Kneebone did not have information on how long the delay was between the van being detained and Sgt. Smith opening the door. However, he said the amount of delay was not important to him, because even if the delay was only 10 seconds, he would still have found that the delay was a relevant factor. I infer from this that it takes very little time for a motivated suspect to hide drugs under their clothing. This of course accords with common sense and I accept that that is knowledge that the police officers have.
- [149] When asked during cross-examination if he knew whether the van had been searched when he approved the strip search, he said he could not recall. However, he agreed that it would normally be the practice to search the vehicle first and, indeed, that would be the best practice. Significantly, he agreed in cross-examination that he most likely would not have authorized the strip search if he knew that the van had not yet been searched.
- [150] Sgt. Smith's testimony was mostly consistent with Sgt. Kneebone's. He talked about a constellation of factors that he believed justified the strip search, including his own experience and knowledge that suspects try to hide drugs.

- [151] In direct, he stated that he believed he was aware that no drugs were found in the van when he sought approval for the strip search. He was cross-examined at length on this point. At first, he said he "believed he had been informed", but he admitted he did not seek out that information and he could not confirm whether he did or not. He also agreed that referring to his notes would not be of assistance.
- [152] He was referred to the report to Crown counsel, which included the statement that the "initial search yielded no controlled substance". Sgt. Smith initially relied upon this statement in support of his belief that he understood the van had been searched; however, he ultimately agreed that it was referring to the fact that the initial search of Mr. Sekhon did not reveal any drugs.
- [153] I find that Sgt. Smith was not aware whether the van had been searched for drugs when he sought authority for the strip search. This explanation is most consistent with the totality of his testimony, as well as Sgt. Kneebone's notes.
- [154] I find the fact that Sgt. Kneebone did not make a note regarding any search of the van to be determinative of this issue, as he was satisfied that he would have noted that.

C. Analysis

- [155] I disagree with the Crown's suggestion that Sgt. Smith's grounds for conducting the search are the ones that matter for my analysis. In my view, Sgt. Kneebone's assessment is the one that matters. The APD has a system that the jail sergeant has to authorize a strip search. Accordingly, it is what that person articulates as the reason for allowing it that must meet the standard in Golden. Were it otherwise, the authorizing officer's role would amount to nothing more than a rubber stamp and no purpose would be served by having that system in place to seek authorization.
- [156] This is significant, in my view. It is clear that Sgt. Kneebone did not have any information about whether drugs were found in the van or even whether the van was searched, yet he agreed that had he known the van had not yet been searched for drugs, he probably would not have authorized the strip search. In my view, that is virtually determinative of the issue because, based on the facts, the van was not searched until after the strip search.
- [157] The Crown submits that the fact that Cst. Frendo conducted a search of the van roadside and did not find any drugs is relevant. However, that information was not conveyed to Sgt. Kneebone. Moreover, I find that search was not conducted for the purpose of discovering or retrieving evidence. As Cst. Frendo described, the search was conducted for primary purpose of ensuring safety. In particular Cst. Frendo wanted to make sure no one was hiding in the back and also secure the vehicle and the continuity of evidence that might be later seized when it was properly searched at the station, to where it was getting towed by a third party.

- [158] It was not a thorough search and although it might qualify as a search under s. 8 jurisprudence because he entered to take photos, it is not sufficient to justify the strip search. Cst. Frendo only identified things in plain view and I am not satisfied that his search for the purpose of finding evidence.
- [159] The Crown argues that whether Sgt. Kneebone knew about the search of the van is immaterial to the reasonability of the strip search, as there was, in any event, sufficient justification to conduct the strip search.
- [160] I disagree. The grounds for the strip search, as noted above, was partially based on the police's knowledge and experience that individuals will generally try to hide drugs when they are stopped for trafficking.
- [161] This knowledge is not unique to this arrest. It is mentioned in virtually all cases and all of the officers mentioned it. While it is important investigative knowledge, I cannot agree that it would justify a strip search based on the mere fact that Mr. Sekhon was arrested for possession for the purpose of trafficking and that there was a delay between his detention and search.
- [162] The Crown relies on two cases in support of its position. First, it relies in part on *R. v. Menzies*, 2017 BCSC 377 for Justice Baird's finding at para. 29 that the officer's knowledge of "the well-known fact that drug traffickers often hide narcotics in their bodies" was enough of a reason to conduct a strip search. However, that case is easily distinguished, as the strip search in *Menzies* was conducted for safety reasons before the accused was placed in custody. Golden specifically distinguishes such strip searches from those conducted immediately incidental to arrest, noting that "there is a greater need to ensure that [accused persons] are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment" (at paras. 96-97).
- [163] Moreover, in *Menzies*, the accused's behaviour was erratic and a knife was found in her car. In my view, Baird J.'s finding that the strip search was permissible was clearly based on officer safety and safety of staff and other prisoners, not on a need to find or preserve evidence.
- [164] Second, the Crown relies on *R. v. Johal*, 2015 BCCA 246. This case is also distinguishable in that the accused was arrested after selling drugs to an undercover officer, but no drugs were subsequently found in the vehicle (at para. 27). This fact, combined with the officer's experience that drug dealers sometimes conceal drugs on their person, led the Court of Appeal to conclude that there were reasonable grounds for a strip search. However, in this case, Sgt. Kneebone did not even turn his mind to whether drugs were located in the vehicle when he approved the strip search.

- [165] Furthermore, I note that the driver of the van was not strip searched. I find this fact to be of some significance in this case, particularly in light of Baird J.'s finding in Deschamps. In that case, three people were arrested for the same offence at the same place, at the same time, and in the same circumstances; however, one of them was not subjected to a strip search, while the other two were. Justice Baird stated he could think of no reason why a strip search was conducted on the others, but not on the one (at para. 41).
- [166] While it is true that the driver was taken out first, there was still a delay between the van being stopped and him getting out of the vehicle. Sgt. Kneebone testified that even 10 seconds would be sufficient for someone to hide drugs. My recollection from the video is that there may have been as much as 10 seconds from when the van stopped to the driver getting out.
- [167] As well, the surveillance team was aware that the driver interacted with the Toyota in a way that may have been consistent with drug activity. Even if the interaction with the Toyota did not form the grounds for arrest of Mr. Sekhon, it might have for the driver, although that evidence was not in front of me.
- [168] Moreover, Sgt. Smith did not arrest the driver, Cst. Walker did. Presumably, Cst. Walker came to the conclusion that he did not have sufficient grounds to strip search the driver. Given the similar circumstances in which the driver of the van and Mr. Sekhon were arrested, it is difficult to discern why Sgt. Smith would think a strip search was necessary for Mr. Sekhon, but Cst. Walker would not think one was necessary for the driver.
- [169] Deschamps is again helpful on this point. The officer in that case said the strip search was necessary to preserve evidence because there was a suspicion of trafficking and people often try to hide evidence. While Baird J. accepted that those were reasons, he stated that the "mere possibility that an individual may be concealing drugs on his person is not sufficient to justify a strip search".
- [170] The court went on to say further case-specific, fact-sensitive consideration is required, and there must be a compelling reason. Specifically, there must be reasonable and probable grounds, separate and apart from those that give rise to the arrest itself, and those have to be unique factors.
- [171] On the facts before me, what it boils down to is that Mr. Sekhon was arrested for possession for the purpose of trafficking. There was a delay between the detention of the vehicle and him exiting the vehicle when he could not be seen and there was knowledge by the officers that people in that situation tend to hide drugs.
- [172] However, I am not convinced that the delay is a unique factor. In virtually every case where a vehicle is stopped and the occupants are suspected of having committed possession for the purpose of trafficking, there will be a delay. As noted by Sgt. Kneebone, even a brief delay is sufficient to give a person the opportunity to hide drugs on their person.

[173] If I were to accept this delay as providing reasonable grounds for conducting a strip search, I would effectively be saying that strip searches could be justified incident to arrest in every case where a vehicle is stopped and the occupants are arrested for trafficking. I am not satisfied that would be appropriate. Indeed, the concern raised in relation to the s. 10(b) issue, namely that Mr. Sekhon might dispose of the evidence while in the telephone room, simply cannot hold water, given all the factors I have already mentioned.

[174] For these reasons, I find that the strip search violated Mr. Sekhon's s. 8 rights.

D. Interplay between Sections 8 and 10(b)

[175] As an additional analysis that is not determinative, I also find it relevant that the strip search was conducted in the context of what I have already found to be a violation of the accused's right to instruct counsel without delay. Mr. Sekhon was not able to call his lawyer until the strip search was conducted.

[176] In *Debot*, the majority explicitly disagreed with Wilson J.'s conclusion that denial of one's s. 10(b) rights is relevant to assessing the reasonableness of a search under s. 8. In coming to this conclusion, Wilson J. commented on the purpose and importance of the right to counsel in the context of a search incidental to arrest. She noted that the value of having counsel is broader than just receiving advice. It extends to the inherent benefit of knowing one's legal rights and obligations, even where it is clear that a search is valid, such as when there is a warrant.

[177] As quoted above (at para. 102), Wilson J. noted that the right to be informed of counsel "is surely the main safeguard to the citizen that his or her other rights will be respected". She also noted that nothing about s. 10(b) is contingent on a hypothetical assessment of the utility of calling counsel at that point (at 1163-1164):

Section 10(b) also instructs the police to inform a detainee of his or her rights to counsel "without delay". As I have [already] stated elsewhere, the phrase "without delay" does not permit of internal qualification. The phrase does not mean "at the earliest possible convenience" or "after police get matters under control", or even "without reasonable delay"; to which I add here that "without delay" likewise does not mean "after police have had a chance to search the suspect".

[178] Justice Lamer, writing for the majority, disagreed with Wilson J. that the denial of s. 10(b) is a factor to consider when determining the reasonableness of a search. He wrote that only in exceptional circumstances will the denial to counsel trigger a violation of s. 8, explaining at 1146 that "[t]he right to search incidental to an arrest derives from the fact of the arrest". The right to retain and instruct counsel likewise derives from the arrest, not from the fact of being searched. Therefore, detainees have the right to be informed immediately upon detention. Nevertheless, police, as noted above, are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel.

- [179] Justice Lamer noted that there would be an exception to this if the lawfulness of the search is dependent upon the detainee's consent. For example, if a person gave consent to search their home where normally a warrant is required, but was not informed of his or her s. 10(b) rights or gave consent before he or she could exercise it, that search would, in fact, be unlawful and unreasonable.
- [180] However, apart from this example or analogous situations where the s. 10(b) violation goes to the lawfulness of the search, Lamer J. said he could not imagine a situation where the right to counsel will be relevant to assessing the reasonableness of the search, although he hastened to add that evidence obtained in that manner might not be admitted.
- [181] I note Debot was decided in 1989. We now have Golden, which clearly says that strip searches incidental to arrest cannot be routine. Strip searches must be for either ensuring safety or discovering evidence related to the reason for the arrest, to preserve it or prevent the disposal. In addition, specifically, I repeat the majority's comment in Golden at para. 93, namely that if "officers suspect that evidence may have been secreted on areas of the body that can only be exposed by a strip search, the risk of disposal must be reasonably assessed in the circumstances".
- [182] In my view, a combination of these two cases means that in this particular case, it was unreasonable to delay facilitating counsel until after the strip search was done. This is a compelling reason why the strip search itself ought to have been regarded as unreasonable.
- [183] I make note specifically that the importance that the majority in Golden placed on the intrusive nature of the strip search and the need for compelling reasons, which could include officer safety such as in the Menzies case, but that did not arise here. However, in terms of discovering evidence, it is very significant that it was conducted in the controlled environment of the police department and that there was a room available for counsel, which could have been easily searched before and after Mr. Sekhon's call to counsel.
- [184] I am obviously bound by the majority decision in Debot; however, the time may be ripe to reconsider Wilson J.'s comments, because we now have the benefit of the Supreme Court of Canada's reasoning in Golden. Lastly, it may be that the facts here would be considered as falling within Lamer J.'s exception. However, as I said, this reasoning is alternate to what I have relied on for my conclusion on this issue.
- [185] I also make specific note of the comments at para. 93 of Golden. The majority specifically rejected the notion that the strip search had to be done at the scene because of the risk that something could be disposed of on the sidewalk. Rather, the majority specifically said that there is a low risk of disposal while in police custody because the circumstantial evidence could easily be link it back to the accused.

[186] I mention this because Sgt. Smith and the other officers specifically talked about the concern they had regarding the continuity of evidence while in the controlled environment of the APD. In my view, that cannot be a reason to justify a strip search prior to facilitating access to counsel.

V. SEARCH OF THE CELLPHONE

[187] Mr. Sekhon alleges that Cst. Dhaliwal searched his cellphone contrary to the test set out in *R. v. Fearon*, 2014 SCC 77 when Cst. Dhaliwal answered Mr. Sekhon's cellphone at the scene.

A. Legal Framework

[188] The power to search cellphones incident to arrest is more limited than ability to conduct a "pat-down" search or to search a vehicle. As Justice Cromwell notes in *Fearon*, "police officers will not be justified in searching a cell phone or similar device incidental to every arrest" (at para. 83).

[189] For a search of a cellphone incident to arrest to comply with s. 8, the following must be established (*Fearon* at para. 83):

- a) The arrest was lawful;
- b) The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:
 - (a) Protecting the police, the accused, or the public;
 - (b) Preserving evidence; or
 - (c) Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest;
- c) The nature and the extent of the search are tailored to the purpose of the search; and
- d) The police take detailed notes of what they have examined on the device and how it was searched.

[190] Under this framework, searches must be for one of the three purposes noted above, namely protecting the police and the public, preserving evidence, and discovering evidence.

[191] The scope of the search must be directly related to the stated purpose of the search. Officers are not entitled to search the entire contents of the phone; rather, the extent of the search "must be truly incidental to the particular arrest for the particular offence" (at para. 76). Justice Cromwell elaborates on this (at para. 76):

In practice, this will mean that, generally, even when a cell phone search is permitted because it is truly incidental to the arrest, only recently sent or drafted emails, texts, photos and the call log may be examined as in most cases only those sorts of items will have the necessary link to the purposes for which prompt examination of the device is permitted. But these are not rules, and other searches may in some circumstances be justified. The test is whether the nature and extent of the search are tailored to the purpose for which the search may lawfully be conducted. [Emphasis added].

[192] Answering an accused's cellphone during a search incident to arrest appears to be a permissible search within this framework. Of course, this is subject to it otherwise being reasonable.

B. Analysis

[193] Mr. Sekhon argues that Cst. Dhaliwal's purpose in answering the phone was not to protect the police or the public or to preserve evidence. He submits that although it could be reasonable to answer a phone as a means to discover evidence, this was not a situation where the investigation would have been "stymied or significantly hampered" had he not searched the cellphone.

[194] Specifically, Mr. Sekhon points to the fact that the content of the incoming call was of little evidentiary value, as it was not led by the Crown in this case. He points out that 46 minutes elapsed between the vehicle being stopped and the phone being answered, and that a warrant could have been obtained in this time.

[195] The Crown submits that there was nothing improper in Cst. Dhaliwal's search of Mr. Sekhon's cellphone. It was limited to answering one call and Cst. Dhaliwal had good reason to believe it was Mr. Sekhon's phone because it was seized from him and his picture was on the phone. Moreover, he complied with Fearon by taking notes of his search.

[196] I agree with the Crown that the search meets the test set out in Fearon and thus there was no breach of Mr. Sekhon's s. 8 rights. The limited evidentiary value of the content of the phone call cannot be used to invalidate the search, because Cst. Dhaliwal did not know what value the call would have before he answered it. Indeed, the very purpose of answering the call was to discover if it yielded any helpful information to the investigation.

[197] As noted at para. 48 of Fearon, "cell phones are the 'bread and butter' of the drug trade and the means by which drugs are marketed on the street" (quoting from *R. v. Howell*, 2011 NSSC 284 at para. 39). In order to obtain such evidence, officers often need prompt access to a detainee's cellphone. The Supreme Court of Canada has recognized that, in general, the promptness of the search of a phone is directly tied to the possible utility of the evidence. This differentiates it from other searches with a high level of invasion of privacy, such as dental impressions, where there is no such need for urgency.

[198] The defence focused on wording in Fearon at para. 83, specifically on the language in (2)(c) of the test that suggests that cellphones may only be answered to discover evidence when the investigation might otherwise be stymied. I disagree. In particular, I note Cromwell J.'s comment at para. 84 that the test in Fearon is not the exclusive means of justifying a search of the cellphone incidental to arrest.

[199] For all those reasons, I dismiss the application with regard to the search of the cell phone.

VI. SEIZURE OF THE CELLPHONE

[200] With regard to certain items seized, Mr. Sekhon says the police did not non-comply with the statutory requirements in retaining them. The evidence was clear that while the original order under s. 490 of the Criminal Code was obtained to permit the detention of things for 90 days, a subsequent application was not made. Because charges were not filed for four months after the arrest, there is a one-month period when the items were detained, apparently without lawful authority.

[201] In *R. v. Flintroy*, 2019 BCSC 110, Justice Williams stated at para. 26 that the "failure to strictly comply with statutory reporting obligations will constitute a s. 8 breach when a person retains an ongoing residual privacy interest in the items which have been seized and continue to be detained". This would clearly apply to a cellphone.

[202] The Crown asks me to consider the officers' testimony that they believed that the dictates of s. 490 did not have to be met, as some of the items were apparently forwarded to the Director of Civil Forfeiture. However, even if that was their belief, their testimony was vague and they did not present any documentation to confirm it.

[203] I am also not certain that proceedings launched by or to be launched by the Provincial Director of Civil Forfeiture could purport to negate the requirements of the Federal Criminal Code, particularly s. 490. The primary reason the scheme of civil forfeiture is constitutional is that it is considered not to be criminal law or not primarily criminal law.

[204] The Crown fairly concedes that if I do not accept that version of the officers' testimony, then there was a technical breach of s. 8.

[205] As such, I find that the failure to extend the s. 490 order constitutes a breach of Mr. Sekhon's s. 8 rights.

VII. CONCLUSION

[206] For all of the reasons expressed above, I find that Mr. Sekhon's ss. 8 and 10(b) rights were breached.

"Sharma J."

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