Court of Queen's Bench of Alberta

Citation: R v Truong, 2020 ABQB 337

Date: 20200526
Docket: 170629075Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Hanh Tuyet Truong

Accused

Ruling on Voir Dire
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] Hanh Tuyet Truong is charged with possession of cocaine for the purposes of trafficking and possession of the proceeds of crime. She argues that her section 8, 9, and 10 *Charter* rights were violated and seeks exclusion of the evidence obtained as a result of these breaches under section 24(2).

[2] Section 8 protects Ms. Truong's right to be secure against unreasonable search or seizure. Ms. Truong alleges this right was infringed because the information to obtain ("ITO") the search warrant that resulted in the search of her residence and the seizure of cocaine and cash located

there failed to disclose reasonable and probable grounds that an offence had been committed or that evidence of an offence would be found in her home.

[3] Section 9 ensures the right to be free from arbitrary detention. Ms. Truong claims this right was infringed when she was arrested in the absence of reasonable and probable grounds, and again when she was detained during the execution of the invalid search warrant.

[4] Section 10 gives Ms. Truong the right to be promptly informed of the reason for her detention, and to retain and instruct counsel without delay, and to be informed of that right. She says that Calgary Police Service ("CPS") failed to ensure that she understood the reason for her detention and her right to contact counsel. CPS then failed to hold off questioning Ms. Truong before she had an opportunity to contact counsel, and they also unreasonably delayed Ms. Truong in contacting counsel.

[5] The trial proceeded as a blended voir dire. At the conclusion of the evidence on the voir dire, I reserved decision.

Evidence

[6] Ms. Truong is originally from Vietnam. She requested a Vietnamese interpreter for the trial and one was provided.

[7] At the commencement of the trial, we entered a *Charter* voir dire. A Statement of Admitted Facts and Admissions was entered as an exhibit, as was a video of the CPS surveillance conducted on Ms. Truong before her arrest.

Statement of Facts

[8] The Statement of Admitted Facts provides some of the narrative in the investigation, focusing on the vehicle stop and arrest of Ms. Truong on June 6, 2017. It includes a copy of the ITO affirmed by Constable Bruce Dowd on June 5, 2017.

[9] It sets out the basic narrative, which included the admission that a brown bag on the passenger seat of the Venza contained 956 grams of powder cocaine and 156.3 grams of crack cocaine. A purse, which had a wallet with $625 in it and a cell phone, was also found on the passenger seat There were also various cheques payable to Ms. Truong from her business, Good Nails and Spa Ltd. A second cell phone was located in a cupholder in the Venza.

Information to Obtain

[10] The ITO relies heavily on the Maitland Green incident on June 1 so support Constable Dowd's belief that" there is a controlled substance or a thing in the Venza that will afford evidence in respect of an offence under the Controlled Drugs and Substances Act, to wit: cocaine, weigh scale, packaging materials, cellular telephones/smart phones and the data contained within, score sheets, ownership documentation, and currency."

[11] Constable Dowd relies on information received by CPS "from a confidential informant" that Ms. Truong is selling a large volume of cocaine and marijuana. He says (paragraph 7)

> Covert surveillance has been able to corroborate the information provided by the Confidential Informant including observing activities that are consistent with drug trafficking.

[12] He describes corroboration of the information received in a very general way "to preserve the confidentiality of the Confidential Informant ("CI")". It is clear that he did not know the source and did not deal directly with the source. Contact and communications are through a "source handler".

[13] In paragraph 15, Constable Dowd describes information from the source handler in a "Confidential Informant Credibility Statement":

> a. CI has provided information in relation to criminal activity on ten occasions;
>
> b. CI has proven reliable and has aided the COPS in multiple seizures of stolen property, illegal narcotics, and restricted or prohibited firearms;
>
> c. CI obtains information through associating with persons involved in criminal activity;
>
> d. CI has never been charged with Perjury or Obstruction;
>
> e. CI does have a criminal history;
>
> f. The motivation for CI providing information is a moral obligation.

[14] The information from the confidential informant was:

> a. Where Ms. Truong lives on Memorial Drive;
>
> b. That she drives a Venza with a specific license plate number;
>
> c. Her telephone number;
>
> d. That she owns a nail salon;
>
> e. That she gambles and frequents the Grey Eagles Resort and Casino;
>
> f. That she has been previously investigated by CPS for drug offences;
>
> g. She is a multiple ounce cocaine distributor; and
>
> h. She is a multiple pound fresh cut marijuana distributor.

[15] Constable Dowd says he tried to corroborate some of the information, but his searches showed the Venza was registered to someone else and Ms. Truong's address was different. The telephone number was confirmed. He was able to confirm that Ms. Truong was a director and shareholder for Good Nails and Spa Ltd, although the business license for the company had been applied for by someone else.

[16] Constable Dowd explains the use of a different address for a driver's license and business license because:

> It is my experience as a drug investigator that those involved in the drug trade will use other addresses than that of their primary residence in order to create a layer of insulation and protect their illegal activities.

[17] Constable Dowd confirmed that Ms. Truong has two prior convictions for possession of a controlled substance for the purpose of trafficking, one in 2003 and another in 2005.

[18] Constable Dowd also said in the ITO that Ms. Truong had been seen leaving from the address given by the confidential informant, getting into the Venza and driving off. She was also seen during surveillance gambling at the Grey Eagles casino. One of the investigators saw her come and go from Good Nails and Spa.

[19] He described the surveillance on June 1 and learned that Ms. Truong left the Memorial drive house, got into the Venza and drove eastbound on Memorial Drive. At some point, surveillance saw an unknown male place a large garbage bag into the rear of the Venza, have a conversation with Ms. Truong and walk away, carrying a small object in his hands.

[20] Constable Dowd offers the opinion that in his experience the contents of the garbage bag "is likely fresh cut marijuana".

[21] Constable Dowd also described one of the investigators seeing the Venza parked at the rear of a house on Aboyne Crescent. The investigator saw a Honda Civic on the street in front of the house, and an unknown female got out of the Civic carrying nothing in her hands. She went into the house. One minute later she emerged carrying a white plastic bag containing white Styrofoam containers. The woman got back into the Civic.

[22] He opines that drug traffickers conduct their transactions inside or close to residences in an effort to conceal their actions and minimize the risk of police intervention or public interference. He described the short time the woman was in the Aboyne Crescent home and says "it is common for drug traffickers to use every day items to disguise the items they are selling and to provide a cover story for the buyer in an effort to minimize the risk of police intervention or public interference.

[23] Constable Dowd then describes the Maitland Green incident, and says of it:

> The observations made by Sgt. Tudor are consistent with drug trafficking. This method is commonly referred to as a "dial-a-dope" transaction where the customer calls the trafficker on a cell phone and arranges a weight and price for the drug…

He concludes at paragraph 23:

> I believe that Truong is responsible for committing the offense of possession of proceeds of crime. Members of the Calgary Police Service have corroborated information that was provided by the Confidential Informant as well observed activity that was consistent with drug trafficking. I have reasonable grounds to believe that a search of the dark grey Toyota Venza, will lead to the seizure of Cocaine, weigh scale, packaging materials, cellular telephones/smart phones and the data contained within, score sheets, ownership documentation, and currency and that these things will afford evidence of possession of a controlled substance for the purpose of trafficking and possession of the proceeds of crime.

[24] Three witnesses testified for the Crown. I will deal with the portions of their evidence that are relevant on the voir dire.

Sergeant Tudor

[25] Sergeant Christopher Tudor testified that his role in this matter was to direct the investigation and supervise the team involved. His duties included corroborating some of the information provided to him from a confidential informant by a source handler. The source

handler had corroborated some of the information himself. Once this had been done, Ms. Truong was targeted and the CPS drug team coined the term "Operation Dingo" for the investigation. Surveillance began on Ms. Truong. Sgt. Tudor participated in the surveillance on June 1. He said Constable Austin Labranche was the "street boss" supervising and coordinating the surveillance (although Constable Labranche testified that he was only involved on June 6).

[26] Sgt. Tudor described his experiences with drug trafficking as a patrol constable, and then over his four years in CPS's drug unit. He testified that during that time, he bought drugs approximately 250 times, and was part of a team that was involved in at least double or triple that amount. He has been involved in drug investigations for all but 2 years of his 18 years on the police force.

[27] Sgt. Tudor testified that at 5:35 pm on June 1, 2017, he saw a gray 2014 Toyota Venza pull up to a house on Maitland Green. The Venza had been previously linked to Ms. Truong, although she was not the registered owner and he could not tell if she was in the Venza at the time. Moments after the car stopped at the house, a younger-looking Asian male walked out of the house and got into the passenger side of the car. Three minutes later, the man got out of the car and returned to the house. The car then drove away.

[28] Sgt. Tudor testified that from his experience as a drug investigator, he believed he had witnessed a drug transaction and that based on what he knew about Ms. Truong, he had grounds to arrest at the time (although he did not know if she was actually present or involved in the transaction).

[29] Following the surveillance on June 1, the team decided that they would do further surveillance and try and stop Ms. Truong when she likely had cocaine in her car with her.

[30] Sgt. Tudor's surveillance notes indicate that surveillance would be conducted to establish people, vehicles, places, and interactions. They would make efforts to try to see Ms. Truong conducting transactions. If a transaction was observed, they would arrange for a traffic stop. Once stopped, the occupant would be detained for investigative purposes.

[31] Sgt. Tudor testified that after June 1, his involvement was mainly speaking to Constable Labranche during the surveillance and listening to events as they occurred in the phone room. On June 6, he was in the phone room listening on the police radio. After the team learned that Ms. Truong had left her Memorial drive residence in her Venza, Constable Labranche instructed a traffic stop of her car. That occurred, and Ms. Truong was detained. The search warrant was executed at the location where the Venza was stopped, and the search team found cocaine and money in the car. Ms. Truong was then arrested for possession of cocaine for the purposes of trafficking and possession of the proceeds of crime, and transported to CPS headquarters-Westwinds.

[32] On cross-examination, Sgt. Tudor was questioned about the locations of various police stations in the general area of the traffic stop. Ms. Truong had been arrested on 8th Avenue SE at 37th Street. Sgt. Tudor acknowledged that the CPS Franklin office is closer to the arrest site than is Westwinds. Sgt. Tudor also acknowledged that he did not check up on Constable Labranche to make sure he was doing his duty regarding Ms. Truong's arrest and the planning and administration of Ms. Truong's section 10(b) *Charter* rights.

[33] On re-examination, Sgt. Tudor said that Ms. Truong was taken to Westwinds because that is where the team was based and that was where any questioning would take place. He said it did

not make sense to take her to the Franklin station even if it was closer because Westwinds was only a few minutes further away.

[34] Sgt. Tudor also acknowledged that he was not able to see who was in the car during the surveillance on Maitland Green he was involved in, although he believed Ms. Truong was the driver. He drew that conclusion from previous surveillance where Ms. Truong was the only driver of the Venza.

[35] Sgt. Tudor also acknowledged that he did not see the transaction he believed had occurred inside the Venza, nor did he see the man carrying anything before he got in the car or after he left it.

[36] He described what he observed as being "consistent with a drug transaction", and when asked what that meant, he said "based on the totality of the investigation to that point, here a long-term informant with 11 points, 7 of which had been confirmed by June 1, a dated history of trafficking and possession for the purposes of trafficking, combine that with observations; if you see someone pulled over to a curb and someone gets in, you normally think nothing of it, but when you know more then that is consistent with a drug transaction".

[37] Sgt. Tudor confirmed that they did no investigation on the man on Maitland Green. They did no investigation on the house there. Mr. Jugnauth asked him if he could have arrested the woman during or following the meeting, and Sgt. Tudor answered "we chose not to" because they wanted to get judicial authorization.

[38] Sgt. Tudor agreed during cross-examination that surveillance at a different location showed a person putting a garbage bag into the Venza. He had presumably learned this from radio communications with other police officers involved in the surveillance. He did not have personal knowledge of this part of the surveillance. Sgt. Tudor believed the garbage bag to contain a significant quantity of marijuana, although no one saw the contents and no one apparently smelled marijuana. On cross-examination, he said "it could have been marijuana". Sgt. Tudor agreed that he then believed he had grounds to arrest, but thought it would be better to get a search warrant.

[39] He also confirmed that they had planned to do more surveillance on June 6, but none took place.

Constable Clark

[40] Constable Stephen Clark testified about the stop on June 6, 2017. He was not part of the drug team, but was in his patrol car. He was requested to conduct a traffic stop of the Venza and did so without incident. All of his interactions with Ms. Truong were recorded by webcam in his police car. Ms. Truong was stopped at 3:12 pm.

[41] The video shows Ms. Truong speaking with Constable Dalton, who placed her under "detention for drug investigation". Constable Clark then took Ms. Truong back to his police car and can be heard asking her to identify herself, and he then tells Ms. Truong she is being detained for a drug investigation, and then reads Ms. Truong her *Charter* rights. She is told she can retain a lawyer without delay. Ms. Truong can be heard telling him she wanted to call a lawyer.

[42] Constable Clark candidly acknowledged that he didn't know if Ms. Truong understood him, but she didn't say anything and she responded appropriately to all of his questions, including her name, her birthdate, her address and her phone number.

[43] He advised her that there was a search warrant for her car, and police were going to do the search right now. Ms. Truong tells him she needs to go to the washroom.

[44] The car video then shows Constable Matt Szabo arrive. He was part of the search team. Constable Szabo can be seen serving Ms. Truong with the search warrant, and asking her if there is anything in the car "he should know about", and she replies no. At some point during the video Constable Clark can be heard telling Ms. Truong she can speak to counsel "immediately".

[45] Constable Clark was instructed to drive Ms. Truong to Westwinds by one of the drug team members. He did so. He confirmed that he did nothing to facilitate Ms. Truong contacting counsel, saying that it was not common practice to give someone a cell phone in a police vehicle and that it was usual to take the person to a district office or to a jail to you a phone there.

[46] He also confirmed that he could get a translator to assist with the arrest and *Charter* process, but he didn't think it was necessary here because it seemed to him that Ms. Truong was understanding what he was saying.

[47] On cross-examination, Constable Clark confirmed that he initially arrested Ms. Truong and handcuffed her before putting her in his police car. He acknowledged that he had no warrant to arrest Ms. Truong, nor did he have any information that she had committed an indictable offence. He had been asked by the drug team to detain her.

[48] He became aware quickly that English was not Ms. Truong's first language, as she had a thick accent and had a broken sentence structure. He did not inquire whether she understood him, or if she wanted a translator. Constable Clark did confirm that Ms. Truong didn't understand him as he read the *Charter* rights to her twice, and she responded that she did not understand. However, he believed he had explained it in plain language and that she was understanding what he was saying.

[49] Constable Clark also confirmed that it would have been closer to take Ms. Truong to the Franklin station instead of Westwinds, but he had been told by the drug team to take her to Westwinds.

Constable Labranche

[50] Constable Todd Labranche was the street boss for Operation Dingo on June 6. He said that was the only day he was involved in Operation Dingo. His objective for June 6 was to continue surveillance on Ms. Truong and the Venza to observe her interactions with other people and for activities consistent with drug trafficking. They set up surveillance at Ms. Truong's residence on Memorial Drive just before 8 am, and eventually watched her leave the residence and drive off in the Venza. They then followed the Venza.

[51] The Venza travelled to different locations over the course of the day, followed by surveillance. At one point, they Ms. Truong arrive at the Century Casino, where she loaded a large black plastic bag from the trunk of the Venza into another vehicle. She then drove back to her residence on Memorial Drive.

[52] When she returned to the residence, another vehicle arrived. A licence plate check showed that vehicle to be registered to a person involved in organized crime. A man got out of

the vehicle carrying a brown bag with him. He went into the house and left a short time later without the brown bag. Ms. Truong then left the residence, went to her vehicle and got a black bag from her trunk and carried it inside the house.

[53] Ms. Truong then returned to her car and drove off. Constable Labranche instructed a vehicle stop. He told Constable Clark to detain Ms. Truong for a drug investigation. Ms. Truong was stopped and detained while he directed the search of the Venza. As a result of the search led by Constable Szabo, he learned they had found what was believed was cocaine and cash in the Venza. Constable Szabo told Constable Labranche what they had found at 3:16 pm. Constable Labranche believed he then made the decision to arrest Ms. Truong. Constable Labranche arrived at the scene at 3:32 pm. As the primary investigator, he felt that he should be the one to arrest Ms. Truong. Constable Labranche went to speak to Ms. Truong, who was by that time in Constable Clark's police vehicle. All of Constable Labranche's interactions with Ms. Truong are recorded by the webcam in Constable Clark's police car. He began speaking to Ms. Truong at 4.23 pm. When Constable Labranche got to Constable Clark's police car, he got into the front passenger seat. He told Ms. Truong that she was under arrest for possession of cocaine for the purpose of trafficking and possession of the proceeds of crime. He rushed through Chartering Ms. Truong. She said she didn't understand him, but when he asks her if she wanted to call a lawyer she said "yes". When he cautioned her, she told him she didn't want to say anything,

[54] Constable Labranche then asked Ms. Truong about her residence and the Venza. She told him that it belonged to her sister-in-law. He then asked her where she was going, and she told him she was going to a restaurant. Constable Labranche then asked her some questions about charges from 2003 and 2005. He said he had no concerns about Ms. Truong's medical state, so he left Ms. Truong in Constable Clark's care.

[55] Constable Labranche had no further involvement in the investigation other than with respect to serving a notice of mandatory minimum punishment on her.

[56] He testified about the decision to take her to Westwinds headquarters where she would be given access to a telephone and could contact a lawyer. They intended to question her there. When asked about why she wasn't taken to a police station closer to the site of the traffic stop so she could contact counsel, Constable Labranche said that Westwinds was where they conducted their investigations, it was relatively close to where they were, and he did not think they should allow her to try to contact counsel from the back seat of a police car with no telephone books or duty counsel number.

[57] On cross-examination, Constable Labranche confirmed he understood that English was not Ms. Truong's first language. He denied that Ms. Truong had a language barrier, as he asked her questions and she answered them. He agreed that he did not ask Ms. Truong if she wanted a translator.

[58] Constable Labranche was questioned about the delay in facilitating Ms. Truong's access to counsel, as well as him questioning Ms. Truong after she had been Chartered and told him she wanted to speak to a lawyer. He agreed that District 4 (Forest Lawn) was closer than Westwinds to where the Venza was stopped.

[59] He was asked if he had been trained that if a detained person asked to speak to a lawyer that was to be in a timely way, and no questioning should occur until she had the opportunity to speak to a lawyer. Constable Labranche testified that was not his training. He understood

someone had to be given access to counsel within a reasonable time, but that he was free to question the detainee in the meantime. Constable Labranche said he asked Ms. Truong some questions and "she decided to answer them".

Positions of Parties

Defence

Section 8 – search and seizure

[60] The Defence argues that the information in the ITO did not demonstrate reasonable grounds to believe there would be evidence related to an offence found in the Venza. The warrant sought and obtained here was a temporal warrant and not a general warrant under the provisions of section 11 of the *Controlled Drugs and Substances Act*. That type of warrant is based on the present belief that an offence has been committed, not that one will be committed. The latter is an anticipatory warrant under section 487.01 of the *Criminal Code*, which has more stringent requirements before it can be granted, including that it can only be granted by a judge.

[61] The Defence objects to the information provided by the confidential informant as being insufficient to be relied on. There is no information as to how many times the confidential informant's information has turned out to be incorrect. There were no details provided of any criminal record, other than that the informant has never been charged with perjury or obstruction.

[62] Conclusory statements from an informant such as here, with statements that Ms. Truong "is a multiple ounce cocaine distributor" and a "multiple pound fresh cut marijuana distributor" should carry little or no weight.

[63] The Defence argues that Ms. Truong's dated criminal record should have little probative value here.

Section 9 – grounds for detention and arrest

[64] This was a warrantless arrest. The Defence argument is that but for the results of the vehicle search that was carried out under a flawed search warrant, there was no reasonable basis for Constable Labranche to arrest Ms. Truong. Constable Clark, who initially arrested Ms. Truong, had no reasonable basis at all to arrest Ms. Truong. He did so erroneously, having been told by the drug team to detain Ms. Truong for a drug investigation.

Section 10 - legal rights on detention and arrest

[65] The Defence says that with respect to section 10(a), the right to be informed, CPS took insufficient steps to ensure that Ms. Truong, whose first language is Vietnamese, understood her rights and was able to make an informed decision to decline to submit to the detention or to undermine her right to counsel.

[66] With respect to section 10(b), the Defence argues that CPS failed to facilitate Ms. Truong's request to speak to counsel without delay in that she was detained on site while CPS searched the Venza, and when they did take her to a police station where she could exercise her right, they took her to Westwinds headquarters instead of the Franklin station, which was closer.

Crown

[67] The Crown argues that the search warrant was properly issued and that the resulting searches did not breach Ms. Truong's section 8 rights to not be subjected to unreasonable search and seizure.

[68] Regarding section 9, the right to be free from unreasonable detention and arrest, the Crown's position is that there was no breach. When Ms. Truong was stopped on June 6, she was found committing an indictable offence, or that there were reasonable grounds to believe she was committing an indictable offence such that she could be detained and arrested without a warrant under section 495(1)(a) and (b) of the *Criminal Code*.

[69] With respect to section 10, Ms. Truong's legal rights, the Crown says that she demonstrated a "working, basic knowledge of English" and she was asked minimal questions, mainly to do with establishing her identity and to assist in the execution of the search warrant for the Venza. Her answers to questions asked of her provided no evidence which could be excluded under section 24(2) of the *Charter* as she provided no evidence whatsoever. The cocaine which the Crown will seek to introduce was found before Ms. Truong was asked any questions.

Case law

[70] The Defence referred to a large number of cases. Its list resembles an encyclopedia of *Charter* cases. The Crown added a few more. I will cite them, but I will only refer to the ones that are particularly germane to this matter. I have also referred to a number of cases not cited by counsel.

Defence

Hunter v Southam Inc, [1984] 2 SCR 145;

R v Caslake, [1998] 1 SCR 51;

R v Collins, [1987] 1 SCR 265;

R v Morelli, 2010 SCC 8;

R v Gilmour, 2017 ABQB 735;

R v Herta, 2018 ONCA 6;

R v Jodoin, 2018 ONCA 639;

R v Lucas, 2014 ONCA 561;

R v Araujo, 2000 SCC 65;

R v Garofoli, (1990), 60 CCC (3d) 161 (SCC);

R v McDonald, 2017 ABQB 778;

R v Debot, [1989] 2 SCR 1140;

R v Greffe, (1990), 53 CCC (3d) 316 (SCC);

R v Mackenzie, 2013 SCC 50;

R v Feeney, (1997), 115 CCCC (3d) 129 (SCC);

R v Quilip, 2017 ABCA 70;

R v McGuffie, 2016 ONCA 365;

R v Ly, 2019 SCC 33;

R v Evans, (1991), 63 CCC (3d) 289 (SCC);

R v Lund, 2008 ABCA 373;

R v Suberu, 2009 SCC 33;

R v Prosper, (1994), 92 CCC (3d) 353 (SCC);

R v Bartle, (1994), 92 CCC (3d) 289 (SCC);

R v Sinclair, 2010 SCC 35;

R v Taylor, 2014 SCC 50;

R v Black, (1989), 50 CCC (3d) 1 (SCC);

R v Mian, 2011 ABQB 290;

R v Mian, 2014 SCC 54;

R v Tieu, 2016 ABQB 344;

R v GTD, 2018 SCC 7;

R v Hoang, 2017 ABQB 313;

R v Karlo, 2016 ABPC 92;

R v Pino, 2016 ONCA 389;

R v Kenowesequape, 2018 ABQB 135;

R v Lam, 2016 ABQB 736;

R v Paulishyn, 2017 ABQB 61;

R v Harrison, [2009] 2 SCR 494;

R v McSweeney, 2020 ONCA 2;

R v Rover, 2018 ONCA 745;

R v Poirier, 2016 ONCA 582;

R v Al-Molati, 2019 ONSC 6035; and

R v Al-Molati, 2019 ONSC 7263.

Crown

R v Piries, R v Lising, [2005] 3 SCR 343;

R v Jacobson, 2006 CanLII 12292 (ONCA); and

R v Ha, 2018 ABCA 233.

Analysis

Section 8

[71] The search of the Toyota Venza that led to the discovery of over a kilogram of cocaine and a relatively small amount of cash followed a search warrant for the Venza. The warrant was obtained based in the ITO sworn by Constable Dowd on June 5, 2017. The warrant was sought and granted under section 11 of the *Controlled Drugs and Substances Act*, SC 1996, c 19. It provides:

> **11 (1)** A justice who, on *ex parte* application, is satisfied by information on oath that there are reasonable grounds to believe that
>
> > **(a)** a controlled substance or precursor in respect of which this Act has been contravened,
> >
> > **(b)** any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,
> >
> > **(c)** offence-related property, or
> >
> > **(d)** any thing that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the *Criminal Code*
>
> is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

[72] In the Bible of section 8 cases, ***Hunter v Southam*** is Genesis. It continues to provide the guiding principles for the interpretation and application of section 8 of the *Charter*. ***Morelli*** provides instructions to the reviewing Court at paragraphs 39-41:

> [39] Under the *Charter*, before a search can be conducted, the police must provide "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search" (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 168). These distinct and cumulative requirements together form part of the "minimum standard, consistent with s. 8 of the *Charter*, for authorizing search and seizure" (p. 168).
>
> [40] In reviewing the sufficiency of a warrant application, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.

> [41] The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58). Furthermore, the reviewing court may have reference to "amplification" evidence — that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO — so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.

[73] Justice Renke summarizes the law on reasonable and probable grounds in ***Gilmour*** at paragraphs 9 – 13:

> [9] Reasonable and probable grounds to believe that an offence has been committed and that evidence of that offence would be found at a specified time and place refers to a level of proof that is
>
> - less than proof beyond a reasonable doubt - that is, the guilt of the suspect is not the *only* reasonable inference based on the evidence; reasonable and probable grounds for belief do not exclude inferences that the suspect is innocent: ***Clow*** at para 13.
> - less than proof on a balance of probabilities - that is, the guilt of the suspect is not more likely than his or her innocence; reasonable and probable grounds to believe do not depend on a comparison of the respective weights of the inferences of guilt and innocence: ***Mugesera v Canada (Minister of Citizenship and Immigration)***, [2005] 2 SCR 100, 2005 SCC 40 at 114. In my opinion, both the reasonable grounds and proof on a balance of probabilities standards share a requirement that the requisite inferences be *probable* – i.e., more than trivially likely and not *unlikely*. The reasonable grounds standard, though, does not involve a comparison of the requisite probabilities to the probabilities of other competing inferences. The balance of probabilities standard, in contrast, does involve this comparison. That is, the reasonable grounds standard does not require that the inferences sought be the most likely or the more likely inferences arising from the evidence. No particular degree of probability or likelihood is specified by the reasonable grounds standard. Probability, of course, may range from low to high. In my view, the degree of probability must be approached normatively. The issue is whether the inferences sought are sufficiently probable to justify State interference with reasonable expectations of privacy.
> - more than reasonable suspicion (and certainly more than mere suspicion) - that is, the evidence supports a reasonable

> likelihood, not only a possibility, that an offence has been committed and that evidence of that offence will be found as specified: ***Mugesera v Canada*** at 114; ***R v Kang-Brown***, 2008 SCC 18 at para 75; ***R v Chehil***, 2013 SCC 49 at para 27; ***R v Sanchez***, 1994 CarswellOnt 97, 1994 CanLII 5271, 93 CCC (3d) 357 (Gen. Div), Hill J at paras 30-32 (CarswellOnt); ***Uppal*** at para 29.

[10] In a word, reasonable and probable grounds to believe entail a finding of credibly-based *probability*, an inference with some appreciable or non-trivial likelihood based on the evidence that does not exclude other competing inferences: ***Hunter v Southam*** at 167-8; ***Sanchez*** at para 30 (CarswellOnt). According to Justice Martin in ***Clow*** at para 90,

> [90] ...While certain conduct of the Accused may be open to various inferences, including innocence, it is sufficient if the issuing justice reasonably relied upon one of those available inferences in finding reasonable and probable grounds to issue the warrant.

[11] The belief, finding, or inference that it is probable that an offence has been committed and that evidence of that offence would be found as specified must be based on "credible" evidence: the standard is one of *credibly-based* probability: ***Clow*** at para 10. ***Mugesera*** refers in para 114 to "compelling and credible" information. ***Morelli*** and ***Aranjo*** refer to "reliable" evidence that might reasonably be believed and to credible and reliable evidence.

[12] The belief, finding, or inference is objective. The perspective is that of the reasonable person. More precisely, the perspective is that of the reasonable person "standing in the shoes of a police officer:" ***Sanchez*** at para 32 (CarswellOnt). Police training and experience may permit an appreciation of the significance of facts that persons without that training and experience would miss.

[13] In ***R v Quilop***, 2017 ABCA 70 at para 27, the Court of Appeal reminded reviewing judges not to degrade the reasonable probability standard into the reasonable possibility standard:

> [27] ... It is not enough to suspect that a targeted individual is engaged in criminal activity. A suspicion is no more than a feeling that an assumed set of facts might possibly obtain. Reviewing judges must not substitute the more demanding reasonable grounds standard with the less onerous standard of reasonable suspicion.

The evidence properly relied on must show a reasonable likelihood or probability that the suspect is or was engaged in the alleged criminal activity and that evidence of that criminal activity is reasonably likely to be found at the place to be searched.

[74] So, the question here is whether Constable Dowd had reasonable and probable grounds to believe that the Toyota Venza registered driven (but not owned) by Ms. Truong contained

evidence in respect of her being in possession of drugs for the purposes of trafficking, or in possession of the proceeds of crime.

[75] This was not a general warrant, or an anticipatory warrant as described in section 487.01(1) of the *Criminal Code*:

> **487.01 (1)** A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if
>
> > **(a)** the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
> >
> > **(b)** the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
> >
> > **(c)** there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

[76] So, what was the warrant based on? The ITO sets out a number of grounds:

1. A confidential informant told CPS that Ms. Truong:
    a. was selling a large volume of cocaine and marijuana;
    b. Lives on Memorial Drive, drives a Toyota Venza, uses a particular telephone number, owns a nail salon, gambles and frequents the Grey Eagles Casino; and
    c. Has been previously investigated by CPS for drug offences;
2. Background information on the informant including that he has:
    a. provided information on 10 previous occasions;
    b. proven reliable and has aided CPS with multiple seizures of stolen property, illegal narcotics, and firearms;
    c. obtained his information through associating with criminal;
    d. a criminal record but has never been charged with perjury or obstruction;
    e. provided information as a moral obligation.
3. That Ms. Truong was convicted of possession of a controlled substance for the purpose of trafficking in 2003 and again in 2005;

4. Covert surveillance corroborated some the information provided by the informant, including observing activities that are consistent with drug trafficking;
5. Sergeant Leckie saw Ms. Truong leave from the Memorial Drive residence, get into the Venza and drive away. He then later saw a man put a large garbage bag into the rear of the Venza, and have a conversation with Ms. Truong. He then walked away carrying a small object in his hands. Constable Dowd opines that he believes the contents of the black garbage bag was fresh cut marijuana;
6. Constable Perkins saw the Venza parked at the rear of an address on Aboyne Crescent. A woman got out of a car parked in front of the address carrying nothing, went to the front door of the residence there, and emerged a minute later carrying a white plastic bag carrying white Styrofoam containers and get back in her car. Constable Dowd opines that drug traffickers conduct their transactions inside residences for concealment purposes, and they use every day items to disguise what they are selling and to provide a cover story for the buyer;
7. Sgt. Tudor saw the Venza park at a Maitland Green address and an unknown male coming out of the resident, getting into the Venza and leaving three minutes later. Constable Dowd describes that as a dial-a-dope transaction.

[77] Constable Dowd says that he believes that Ms. Truong is responsible for committing the offence of possession of a controlled substance for the purpose of trafficking and is in possession of the proceeds of crime. He also believes that a search of the Venza will yield to the seizure of cocaine, weigh scale, packaging materials, cellular telephones/smart phones and the data contained within, score sheets, ownership documentation, and currency. He believes these things "will afford evidence of possession of a controlled substance for the purpose of trafficking and possession of the proceeds of crime".

[78] The Defence raises an issue that the search warrant here was related to trying to find evidence of an offence that had been committed, here possession of cocaine for the purposes of trafficking and possession of the proceeds of crime. They cite ***Morelli*** at paragraph 40 which says that there needed to be reasonable and probable grounds to believe the Venza would contain evidence of that offence or those offences instead of applying prospectively. For evidence of crimes that had not yet been committed, CPS needed a general warrant.

[79] That is an intriguing argument, but in the case of possession of illicit things (like drugs, stolen property and firearms) the offence is a continuing offence for as long as the suspect has the thing in his or her possession. I do not think, at least on the facts here and for the purposes of the offences Ms. Truong is charged with here, that the scope of a search warrant obtained under the CDSA is limited to looking for evidence of a specific crime that has already been committed. They believed Ms. Truong was a drug trafficker, from surveillance they believed they had observed drug transactions or behaviour consistent with that of a drug trafficker, and believed that they would find evidence that she was a drug trafficker in the car she drove.

[80] I do not think a general warrant was required for the purposes of searching the Venza for evidence that Ms. Truong continued to be in possession of drugs for the purposes of trafficking, and that she continued to be in possession of the proceeds of crime. It was not necessary for them to look only for evidence supporting their conclusions about the suspected offences they observed.

[81] If the latter were required, that would unduly limit the scope of a search warrant under the CDSA,

[82] At the outset of my analysis, I wonder Constable Dowd believed the Venza would contain "weigh scale, packaging materials and score sheets"? And if Sgt. Tudor believed the garbage bag put in the Venza on June 1 contained a large quantity of marijuana, why did they not stop the Venza then? And why did Sgt. Tudor and Constable Labranche stop the Venza and execute the search warrant on June 6 when they had seen nothing that would suggest that Ms. Truong was going to conduct a transaction?

[83] There is a sense that they jumped the gun. CPS had conducted surveillance of Ms. Truong for 3 days. They had obtained a search warrant. But instead of immediately executing the search warrant on June 5 or June 6, they conducted most of a day of surveillance, hoping to stop the Venza with Ms. Truong in it at a time they thought she was about to do a drug deal. However, despite seeing nothing of the sort on June 6, they eventually stopped the Venza. Sgt. Tudor commented about CPS not having unlimited resources, suggesting that they needed to finish this investigation.

[84] In any event, I must review the ITO for its sufficiency. The test from ***Araujo*** is cited at paragraph 40 in ***Morelli***: "whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place".

[85] ***Morelli*** was a case about child pornography. In reviewing the ITO, the Supreme Court concluded at paragraph 44:

> Once these flaws are taken into account, it becomes clear that the ITO, as reduced and amplified, could not possibly have afforded reasonable and probable grounds to believe that the accused possessed child pornography and that evidence of that crime would be found on his computer at the time the warrant was sought or *at any time*.

[86] In this case, there was no ***Garofoli*** application and only two of the surveillance officers testified. I will comment on each of the grounds set out in the ITO. The source handler appears to have a lot of faith in the informant here, and is justifiably keen to protect his confidentiality. That explains the absence of some details that would make the information more compelling.

1. Confidential Informant Information

[87] As held in ***Gilmour*** at paragraph 21, there are five elements to consider in the context of informant information (from ***R v Caissey***, 2007 ABCA 380, aff'd 2008 SCC 6):

1. The age of the information;
2. The content of the information;
3. The sources of the information;

4. The reliability and credibility of the informant; and
5. Corroboration of the information.

[88] The age of the information is not provided, although the informant gives apparently current information about Ms. Truong's activities, and other information about her background. I do not see the absence of information as to the age of the information being a defect or deficiency here.

[89] The content of the information is largely unremarkable, such as where Ms. Truong lives, what kind of car she drives, her telephone number, and that she owns a nail salon. None of that is particularly secret. More notable, however, is the informant's knowledge of Ms. Truong's previous involvement with CPS and their knowledge that she gambles at a particular casino. Their information about her drug trafficking activities was specific: multiple ounce cocaine transactions and large quantity freshly cut marijuana transactions. They do not describe her as a dial-a-doper or someone who runs dial-a-dopers. The information suggests someone who knows a fair bit about Ms. Truong, or who has been told a fair bit about her.

[90] There is scant information about their sources. That is understandable because of the need to protect the informant's identity, but "associating with criminals" is so vague as to be unhelpful. It does not, for example, say the informant has been in the drug trade or provide any compelling information that what they have learned is other than rumor or gossip.

[91] Reliability and credibility are only partly established. It is helpful that the informant has given information on some 10 previous occasions and that their information has resulted in numerous seizures. There is no information as to how many times their information has <u>not</u> been reliable or helpful. Of greater concern is the fact that there are no details given of their criminal record. The informant obviously has one. It is of little assistance to simply say they have never been charged with perjury or obstruction. That begs the question about crimes of dishonesty like fraud and theft and other things that relate to assessing a person's reliability. The motivation of "moral obligation" may be a positive factor as informers for money may be less credible than differently-motivated informants, although "moral obligation" can cover a wide range of intentions including spite or revenge.

[92] Corroboration is to be considered as at the time the ITO is sworn or affirmed. The address provided was different from where Ms. Truong appeared to come and go to during the surveillance. She was seen driving the Venza. Her telephone number matched with records available to CPS. She owned the business referred to by the informant. Ms. Truong had previous involvement with CPS, being two drug convictions. And she was seen at the casino referenced by the informant. Surveillance did not corroborate Ms. Truong being involved in multiple ounce cocaine transactions or large quantity fresh cut marijuana transactions. Sgt. Tudor saw what he believed was a dial-a-dope transaction. Sergeant Leckie saw someone put a large bag in her trunk, talk to Ms. Truong and carry something small back to his car. Without more, it is difficult to conclude the bag likely contained fresh cut marijuana or that there had been a drug transaction of any kind at all. Constable Perkins saw the Venza at a residence on Aboyne Crescent, where a woman stopped in front and went into the residence. She emerged a few minutes later carrying a bag with Styrofoam containers in it. Without more, it is difficult to conclude that a drug transaction of any kind had taken place.

[93] In my view, this is a situation where the informant information is somewhat weak. What he got right and what was confirmed before the ITO was affirmed was mixed. More importantly, there is limited information with which to assess his credibility and reliability.

[94] Justice Renke commented on the reliability of informant information relating to the number of times informant has provided information and what has resulted from that information in ***Gilmour***. At paragraphs 27 and 28 he stated:

> [27] The ITO did not support a finding that the CI's information was strongly reliable. Cst. Kowalchuk had known the CI for less than a year. Cst. Kowalchuk did state that the CI had "provided reliable, actionable information in the past, subsequently used twice in CDSA warrants to seize drugs." Moreover, the CI "has provided information on other individuals involved in criminal activity," and "has been used as intelligence and has been corroborated through various investigations and techniques" (para 19). However, Cst. Kowalchuk did not disclose whether any convictions or even any charges arose from the CI's information. See ***Uppal*** at para 55. The reference to "various investigations and techniques" was too vague to be useful.
>
> [28] In terms of testing of the CI's information, the CI was not a first-time untested source; but the evidence does not point to independent or authoritative confirmation of the CI's information.

[95] The same can be said here. While the source handler had obtained information from the informant on ten occasions, there was no information given about charges or convictions; only "seizures".

[96] As to credibility, Renke J stated at paragraphs 29 and 30:

> [29] Cst. Kowalchuk stated that the CI "does not have any convictions for Fraud, Obstruct[ion of] Justice, Public Mischief or Perjury." This recitation was more useful than a simple claim that the CI had no convictions that would cause an affiant "to doubt the authenticity of the information provided" (***Gore*** at para 18). Nevertheless, more complete criminal record information could have been provided, including whether the CI *had* any criminal record. See ***Uppal*** at para 55. Protecting CI safety or operational value would demand that a criminal history not be so detailed that it would serve as identifying information.
>
> [30] The nature of the CI's allegations, the lack of specification of the CI's sources of information, and the inadequate information about the CI's reliability and credibility entail that the CI's information can be given little weight. As in ***Quilop*** at para 29,
>
> > Given the frailties of this informant's information, the focus must be on what the police actually observed or at least on additional independent information.

[97] In ***Herta***, the Ontario Court of Appeal discussed similar issues at paragraph 42:

> [42] The most significant concern lies with whether the CI information was compelling. As noted by Martin J.A. in *R. v. Debot* (1986), 1986 CanLII 113 (ON CA), 30 C.C.C. (3d) 207 (Ont. C.A.), at p. 219, and later adopted by Wilson J. on

> appeal, "[h]ighly relevant to whether information supplied by an informer constitutes reasonable grounds" are considerations involving whether "the informer's 'tip' contains sufficient detail to ensure it is based on more than mere rumour or gossip" and "whether the informer discloses his or her source or means of knowledge". Bald conclusory statements cannot support the veracity of CI information: *Debot*, at p. 1168-9; *Rocha*, at para. 26.

[98] The Court there concluded at paragraph 34:

> [34] Even so, it is the totality of circumstances that informs the strength of the CI information. Accordingly, weakness in one of the *Debot* criteria can be compensated for by strengths in the other areas.

[99] I said something similar to that in ***Gore*** at paragraph 34, describing informant information as a spectrum: the more trustworthy the informant the more reliable his or her information is likely to be. After reviewing many of the authorities referred to in ***Herta***, I concluded that the informant evidence was weak. The surveillance evidence disclosed ambiguous information. No actual exchanges were observed and there was no information as to what was exchanged if anything. I concluded at paragraph 106 that there was nothing in the information presented that escalated suspicion to reasonable probability.

[100] In ***Gilmour,*** Renke J referred to the Alberta Court of Appeal decision in ***Quilop*** (as did I in ***Gore***) referencing the Court of Appeal's conclusion in that case at paragraph 26:

> [26] With respect, we are of the view that the trial judge erred in concluding that the facts he found amounted to reasonable and probable grounds for arrest. It is important to note that there were very few surveillance observations: two, to be exact. And not only were they consistent with lawful behaviour, but there was also nothing in the observed behaviour which objectively suggested the appellant had committed or was about to commit an indictable offence. The police simply suspected drug trafficking. Mere suspicion cannot justify an arrest.

[101] Similar conclusions were reached in similar circumstances by Moreau J (as she then was) in ***Uppal***.

[102] In ***R v Warsame***, 2018 ABCA 339, the Court of Appeal considered the weight to be given to information given to police by confidential informants and the competing interests in testing the informant's credibility and the informant's confidentiality (and safety), stating at paragraph 9:

> [9] Relying on information received from informants creates a tension between protecting the informer privilege and the right of the accused to make full answer and defence. The Crown, the police and the court have no ability to waive the informer privilege, which must be studiously protected: ***Named Person v Vancouver Sun***, 2007 SCC 43 at paras. 19, 21, 26, 30, [2007] 3 SCR 253. Being too precise about the source of the informants' information, or providing too much detail about their criminal records, might well expose their identity. The informant privilege can only be compromised when it is absolutely essential because innocence is at stake: ***Named Person*** at paras. 27-8. The appellant has not demonstrated that merely attempting to undermine the credibility of the informants, so as to undermine the foundation of the warrant, meets that test: ***R. v***

> ***Leipert***, 1997 CanLII 367 (SCC), [1997] 1 SCR 281 at paras. 27, 32.
> Accordingly, any gaps in the information provided about the informants did not preclude the issuance of the warrant.

[103] In that case, police had observed a number of interactions consistent with the information provided by the informant.

[104] My conclusion on the confidential informant's information in this case is that it is on the weaker end of the spectrum with reference to the generality of the drug trafficking information given and the absence of much information that would allow the reader to make any meaningful assessment of the informant's reliability and credibility. In particular observations about fresh cut marijuana are extremely speculative, being based on one observation of a garbage bag. The only other "transaction" observed was believed to be a dial-a-doper transaction which suggests low level trafficking and not "multi ounce distributions". As in ***Herta*** and ***Gilmour***, corroboration of weak informant information requires significantly more by way of subsequent observations and investigation by CPS.

2. Criminal record

[105] How much store can be placed on a criminal record for related offences? Here, the ITO contained information about convictions in 2003 and 2005. The offences here took place in 2017, 12 years later than the last conviction. Dated criminal records are of little assistance and while they may add to the suspicion, they do not establish guilt or probable guilt. Jurors are told that all the time.

[106] My conclusion on Ms. Truong's dated criminal record is that it is of very little assistance in the analysis of the sufficiency of the information provided in the ITO. It is not irrelevant, but its impact declines with age. It creates suspicion but nothing more.

3. Covert surveillance

[107] Covert surveillance was conducted on May 29, June 1 and June 6, 2017. Over the three days of surveillance, three incidents were included in the ITO by Constable Dowd as being significant.

[108] The first was on May 29. Sergeant Leckie saw Ms. Truong leave from the Memorial Drive residence, get into the Venza and drive away. He then later saw a man put a large garbage bag into the rear of the Venza, and have a conversation with Ms. Truong. The man then walked away carrying a small object in his hands. Constable Dowd says that he believes the contents of the black garbage bag to be fresh cut marijuana. The basis for his belief is his experience as a drug investigator with CPS.

[109] Of note, there was nothing reported as to the time of day or the location where this occurred. There was nothing to suggest there was anything surreptitious about this incident and there is nothing to suggest that it did not occur in a public place in plain view in daylight hours. Nothing else of significance was reported on May 29.

[110] The second was on June 1. Constable Perkins saw the Venza parked at the rear of an address on Aboyne Crescent. A woman got out of a car parked in front of the address carrying nothing, went to the front door of the residence there, and emerged a minute later carrying a white plastic bag carrying white Styrofoam containers and get back in her car. Constable Dowd opines that drug traffickers conduct their transactions inside residences for concealment

purposes, and they use every day items to disguise what they are selling and to provide a cover story for the buyer.

[111] There is no information that Ms. Truong (who does not own the car) had driven the Venza there, or was inside the residence, or had anything to do with the residence, the woman who went in, let alone whether she had any dealings with the woman inside.

[112] Later on June 1, Sgt. Tudor saw the Venza park in front of a residence on Maitland Green. He could not see who was driving the Venza. An unknown male came out of the residence and got into the passenger side of the Venza. He remained there for three minutes, then got out of the Venza and returned to the residence. Sgt. Tudor didn't see or hear what was going on inside the Venza, and he did not see the male carry anything away with him. Constable Dowd describes that as being consistent with a dial-a-dope transaction.

[113] One of the difficulties with the observations in general is that there is no apparent continuity of the surveillance. It is only speculation that Ms. Truong was in the Venza at the time.

[114] What reasonable conclusions do these observations lead to? The Crown cites ***Ha*** from the Alberta Court of Appeal in 2018. There, the Court of Appeal upheld the trial judge's conclusion that a police officer had reasonable grounds for arrest on the basis of his observations. The constable had been conducting surveillance with the Edmonton Police Service drug unit. He was a 7-year veteran and had spent a year and a half with the gang and drug unit. He had participated in some 30 drug investigations and 75 drug transactions.

[115] Unrelated to his investigation, he noticed a car with a lone occupant enter the parking lot he was conducting surveillance from. The car passed slowly in front of his vehicle and then parked with its engine running in an area of the lot where there were no vehicles within a 30 to 50 foot radius. He thought the person may be waiting for someone. The occupant remained inside the car, and it stayed there for about 3 minutes. The constable ran the licence plate. A few minutes later, the car drove past the constable's car again, and parked in another location in the parking lot. The constable lost sight of the car for about one minute. When he regained contact, he saw the front passenger door open, and an Asian male exited the car and walked about 30 or 40 feet to another vehicle. The constable described the Asian male as "looking around the parking lot, alert to his surroundings" (at paragraph 5).

[116] The constable ran the licence plate for the Asian male's vehicle and learned the registered owner's name. He believed he had observed a drug transaction and that he had grounds to arrest both the Asian male and the occupant of the car he had been watching.

[117] The basis for his conclusion was his experience. The trial judge found it significant that the cars were located in an isolated area in the parking lot, the transaction was a quick one, no more than two minutes, and the transaction occurred within a vehicle where the exact interchange could not be observed (at paragraph 7).

[118] Because the constable did not have the equipment with him to make an arrest of either or both participants in the transaction he believed occurred, he asked his sergeant which of the two individuals he had identified was more likely to be the supplier. His sergeant, also an experienced drug investigator, responded that the driver of the second vehicle was a "a "high level drug dealer" and was Asian.

[119] The majority in the Court of Appeal commented on ***McClelland*** and ***Clayton***, concluding at paragraphs 26-30:

> [26] Cst Campeau witnessed a suspected drug transaction between the drivers of the Maxima and the Acura. Although at that time, he may have honestly believed he had grounds to make an arrest, he did not immediately do so. Instead, he put out a call over the police radio asking if either of the names of the registered owners of the vehicles were known to EPS, in particular, the drug squad. The information received in reply from his senior officer, an experienced drug investigator, was that the registered owner of the Acura, named Michael or Mike Ha, was involved in high-level drug trafficking and would be the likely supplier in any drug transaction.
>
> [27] There was no reason why Cst Campeau would have reason to question the trustworthiness of the information provided by Sgt. Berge; its reliability was based on Cst Campeau's own experience in illicit drug enforcement but also on his involvement with Sgt. Berge in this capacity.
>
> [28] Whether the *totality* of the evidence supports an objective finding of reasonable and probable grounds to arrest, is assessed through the eyes of the reasonable person with the experience and knowledge of the arresting officer. I agree that "[w]hatever the precise measurement of the degree of certainty required for a warrantless arrest, here the information disclosed to [Cst Campeau] prior to the time of the arrest was sufficient to allow a reasonable person in his position to conclude that there was reasonable grounds to arrest": ***Can v Calgary Police Service***, 2014 ABCA 322 at para 9, 584 AR 147.
>
> [29] In my view, the trial judge was correct in concluding that the information provided by Sgt. Berge, combined with Cst Campeau's experience and knowledge about drug transactions and his observation of a suspected drug transaction between the drivers of the two vehicles, sufficiently grounded the objective reasonableness of the subjective belief in the requisite reasonable and probable grounds for arrest.
>
> [30] These cases are heavily fact-driven. When comparing facts on a case-by-case basis, inevitably there will be quantitative and qualitative differences in the evidence. Nonetheless, there is only one applicable standard to be applied by a judge undertaking such an evidentiary review.

[120] The majority commented on two of the Court's earlier decisions ***Quilop*** and ***Bui***, which have been interpreted as articulating a standard closer to the more than likely than not point on a certainty scale. As well, they have been interpreted as requiring the police to eliminate innocent explanations for their observations. The majority held that "to the extent that these cases are understood to have imposed additional legal requirements, or laid down fixed rules, they are being over-read because such requirements do not accurately state the law" (at paragraph 31).

[121] In his concurring decision, Slatter JA commented on ***Bui*** at paragraph 69:

> The suggestion in ***Bui*** that trial judges must search for some legal point on the spectrum between suspicion and balance of probabilities which marks "reasonable grounds" should not be read as changing the underlying standard.

[122] He concluded at paragraph 70:

> [70] In summary, "reasonable grounds to believe" requires a factually based likelihood that there are grounds for the arrest, rising above mere suspicion, but not necessarily demonstrating grounds on a balance of probabilities. The test must be applied in a common sense manner, having regard to the circumstances in which the police find themselves, and the entire constellation of facts. The court must ask if there are objectively verifiable facts that would have caused a reasonable person with the training and experience of the police officer, who was aware of the information known to the officer, to believe in the facts supporting the arrest.

[123] The Court of Appeal noted in ***R v Zolmer***, 2019 ABCA 233 that ***Quilop*** "is an outlier in the cases of this Court because it overstates the requirements on the police respecting how to address the circumstances were the circumstances (which are to be considered in their totality) might conceivably have an innocent explanation." (at paragraph 40).

[124] That case also approved the comment from ***Ha*** that "analytical purity is not to be expected during roadside dynamics" (at paragraph 42).

[125] ***Ha*** was approved in ***R v Warsame***, 2018 ABCA 233 for the point that "the mere possibility of innocent explanations does not preclude the officers from having reasonable grounds to believe that the transactions were criminal in nature: (at paragraph 10).

[126] The latter comment is difficult to reconcile with the Court's decision in ***R v NO***, 2009 ABCA 75. There, the Court of Appeal was critical of the trial judge's reliance on the investigating police officer's opinions based on his experience. The Court commented at paragraphs 41-43:

> [41] The Crown points to the hand-to-hand exchange which, in the officer's experience, was typical of drug transactions. But in many innocent circumstances one person may hand a small object (such as a key or an earring) to another. Without information about the individuals or the building, the fact of a hand-to-hand exchange shortly after midnight does not elevate the circumstances to the objectively reasonable level necessary to justify detention.
>
> [42] The trial judge appears to have placed some weight on the fact that there was no conversation as the exchange took place. But a quick innocent exchange of, say, a key, might have been preceded by an earlier telephone conversation; a jilted boyfriend might hand over an apartment key or a ring to his former partner without conversation.
>
> [43] The trial judge also emphasized that the exchange did not take place in a park or other public place. She did not explain why an exchange in an apartment lobby is more suspicious than one in a park or other public place.

[127] My conclusion from reviewing these decisions is that ***Ha*** is the Alberta Court of Appeal's guiding authority on police observations factoring into whether there are reasonable and probable grounds for arrest. That is the same test for granting a search warrant.

[128] Other observations relevant to the facts and circumstances in this case are that:

1. The cases are highly fact driven;

2. ***Quilop*** is of little or no authority, as is ***Bui***, and they should be read carefully and limited to their facts;
3. The test for reasonable and probable grounds is not on a balance of probabilities, but rather on "reasonable probability" (***Ha***);
4. Inconsistencies do not preclude the formation of reasonable grounds to believe an offence is occurring or has occurred (***Warsame***);
5. considerable deference will be given to the opinions of police officers experienced in drug trafficking (***Ha***);
6. innocent explanations for observations made during surveillance by experienced police officers are less important than they were considered to be in ***NO*** (***Ha***);
7. Less scrutiny will be given to arrests in exigent circumstances such as roadside dynamics (***Ha*** and ***Zolmer***);
8. The time for assessing the sufficiency of the arresting officer's reasonable and probable grounds is immediately prior to the arrest (***Clayton*** and ***Ha***); and
9. One officer can rely on information received from another officer (***Ha*** and ***Warsame***);

Decision on Search Warrant

[129] I am of the view that there was no reasonable basis for the search warrant to have been issued. The information in the ITO did not move past reasonable suspicion to reasonable grounds. The informant information, which was the strongest of the evidence put into the ITO was lacking.

[130] The bald statement that while the informant has a criminal record there have been no perjury or obstruction charges against them is insufficient to make any meaningful assessment of credibility. The reliability information is lacking as well; while there have been seizures, there is no information about arrests, convictions and equally important instances where the information has been incorrect.

[131] While the informant obviously had some knowledge about Ms. Truong, the source of the knowledge (associating with criminals) is skimpy. And here, the fundamental allegations: that Ms. Truong dealt cocaine in multiple ounce quantities and fresh cut marijuana in large quantities were not verified in any meaningful way. The surveillance by CPS gave some reasonable basis for suspicion, but nothing that moved past that low threshold.

[132] The surveillance unearthed nothing but for the one incident outside a house on Maitland Green. That was consistent with a dial-a-dope transaction. Those are small quantity transactions. But there was no information that Ms. Truong was actually in the vehicle at the time. The incident involving the large bag being placed in the trunk of the Venza involved Ms. Truong, but it occurred in an open and public way. It could have been fresh cut marijuana in the bag; it could have been any number of other things. One of the hallmarks of drug transactions – surreptitious

behaviour – was clearly lacking. Nothing is known about the man who put the bag in her trunk, and there was apparently no attempt to find out what was actually in the bag.

[133] What was observed at Aboyne Crescent should not have not been included in the ITO. Constable Dowd was not sure enough of what occurred there to express a clear opinion that there had been a drug transaction, but the wording of the ITO leads the reader to assume that the women went to the house to purchase drugs and emerged carrying drugs, camouflaged in Styrofoam containers. Constable Dowd takes pains to talk about drug transactions in a residence where they cannot be observed and the use of ordinary materials to disguise the contents. The intent of including this information in the ITO is clear, otherwise its inclusion is irrelevant.

[134] Whatever occurred on Aboyne Crescent did not involve anyone coming or going from the Venza, and there is no information that Ms. Truong was in the house. Nevertheless, the incident was used to describe the habits of drug dealers. Using that incident to support a search warrant for a vehicle parked behind the house is such a stretch it should be excluded. However, keeping it in provides nothing on which a search warrant could be based in any event and suggests Constable Dowd was trying to inflate Sgt. Tudor's observation from Maitland Green that did not include Ms. Truong by adding one incident (the bag in the trunk) that might rise to suspicion but nothing further, and the incident on Aboyne Crescent that is hard to find even suspicious.

[135] Weak informant information and weak surveillance information do not combine to equal reasonable grounds for a search warrant.

[136] If one focuses only on the Venza, it could be said that someone with a dated criminal record was seen driving the Venza. At one stage a man was seen putting a black bag in its trunk. At another time, a man went into the passenger seat and came out three minutes later. On a third occasion, it was seen parked behind a house where a woman went in and came out with a bag full of Styrofoam containers. That alone would be insufficient to create reasonable grounds for a search warrant of the vehicle. The search warrant here was based on the combination of information about Ms. Truong, who was not the owner of the Venza, and observations about the Venza, only one of which included Ms. Truong. The reality is that the focus was Ms. Truong. Without the background on her, there would have been nothing even suspicious about a man putting a black bag in her trunk, and Sgt. Tudor would have had no reasonable basis to think he had seen a drug transaction on Maitland Green.

[137] Topolniski J conducted a very thorough analysis of the recent Court of Appeal cases in ***R v Tran***, 2019 ABQB 244. On the facts of that case, and in looking at the totality of the circumstances, she concluded that the ITO was "sufficient to support the warrant" (at paragraph 64). There, there was confidential informant information supported by observations of at least 9 suspected drug transactions as well as observations about a likely "stash house".

[138] Here, there is weak informant information with inadequate information about his criminal record on which to consider his credibility, limited corroboration of any key information about criminal activity, and only one "transaction" believed to be a drug transaction. And that one observation did not identify Ms. Truong as having anything to do with it.

[139] My conclusion on the totality of the circumstances here is that the search warrant was invalidly granted, and the search of the Venza based on the search warrant was a violation of Ms. Truong's section 8 rights.

Section 9 – detention and arrest

[140] The Crown argues in its written materials that there was no breach as the police acted on the basis of a valid search warrant resulting in them finding over a kilogram of cocaine. Ms. Truong was found committing an indictable offence and she could be detained and arrested without warrant under section 495 of the *Criminal Code*. Her brief states that the cocaine was found before Ms. Truong's detention or arrest and it was in plain view. The Crown's position is essentially premised on the fact that there was a valid search warrant. Constable Clark, who stopped Ms. Truong on the instructions of Constable Labranche, made no observations of anything in the Venza, let alone cocaine in plain view, before he erroneously arrested Ms. Truong.

[141] Ms. Truong's detention was based on Constable Labranche's decision that he had a reasonable basis to detain Ms. Truong while CPS executed a search warrant for the Venza. I do not see that as problematic. Ms. Truong was driving the Venza and CPS had judicial authority to search it. That said, Constable Clark fumbled the detention by initially arresting Ms. Truong with absolutely no basis to do so. He had no information about her or the Venza, other than that he had been instructed to stop the Venza and detain the driver. He observed nothing himself that would have given him any basis to stop the Venza and detain Ms. Truong.

[142] I need not explore the extent of investigative detention for the purposes of this decision, other than to observe that it appears to have been entirely unnecessary for CPS to detain Ms. Truong in a police car near where her vehicle had been stopped for over an hour after she had asked to contact counsel, as well as to go to the washroom. She could easily and quickly have been transported to a nearby police station for those purposes, or to Westwinds where the drug team operated from. There was no apparent necessity for Ms. Truong to be detained at the scene for that length of time. Drugs were found almost immediately after the search began. Ms. Truong was not afforded access to counsel without delay.

[143] Investigative detentions are intended to be brief. I have not seen authority for handcuffing someone placed under investigative detention unless there were reasonable officer safety concerns. No such concerns were voiced.

[144] Ms. Truong's detention obviously violated Ms. Truong's section 8 rights, as well as her section 10 rights. I will comment on those later in this decision.

[145] With respect to the arrest by Constable Labranche, his evidence was that he made the decision to arrest Ms. Truong once CPS found the cocaine and money in the Venza shortly after 3 pm on June 6. I have no doubt that Constable Labranche had reasonable grounds to arrest Ms. Truong once drugs and money were observed in the Venza which she was driving at the time. The bags containing the drugs were in plain view on the passenger seat of the Venza at the time. Without the search of the Venza, however, Constable Labranche had no reasonable basis to arrest Ms. Truong. Since the only basis for locating the drugs in the Venza was the search warrant, it follows that absent the unlawful search, no grounds for arrest existed at the time. That is a consequence of the breach of Ms. Truong's section 8 rights.

[146] Even if the arrest following the search could be seen as the product of all of the drug team's knowledge at the time instead of just Constable Labranche's, Sgt. Tudor was the only one who had concluded on June 1 that what he observed on Maitland Green gave him grounds to arrest Ms. Truong. It is what the arresting officer knows at the time of the arrest that is important

for determining whether reasonable grounds for arrest existed: ***R v Clayton***, 2007 SCC 32 at paragraph 48.

[147] The flaw with relying on Sgt. Tudor's beliefs (even if he had shared them with Constable Labranche) is that is I do not think that Sgt. Tudor's opinion that he had grounds to arrest whoever was in the Venza following his observations on Maitland Green was sufficient. He was basing his grounds on information he had about Ms. Truong, her background, her criminal record and the information from the confidential informant that I have already ruled were insufficient to found a valid search warrant. At the time of the observations, Sgt. Tudor took no steps to verify that it was Ms. Truong who was driving the Venza. If his belief that he had observed a drug transaction was not sufficient to support a search warrant, it could not be sufficient to support a warrantless arrest.

[148] This was not a "dynamic" situation as was the case in ***Ha***, where the arresting officer had to make a quick decision. There, he based his decision on his observation of a single incident, but there, there was suspicious behaviour and information from a fellow officer (as opposed to a confidential informant) that the owner of the vehicle was a high-level drug dealer.

[149] In this case, there was no urgency; as of the time of the arrest they had been following the Venza for some three days, and did so for most of a day after CPS had obtained a search warrant for the vehicle.

[150] My conclusion under section 8 is that Ms. Truong's arrest by Constable Clark violated her section 9 rights. Her subsequent arrest by Constable Labranche was a violation of her section 9 rights as well, but only as a consequence of the unlawful search of the Venza.

Legal rights

[151] At the outset there is something contradictory about arguing that Ms. Truong's section 10(a) rights were violated because Ms. Truong did not understand what she was being told by Constable Clark or by Constable Labranche and that her section 10(b) rights were violated when she was not given the immediate access to counsel she asked for following them informing her of her rights. She obviously understood enough to request counsel.

Section 10(a)

[152] The onus of proving on a balance of probabilities that a *Charter* violation occurred rests on the accused. Here, the only evidence of Ms. Truong not understanding her rights when they were told to her came from her telling the officers involved that she did not understand, and having them repeat what they were saying to her. Clearly English was not her first language and spoke English with an accent. She was not fluent, but was able to answer ordinary questions involving documentation and her personal details. She understood enough to ask for a lawyer. She also asked to be taken to the washroom

[153] Mr. Jugnauth argued that the breach of Ms. Truong's section 10(a) rights prevented her from being able to refuse to submit to the detention. I am not sure how someone who has been detained effectively (or for that matter wisely) refuses to submit to the detention. Any refusal may lead to other charges. In any event, I cannot imagine that it would have been easy to obtain an appropriate interpreter to attend at the site or meet them at a police station, and the time to do so would likely have exceeded the time it actually took to get Ms. Truong to Westwinds and to a telephone.

[154] It is not up to the Crown to prove that an arrested person understood the *Charter* and caution process; it is up to the accused to prove that he or she did not.

[155] The evidence falls short of that, and I have not been persuaded that there was any breach of Ms. Truong's section 10(a) rights.

[156] It was troubling that Ms. Truong's request to use a washroom went unheeded. No specific *Charter* breach was argued with respect to that, but I fail to see a basis to deny someone in investigative detention or under arrest basic human needs.

Section 10(b)

[157] With respect to section 10(b), there are two issues. One is whether Ms. Truong should have been given access to counsel earlier than she was, and if her rights were violated when Constable Labranche asked her questions after she had asked to speak to a lawyer and before she was allowed to.

[158] I am concerned about the delay by Constable Clark during what was supposed to be investigative detention that the delay after she was arrested by Constable Labranche and taken to Westwinds instead of a closer police station.

[159] No reason was given by either Constable Clark or Constable Labranche for the decision to keep Ms. Truong in a police car by the side of the road for over an hour after she had been detained and requested to speak to counsel. I accept that it would not be practical to simply hand someone a cell phone, or let them use their own cell phone, to contact a lawyer in the back of a police car. That is especially so when the person has been handcuffed.

[160] That said, Constable Clark had no control over the investigation and he knew little about it. He had no knowledge as to how long the search might take, and what the consequences of it would be. I do not think in these circumstances it was unreasonable for him to wait to take Ms. Truong to a police station until someone connected with the investigation itself gave him further instructions.

[161] However, Constable Clark should at a minimum have enquired about the status of the search and sought instructions from Constable Labranche or a senior officer involved in the investigation as to what to do in the face of Ms. Truong's request for counsel. This was not an urgent situation and there was no explanation as to why Ms. Truong's access to counsel was delayed for so long. I am of the view that a breach of Ms. Truong's section 10(b) rights has been made out. The Crown has failed in its burden to justify the delay that occurred: ***Taylor*** and ***R v Luong***, (2000), 271 AR 368 (ABCA).

[162] With respect to Constable Labranche's delay in taking Ms. Truong to Westwinds instead of a closer police station, I do not see that as being a breach in its own right. I have no idea what policies and protocols exist within police stations, but I doubt that allowing someone who has been arrested and handcuffed to zip into a police station to make a call to a lawyer is that simple and straightforward. I do not see it as being unreasonable for Constable Labranche to want to take Ms. Truong to the police station he operated from and where he intended to process and question Ms. Truong. That is especially so when the difference in time to get to Westwinds was a matter of minutes. The situation might have been different if a longer period of time were involved, but here, I do not think the delay from the time of Constable Labranche's arrest until Ms. Truong was given access to counsel was inordinate, requiring explanation and justification from CPS. Even if the delay between going to a closer police station and Westwind required

explanation, the Crown satisfied any burden on it to justify the extra time taken to get to Westwinds. No section 10(b) right was violated by this circumstance.

[163] I have more concern about Constable Labranche asking Ms. Truong questions about where she was going and what she was doing after he was aware that she wanted to speak to counsel. The duty to refrain from questioning is well established, having been articulated by the Supreme Court of Canada in ***Prospe***r in 1994 (at paragraph 62). That duty was recently emphasized in ***R v GTD***, 2018 SCC 7, where asking the question "do you wish to say anything" after the person had requested counsel was held to be a violation of section 10(b).

[164] Constable Labranche justified his questioning on the basis that Ms. Truong had not told him anything. That is not the point. He asked questions of her that could be incriminating, such as "where were you going?". The "no harm no foul" principle is relevant to remedies, but not to whether a *Charter* breach has occurred in the first place.

[165] It is troubling that a constable with nine years of experience with CPS (6 years at the time of the arrest) would be unaware that he needed to hold off questioning until access to counsel had been facilitated once it had been requested. At the 6-year mark of experience, ignorance of such a basic principle can only be described as negligence. That said, Constable Labranche is correct that Ms. Truong said nothing helpful to the investigation as a result of this breach.

[166] Nevertheless, Ms. Truong's section 10(b) rights were violated when Constable Labranche asked her potentially incriminating questions.

Remedies - Section 24(2)

[167] I have found a number of *Charter* breaches:

1. The search of the Venza under an invalid search warrant (section 8);
2. The warrantless arrest of Ms. Truong by Constable Clark at the roadside (section 9);
3. The warrantless arrest of Ms. Truong by Constable Labranche in the police car (section 9);
4. The failure of Constable Clark to facilitate Ms. Truong's request to consult counsel (section 10(b); and
5. The questioning of Ms. Truong by Constable Labranche after she expressed that she wanted to speak to counsel (section 10(b)).

Section 9 and 10 breaches

[168] None of the breaches justify a stay of proceedings. I would not characterize anything here as willful or in bad faith. Sgt. Tudor and the drug team had reasonable suspicions about Ms. Truong and her activities. I have simply found that those suspicions did not transcend to reasonable grounds, either for a search warrant of the Venza of the arrest of Ms. Truong. There is nothing particularly egregious here. I do not find that CPS acted in bad faith. They did act unreasonably.

[169] I am mindful of the Alberta Court of Appeal's recent decision in ***R v Del Corro***, 2019 ABCA 156, where it stated:

> [100] This Court recently acknowledged in ***R v Zolmer***, 2019 ABCA 93 at para 86 that:
>
> > It is not error to find that good faith non-negligent error tends to favour admission: ***R v Aucoin***, 2012 SCC 66 at paras 46 to 49, [2012] 3 SCR 408. A trial judge's finding of good faith is not just replaced on appeal: ***R v MacMillan***, 2013 ONCA 109 at paras 43 - 44, 114 OR (3d) 506, citing ***R v Côté***, 2011 SCC 46 at paras 51 to 52, [2011] 3 SCR 215.
>
> [101] I reach a similar conclusion here. I see no error in the trial judge's placement of the police conduct in this case on the "less serious" side of the spectrum, favouring admission of the evidence.

[170] More recently, however, the Court of Appeal has held that an unreasonable but honest belief was not good faith: ***R v Vaillancourt***, 2019 ABCA 317. The absence of good faith does not equate to bad faith. There is a "neutral zone" between them: ***R v Caron***, 2011 BCCA 56 at paragraph 38.

[171] By themselves, and even in combination, the warrantless arrests, the failure to facilitate Ms. Truong's access to counsel in a timely way, and questioning her after she said she wanted to speak to counsel do not justify the exclusion of any evidence. None of these breaches resulted in gathering evidence and none related to the investigation but for Constable Labranche's failed attempt to question Ms. Truong in breach of section 10(b). Remedies for those breaches are appropriate under ***R v Nasogaluak***, 2020 SCC 6 by way of a sentence adjustment in the event of conviction.

Search Warrant

Seriousness of the breach

[172] The search warrant is a different story from the other breaches. It is the keystone to Ms. Truong's subsequent arrest by Constable Labranche and these charges. The physical evidence here could not have been obtained in any other way at this stage of the investigation. There is a direct relationship here between the section 8 breach and finding the evidence being used to support the charges against Ms. Truong.

[173] The Crown argues that since there was no attempt to mislead the issuing justice, any state conduct in this case is not serious, such that public confidence in the rule of law would not be negatively affected by the admission of the evidence. As such, Ms. Girard says this factor weighs in favour of admission.

[174] ***Grant*** is cited in support of that submission. The Supreme Court held at paragraphs 73-74:

> [73] This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms

> of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.
>
> [74] State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[175] With respect to the search warrant, I do not find that Constable Dowd acted in bad faith when he composed and affirmed the ITO. That being said, the ITO was somewhat misleading. While the target of the ITO was the Venza, the Venza was only a target because of the information from the confidential informant and Ms. Truong's background. But for the informant information, the Venza would have gone unnoticed.

[176] The ITO did not clearly describe the surveillance and could easily be read to assume that Sgt. Tudor saw Ms. Truong in the Venza on Maitland Green. It should have said that Sgt. Tudor did not see Ms. Truong at that time, only the Venza. That should be read into the ITO. Constable Dowd does not say that Sgt. Tudor had a belief that he had observed a drug transaction. It is Constable Dowd who draws that conclusion. It is unclear if he watched the video surveillance. If he did, he would know that Ms. Truong could not be seen in the Venza. Since there was no information that Ms. Truong was in the Venza at the time, the ITO was drafted in a misleading way.

[177] Constable Dowd falls short of expressing an opinion that what happened on Argoyne Crescent was a drug transaction, although that could certainly be assumed from the information he provided. All of this should be excluded from the ITO because there is nothing to suggest that a drug transaction had occurred at all, let along a drug transaction involving the Venza or Ms. Truong.

[178] What Constable Dowd believes cannot be challenged, but the grounds for his beliefs may certainly be questioned as to their reasonableness. I do not think the case law has gone so far as to say the Courts should simply accept an experienced police officer's beliefs and conclusions. Here, Constable Dowd's belief that there was a drug transaction because a black garbage bag had been put in the trunk of the Venza is difficult to treat as anything more than a hunch. The same can be said about his conclusion that Sgt. Tudor had seen a dial-a-dope transaction.

[179] While I do not find bad faith or anything egregious on the part of Constable Dowd, I do not find that he acted in good faith. I am of the view that read as a whole the ITO was misleading. It appears to have been drafted on the basis that there was reliable and credible informant information as well as three drug transactions. Instead, there was deficient information about the informant, and only one transaction that might be said to support the information that a dial-a-dope transaction had been conducted in the Venza.

[180] The ITO was insufficient on the basis that it did not contain sufficient credible and reliable information from which it could be reasonably concluded that a drug offence had been committed and that evidence would be found in the Venza, to the standard required in the case law. The circumstances here do not rise to the level of the somewhat low threshold set by ***Ha***.

[181] I do not think a precondition of excluding evidence under section 24(2) is police misconduct of some sort. Whatever Constable Dowd's intent was, his drafting created an exaggerated view of Ms. Truong's involvement in drug trafficking and by treating her and the Venza as one in the same. His beliefs were unreasonable and were instead hunches. Precision is required in the drafting of ITOs, and this one comes up short.

[182] "Seriousness" of the breach does not equate only to misconduct of some sort. In my view, the granting of a search warrant, authorizing state intrusion into a private place, in non-exigent circumstances, and on insufficient grounds is a serious *Charter* breach. It is obviously not as serious as many types of breaches, but neither is it trivial. The granting of a search warrant on insufficient grounds is not a technical breach, but rather goes to the heart of judicial authorization.

Impact of the Breach

[183] Here, the impact of the breach was to have Ms. Truong pulled over while lawfully driving, taken out of her vehicle, arrested and handcuffed and detained for over an hour. The vehicle she was driving was searched and the contents of bags and her purse were examined without her consent. The search warrant triggered all of this, together with subsequent breaches of her legal rights. It was totally unnecessary that Ms. Truong be handcuffed in the back of a police car and denied the ability to go to a washroom, let alone be delayed in accessing legal advice.

[184] But for the issuance of the search warrant, none of this would have happened to Ms. Truong. These are not trivial matters.

[185] The search was of a motor vehicle that was not owned by Ms. Truong but was being driven by her. I recognize that there is a lesser expectation of privacy in a vehicle than there is in a residence.

[186] Nevertheless, privacy rights are still recognized with respect to vehicles, whether they be owned, borrowed, or rented. The consequence of the breach here had serious consequences on Ms. Truong and it must be characterized as a serious breach.

Society's interest in adjudication on the merits

[187] Drug crimes are a scourge on society. Drug dealers pray on vulnerable people: children and drug addicts. Sentencing always emphasizes denunciation and deterrence. If the drugs and cash are excluded here because of the section 8 breach, it is likely that Ms. Truong will be acquitted for lack of evidence.

[188] On the other hand, society has an interest in ensuring that intrusions into privacy rights are carefully controlled and scrutinized to prevent society from disintegrating into a police state.

[189] The interest here is the right of Canadian residents to have state intrusions into their privacy only when such intrusions can be reasonably justified. Privacy breaches are not treated as situations where the end justifies the means. The *Charter* ensures that is not the case. Sometimes the guilty go free because their rights have been infringed by the powers and sometimes the arbitrariness of the State. Some citizens may object and believe (as in Blue Bloods and Chicago PD) that police misconduct is justifiable if it results in a bad guy being apprehended and punished. But that element of the public is not the element referenced in the cases: people with an understanding and of *Charter* values in this country.

[190] While this factor always favours inclusion, the circumstances here do not make this an overwhelming factor.

Balancing the factors

[191] Pre-***Grant***, ***R v Goncalves***, [1993] 2 SCR has many similarities to this case. A home was searched under a search warrant that should not have been issued. Cocaine was seized. At trial, the search was found unreasonable but the evidence was not excluded under section 24(2) of the *Charter*. The Court of Appeal overturned the trial decision and held that the evidence should have been excluded: (1992), 131 AR 68 (ABCA), 1992 ABCA 139. Chief Justice Fraser dissented, and her decision was upheld by the Supreme Court. Chief Justice Fraser held at paragraph 6:

> [6] The real issue in this case is whether evidence obtained as the result of a breach of s. 8 of the *Charter of Rights and Freedoms* should nevertheless be admitted into evidence at trial. The mere fact that a search contravenes s. 8 does not inevitably lead to the automatic exclusion of the evidence secured as a consequence of that search. One further step must be taken. The onus is on the defendant to prove that the evidence ought to be excluded under s. 24(2) of the *Charter*, in this case, the trial judge found that the defendant, Helder Goncalves, had failed to discharge this onus. I would not interfere with the trial judge's decision on this point.

[192] Similar results were reached in ***R v Evans***, [1996] 1 SCR 83, ***R v Richard***, [1996] 1 SCR 896, ***R v Carrier***, 1996 ABCA 145, and ***R v Erickson***, (1992), 72 CCC (3d) 75 (to name a few) where evidence seized under invalid search warrants was not excluded.

[193] I have been able to find only a few post-***Grant*** decisions where the results of a search conducted under a defective search warrant have not been excluded from the evidence.

[194] The most recent Alberta case on point is ***R v Vaillancourt,*** 2019 ABCA 317. There, the Alberta Court of Appeal applied ***R v Le***, 2019 SCC 34, quoting at paragraph 42:

> [42] Recently, the Supreme Court in *R v Le*, 2019 SCC 34 at para 143 stated:
>
> > This Court has previously observed that, when considering the seriousness of the *Charter*-infringing conduct, a court's task is "to situate that conduct on a scale of culpability" (*Paterson*, at para. 43). The operating premise here is that inadvertent, technical or otherwise minor infringements impact less upon the rule of law and, therefore, upon the reputation of the administration of justice than wilful or reckless disregard of *Charter* rights (*Grant*, at para. 74; *Harrison*, at para. 22). Further, as this Court held in *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59, and *Paterson*, at para. 44, a "good faith" error on the part of the police must be reasonable and is not demonstrated by pointing to mere negligence in meeting *Charter* standards. In other words, the reputation of the administration of justice requires that courts should dissociate themselves from evidence obtained as a result of police negligence in meeting *Charter* standards.

[195] In ***Vaillancourt***, the alleged defect with the search warrant was that the endorsement required by section 487(2) of the *Criminal Code* had not been made on the search warrant itself. While the Court of Appeal disagreed that a section *8 Charter* breach had been made out, it also concluded that the trial judge had erred in excluding the evidence seized pursuant to the warrant under section 24(2). It concluded that even if a section 8 breach had occurred, it would have been a trivial breach. The Court of Appeal cited ***R v Villaroman***, 2018 ABCA and ***R v Reeves***, 2018 SCC 56 relating to police failure to comply with statutory search warrant requirements, stating at paragraph 45:

> [45] What makes s. 487(2) distinct is the fact that the endorsement itself does not further any substantive rights or important interests of the accused. Compliance with s. 489.1 of the *Criminal Code* is significant in that it is the "gateway" to important protections under s. 490, including judicial oversight over property seized under the warrant: *R v Garcia-Machado*, 2015 ONCA 569 at para 55.

[196] In ***Villaroman***, police had searched the accused's computer under a general warrant. The *Charter* defect relating to the search warrant was that the investigating officer failed to comply with the requirements of section 489.1 for a general warrant under section 487.01. Additionally, the Court of Appeal found that the warrant should have been obtained under section 487 of *Criminal Code* and not the general warrant provisions of section 487.01. The evidence found was not excluded. The Court of Appeal stated at paragraph 31:

> [31] In this case, the decision to obtain a general warrant rather than a section 478 search warrant, was made in good faith and during a period of legal uncertainty. Most importantly, the mistaken use of a general warrant had virtually no impact on the appellant's privacy interests, since the authorizing judge applied essentially the same test.

[197] In ***Reeves***, the accused's home computer was seized without warrant. The home had been searched by the consent of his common-law spouse at a time when the accused had been excluded from the home because of family violence. The computer was detained for over four months before a search warrant was applied for. The trial judge found that the ITO had been "goal-oriented, misleading, unbalanced, and unfair, and that the search warrant should not have been granted (at paragraph 9). The trial judge excluded the results of the search under section 24(2). The Ontario Court of Appeal reversed the trial judge's decision to exclude on the basis that there was a "greatly diminished" expectation of privacy, and while two section 8 breaches had occurred, this was a "borderline case" and the evidence should not have been excluded. (at paragraph 10).

[198] The Supreme Court of Canada restored the trial judge's finding, holding at paragraph 68:

> [68] Ultimately, the application judge concluded that, despite society's strong interest in the adjudication of this case on the merits, the evidence should be excluded due to "the flagrant disregard of the accused's section 8 *Charter* rights" (para. 49). This approach aligns with *Paterson*, where this Court remarked that "[i]t is . . . important not to allow the third *Grant* 2009 factor of society's interest in adjudicating a case on its merits to trump all other considerations, particularly where (as here) the impugned conduct was serious and worked a substantial impact on the appellant's *Charter* right" (para. 56). Given the seriousness of the

> state conduct and of its impact on Reeves' *Charter*-protected interests, I agree with the application judge that the admission of the evidence would bring the administration of justice into disrepute.

[199] In ***R v Jordan***, 2011 ABQB 105, the ITOs used to obtain search warrants had not been sworn. Mahoney J found that these were technical breaches, but concluded that the conduct of the constable involved was in good faith. The officers executing the search relied on the search warrant. Even though the searches were of a dwelling house, the evidence was ruled admissible.

[200] PCJ Fradsham considered section 8 breaches in a series of decisions in ***R v Nafke***. In the first decision, 2018 ABPC 138, he ruled that images captured by a covert hallway camera infringed Mr. Nafke's section 8 rights because the building manager did not have the capacity to consent to the placement of the camera in the condominium complex. That information needed to be excised from the ITO used to support the granting of a search warrant for Mr. Nafke's apartment.

[201] In 2018 ABPC 164, the Crown conceded that the search warrant should not have been granted on the excised ITO, such that the search of the condo under the warrant was unreasonable and also a section 8 breach. Fradsham PCJ concluded that the police actions were in good faith and that the first step in the ***Grant*** analysis favoured inclusion. He found the second step favoured exclusion because the accused had a high expectation of privacy in his condominium. However, he concluded that the public interest in having an adjudication on the merits was high and "admitting the evidence would not bring the administration of justice into disrepute" (at paragraph 21).

[202] In 2019 ABPC 119, Judge Fradsham considered his earlier rulings. Relying on the pre-***Grant*** decisions in ***R v Smith***, 2005 BCCA 334 and ***R v Kokesch***, 2990 CanLII 55 (SCC) he concluded that there had been no flagrant conduct and that the police actions had been in good faith.

[203] He held at paragraphs 32-34:

> [32] The statements made in the Information to Obtain were not misleading. The affiant simply asked the Justice of the Peace to consider the entirety of the contents of the ITO (including the evidence from the hidden hallway video camera), and to draw an inference supportive of the application for a search warrant. The Justice of the Peace was satisfied that the facts presented established sufficient grounds to issue the search warrant. The Justice of the Peace was not encouraged to apply the wrong test, nor was the Justice of the Peace given false or incomplete information.
>
> [33] That the resultant search warrant was ultimately set aside does not, *ipso facto*, mean that the application was made in bad faith. The application was complete and forthright, and was made in fill recognition of *Charter* rights; in short, it was made in good faith. Further, the reliance the police placed on the resultant search warrant was founded in good faith.
>
> [34] I find that nothing in the pre-excision ITO leads to a conclusion of bad faith on the part of the police. Indeed, I find that the whole of the evidence continues to support a finding that the police acted in good faith.

[204] ***Nafke*** is certainly the closest Alberta case to the facts here. Indeed, in ***Nafke*** the accused's privacy interest was greater than Ms. Truong's. It was Mr. Nafke's residence that had been unlawfully searched by way of the covert camera, and then physically searched under an invalid search warrant. Here, the search was of a vehicle (in which there was a reduced expectation of privacy), and Ms. Truong was not the owner of the vehicle.

[205] With the greatest of respect to Judge Fradsham, I am of the view that he has elevated the third branch of the ***Grant*** test too far. Technical or trivial breaches of the *Criminal Code* or *CDSA* provisions are frequently not serious breaches. ***Ha*** appears to give greater licence to police making quick decisions in dynamic situations. Here, there were no exigent circumstances and the breach of section 8 was far from trivial.

[206] Where evidence results from a non-trivial breach and the consequences of that breach result in a serious intrusion into the accused's privacy rights, it should be rare for the breach to be washed away because of the public's interest in the adjudication of criminal cases on their merits.

[207] A myriad of cases at all levels in all Courts speak of the importance, especially in drug trafficking cases, that these matters go to trial on their merits so that highly relevant (and often crucial) evidence is put before the trier of fact.

[208] That does not, however, elevate the third of the ***Grant*** tests to being the most important or dominant consideration. Where evidence results from a non-trivial breach and the consequences of that breach result in a serious intrusion into the accused's privacy rights, it should be rare for the breach to be washed away because of the public's interest in the adjudication of criminal cases on their merits.

[209] Two Ontario Court of Appeal cases decided shortly after ***Grant*** dealt with defective search warrants and section 24(2). In ***R v Blake***, 2010 ONCA 1, the Ontario Court of Appeal found that there was no criticism of the actions of the police, and admitted the seized evidence despite the defects in the ITO and resulting section 8 breach. It noted at paragraphs 32 and 33:

> [32] Having conducted the inquiries mandated by *Grant*, examined the application of those inquiries to non-bodily physical evidence in *Grant* (paras. 112-115) and its companion case, *R. v. Harrison* (2009), 2009 SCC 34 (CanLII), 245 C.C.C. (3d) 86 (S.C.C.), I would hold that the nature of the state conduct and society's interest in an adjudication on the merits militate strongly in favour of admitting the evidence. The impact on the appellant's s. 8 rights points strongly toward exclusion. How does one balance these directly conflicting assessments? Without diminishing the important negative impact on the appellant's legitimate privacy interests occasioned by the unreasonable search, I find compelling the argument that the exclusion of reliable crucial evidence in circumstances where the propriety of the police conduct stands unchallenged would, viewed reasonably and from a long-term perspective, have a negative effect on the repute of the administration of justice.
>
> [33] Absent any claim of police misconduct or negligence in the obtaining of the initial search warrant, and absent any attempt to go behind the redacted information, it would be inappropriate to proceed on any basis other than that the police conducted themselves in accordance with the applicable legal rules. If there

> were a taint of impropriety, or even inattention to constitutional standards, to be found in the police conduct, that might well be enough to tip the scales in favour of exclusion, given the very deleterious effect on the accused's legitimate privacy interests. I can see none. The evidence is admissible under the approach to s. 24(2) set out in *Grant*.

[210] Some months later, another panel (with Doherty JA being the common denominator) considered similar circumstances and concluded that the evidence should be excluded. In ***R v Campbell***, 2010 ONCA 588, the Court stated:

> [101] In ***Blake*** the court addressed the admissibility of cocaine discovered in the course of an unconstitutional search of the accused's home. In holding that the evidence was properly admitted, this court stressed at para. 33 the absence of any basis upon which to criticize the police conduct either in the obtaining or the execution of what was eventually determined to be an invalid warrant. I observed:
>
> > If there were a taint of impropriety, *or even inattention to constitutional standards*, to be found in the police conduct, that might well be enough to tip the scales in favour of exclusion, given the very deleterious effect on the accused's legitimate privacy interests. [Emphasis added.]
>
> [102] The respondent has the same privacy interest that was at stake in ***Blake***. The nature of the evidence is the same in both cases. In this case, however, the contents of the ITO reveal an "inattention to constitutional standards" in that they fail to identify and address the respondent's individual privacy interest. That failure renders the state's conduct more serious than the state conduct in ***Blake*** and tips the scales in favour of excluding the fruits of the unconstitutional search. I would affirm the trial judge's ruling excluding the evidence.

[211] Two years later in ***R v Rocha***, 2012 ONCA 707, the Court of Appeal found that there was "at least negligence involved in the obtaining of the search warrant" (at paragraph 37). ***Blake*** was distinguished on that point, and the trial judge's decision to exclude the evidence for the section 8 breach was upheld.

[212] From the Ontario line of cases, it appears that blameless police conduct with "no taint of impropriety" will support the inclusion of the evidence even though the search warrant should not have been granted on the information contained in the ITO. If there has been conduct that is less than exemplary, such as an "inattention to constitutional standard" or "carelessness", exclusion remains a remedy under section 24(2).

[213] The circumstances of this case are somewhat similar to those in ***R v McDonald***, 2017 ABQB 778. There, Justice Tilleman was faced with somewhat deficient information on the confidential informant, as in ***Gore*** and ***Uppal***. There had been extensive surveillance, but there was what he described as only "one plausible evidentiary surveillance of the residence" (at paragraph 37). Despite noting the importance of the adjudication of drug trafficking cases on their merits (at paragraph 55) he excluded the evidence.

[214] In ***R v Hatton***, Yamauchi J thoroughly analyzed ***Grant*** in the context of an ITO found to be lacking and a resulting section 8 breach. He described the heavy burden on the police to obtain a search warrant at paragraph 35:

> [35] Why are these terms so strict? A search warrant, by its nature, allows the state to invade a person's privacy, whether their home, a motor vehicle, or their person. Thus, the *Code* and the courts must be vigilant to ensure that search warrants are not issued on mere suspicion or allow the state to undertake a "fishing expedition": ***R. v. Araujo***, 2000 SCC 65, [2000] 2 S.C.R. 992 at para. 29; ***R. v. Kokesch***, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3 at 29-30, 121 N.R. 161.

[215] Justice Yamauchi concluded at paragraph 110:

> [110] Stripped of its defects and deficiencies, this Court finds that the ITO was insufficient to permit the JP, acting reasonably, to find adequate grounds for the issuance of the Warrant. Thus, because the JP should not have issued the Warrant, the subsequent search violated *Charter* s. 8 and the Crown cannot rebut the presumption of an unreasonable warrantless search.

[216] After considering the ***Grant*** factors for his section 24(2) analysis, he held:

> [138] We must remember that the onus is on the accused in this case. This Court has found that the actions of the RCMP in submitting the ITO to the hearing office in the form in which it was presented to this Court was significantly careless or negligent. As well, it found that the accused's *Charter*-protected interests were seriously affected through the RCMP's entry into his residence. This Court is persuaded that a reasonable person, informed of the circumstances of the *Charter* s. 8 breach and the values that the *Charter* protects, would find that the admission of the real evidence obtained through the RCMP's exercise of the Warrant in this case, would bring the administration of justice into disrepute.

[217] A similar approach to that in ***McDonald*** and ***Hatton*** was taken by McKelvey J in ***R v Babiak***, 2016 MBQB 188. There, the police were found to have been "careless". He concluded at paragraph 30:

> [30] I have come to the conclusion that the admission of the evidence would bring the administration of justice into disrepute and, accordingly, the evidence is excluded. This conclusion is difficult, particularly after acknowledgment of the seriousness of the offence and the reliability of the evidence. I am mindful of society's interest in having an adjudication of this case on its merits. The police conduct in this context was careless. I have considered all the circumstances that existed in this case, as well as the fact that the police could well have been entering the house of an innocent person given the fact they did not take steps to verify the correctness of Babiak's residence after being provided with two possible addresses. Further, as previously indicated, much of the informant's information was not corroborated, nor was there sufficient regard for the securing or articulating of the necessary details, which would have supported the underlying basis for the informant's tip.

[218] From my review of the case law referenced above, I am of the view that allowing the seized items into evidence here would bring the administration of justice into disrepute. The granting of search warrants authorizing state intrusion into a person's private spaces depends on proper judicial authorization. Where that authorization is lacking because of insufficient grounds,

people with an understanding of *Charter* rights and the whole of the circumstances would rightly lose confidence in the due administration of justice.

[219] I recognize that the items seized here provide significant, real evidence. Their exclusion may be fatal to the Crown's case. In this regard, I consider ***R v Del Corro***, 2019 ABCA 156 to be very significant. There, the majority in the Court of Appeal allowed the accused's appeal from conviction. The police had a suspected firearms trafficker under surveillance. They concluded that the accused had purchased an illegal firearm from him. The suspected purchaser was arrested and searched. No weapon was found, but incidental to the arrest they searched a satchel found in his vehicle and it contained drugs. He was charged with possession of cocaine for the purposes of trafficking.

[220] At trial, the judge found the arrest was a violation of the accused's section 9 rights because of the absence of reasonable and probable grounds. The consequential search of his vehicle and the satchel were also unreasonable and a violation of his section 8 rights.

[221] On the section 24(2) analysis, the majority in the Court of Appeal was satisfied of the arresting officer's good faith. They were critical of the detective's "unreasonable quickness in reaching the conclusion that Mr. Del Corro was engaged in an illegal firearms transaction" (at paragraph 73) and recognized that this factor favoured exclusion of the evidence. They were mindful of the reduced expectation of privacy in a vehicle (especially a non-owned vehicle) following ***Caslake***, but concluded that factor too favoured exclusion (at paragraph 79).

[222] With respect to the public interest factor, the majority stated at paragraph 83:

> [83] We conclude that there is a significant public interest in adjudicating this case on its merits. Nevertheless, is important not to let that trump the seriousness of the officer's breaches and their impact on Mr. Del Corro's *Charter*-protected interests. As the Ontario Court of Appeal stated in ***McGuffie*** at para 63:
>
> > In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: see e.g. *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241, at paras. 75-103; *Aucoin*, at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: see e.g. *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 81-89; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 98-112. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: see e.g. *Grant*, at para. 140.

[223] The majority's balancing of the ***Grant*** factors is found at paragraph 84:

> [84] The focus of the s 24(2) analysis is "long-term", "prospective", and "societal": ***Grant*** at paras 69–70. With that in mind, we have balanced the seriousness of the breaches, the impact of those breaches on Mr. Del Corro's liberty and privacy interests, and society's interest in an adjudication of the charges on the merits. This is a case where the court should dissociate itself from

> the serious *Charter* breaches by excluding the evidence. Anything less would bring the administration of justice into disrepute. Our view might well have been different if the vehicle search had uncovered a firearm, as in ***R v Chan***, 2013 ABCA 385, 561 AR 347.

[224] In this case, I am satisfied that the appropriate remedy for the section 8 breach is exclusion of the evidence seized from the Venza.

[225] To find otherwise would set an unreasonably low threshold for granting search warrants for vehicles and drivers suspected of engaging in drug transactions from vehicles. The failure to exclude the evidence in the face of a *Charter* breach that led to the finding of the evidence would be ignored.

[226] While it would be tempting to allow the evidence in, especially in circumstances where the accused is in all likelihood guilty of the offences she is charged with, and compensate the *Charter* breach with the promise of a reduction in sentence if Ms. Truong is convicted. But that would essentially overlook the importance of proper judicial authorization of search warrants.

Decision on Search Warrant

[227] The search of the Venza was unreasonable and the evidence seized from it during the search should be excluded.

Conclusion

[228] I have found a number of *Charter* breaches:

1. The search of the Venza under an invalid search warrant was a section 8 breach;
2. The warrantless arrest of Ms. Truong by Constable Clark at the roadside was a section 9 breach;
3. The warrantless arrest of Ms. Truong by Constable Labranche in the police car was a section 9 breach;
4. Constable Clark's failure to facilitate Ms. Truong's request to consult counsel was a section 10(b) breach; and
5. The questioning of Ms. Truong by Constable Labranche after she told him she wanted to speak to counsel breached Ms. Truong's section 10(b) rights.

[229] Apart from the section 8 breach relating to the search warrant and the search of the Venza, none of the other *Charter* breaches were sufficiently serious to require a stay of proceedings or the exclusion of any evidence. The section 10 breaches did not result in Ms. Truong saying anything inculpatory to the police. Remedies pursuant to ***Nasogaluak*** would instead be appropriate.

[230] In any event, remedies for those breaches are likely subsumed in my decision to exclude the items seized as a result of the unreasonable search of the Venza from admission into evidence. My section 24(2) analysis indicates to me that admission of the seized items into evidence would have a negative effect on the administration of justice.

[231] Counsel should contact the criminal trial coordinator in Calgary to arrange for a date for the continuation of the trial.

[232] I am grateful to counsel for their thorough and able written and oral submissions on these issues.

Heard on the 22nd to 24th days of January, 2020.

Dated at the City of Calgary, Alberta this 26th day of May, 2020.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

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