

Court of Queen's Bench of Alberta

Citation: R v Yong, 2020 ABQB 644

Date:
Docket: 180177073Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Gregory Cheng Yong

Accused

The following is a written version of a decision delivered orally on October 22, 2020. I reserved the right to make stylistic or grammatical changes, to add or complete authorities and citations, to complete quotations, and to make minor revisions. This written version is provided for reader accessibility; the oral judgment remains the official judgment of the Court.

**Reasons for Decision
of the
Honourable Madam Justice D. J. Kiss**

I. Introduction

[1] Mr. Yong is charged with a total of 19 offences under the *Controlled Drugs and Substances Act (CDSA)* and the *Criminal Code (CC)*, all with the offence date of February 9, 2018. Mr. Yong filed a formal motion on July 20, 2020, raising a number of issues, alleging violations of his *Charter* rights under ss 7, 8, 9, 10 (a) and 10 (b). He challenged the issuance of a Tracking Warrant, the lawfulness of his subsequent arrest, breaches of his right to access counsel without delay and his right to be informed of the reasons for his arrest and finally, the

validity of a Search Warrant issued pursuant to s11 of the *CDSA*. Counsel agreed to address these matters by way of a blended *voir dire*.

[2] I have already ruled that the Tracking Warrant issued pursuant to s 492.1(1) *CC* on December 18, 2017 in relation to a black Ford F150 (the “Ford F150”) was valid and that Mr. Yong’s rights under s 8 of the *Charter of Rights and Freedoms (Charter)* were not breached: *R v Yong* 2020 ABQB 584.

[3] The issues now before me are whether Mr. Yong’s s 8 and s 9 *Charter* rights were breached as a result of his detention, arrest and a search conducted incident to his arrest on February 9, 2018. More specifically, Mr. Yong alleges that the police officer who directed his arrest did not have the requisite reasonable and probable grounds to do so and that the subsequent search of the Ford F150 incident to his arrest was not for a valid purpose and therefore unlawful.

[4] Over the course of 2 days, the Court heard evidence from 3 members of the Edmonton Police Service (EPS) – Det. Korobanik, Det. Kemp and Cst. Stang in relation to these issues. The Defence did not call any evidence.

II. Arrest

[5] Mr. Yong argues that his s 9 *Charter* rights were violated when he was detained and subsequently arrested on February 9, 2018. He challenges the lawfulness of the arrest on the basis that the officer who directed Mr. Yong’s arrest, Det. Korobanik, did not have reasonable and probable grounds to do so.

a. Evidence on *Voir Dire*

Detective Korobaniuk

[6] Det. Korobanik testified that he was the officer in charge of the investigation of Mr. Yong. At the time of Mr. Yong’s arrest, Det. Korobanik had been with the EPS for 13 years and a member of the specialized Edmonton Drug and Gang Enforcement Unit (EDGE) for 5 years. He estimated that he had been involved in over 100 drug investigations, with about 75 of those relating primarily to cocaine. Further, he estimated he had spent approximately 5000 hours conducting surveillance, with a large number of the surveillance activities having resulted in charges and arrests for drug trafficking. Finally, Det. Korobanik stated that he had personally observed what he believed to be hand-to-hand drug transactions on somewhere between 200 – 250 occasions, with between a quarter and a third of these taking place in alleyways.

[7] Det. Korobanik advised that the decision to initiate an investigation of Mr. Yong was made after another EPS member, Cst. Semotiuk, received information from a Confidential Informant (“CI”) that Mr. Yong was trafficking drugs. The initial steps in the investigation involved several database inquiries and some static surveillance through which he was able to verify that Mr. Yong was associated with a black Ford F150 and also with a residence located at 13755 – 130 Avenue.

[8] Surveillance of Mr. Yong continued for several months. Det. Korobanik indicated that he was involved in most of the surveillance conducted by his EDGE team however, on occasions

when another surveillance team was used, he was provided with, and reviewed, all of their surveillance reports.

[9] Det. Korobanik testified that, in his experience, drug transactions are often characterized by a number of common features, including the following:

- An agreed upon time and date for the transaction are typically pre-arranged, by cell phone or some other communication App.
- The parties generally arrive at the location fairly close in time to each other.
- There is a hierarchy involved whereby the lower status individual typically gets into the vehicle of the higher status individual to complete the transaction. At the street level, this most often involves the buyer getting into the vehicle of the seller.
- The transactions are typically short at the street level, although at higher levels, where the parties are more likely to know each other, they can involve more social interaction. There is a quick entry and exit from the vehicle and then the parties go their separate ways.
- It is rare to see items actually exchanged between the parties to a drug transaction. The items are typically quite small and easily concealable. When the transaction takes place in a vehicle, it is not uncommon to see the parties lean together towards the center console with their hands down below the dash of the vehicle. Occasionally, a person may be observed exiting the vehicle with his or her hand in a pocket or holding a pocket.

[10] As well, Det. Korobanik indicated that he had observed several common driving patterns used by drug traffickers. These include (1) taking circuitous routes to travel from one point to another, rather than using the most direct route; (2) travelling on residential streets, rather than using major corridors; (3) driving for long periods of time to go short distances; and (4) making stops that appear random as there is no activity observed during the stop and no one exits the vehicle.

[11] Det. Korobanik indicated that, during the surveillance of Mr. Yong, activities which he believed were consistent with drug related activity occurred on 7 specific dates:

- a) **December 6, 2017** – a detailed account of the events on this date was provided in my decision relating to the validity of the Tracking Warrant. In short, Mr. Yong was observed engaging in what Det. Korobanik believed to be several separate drug transactions in different locations. One of the suspected transactions involved a vehicle that had previously been flagged as a Pointer Vehicle associated with an individual with convictions for trafficking a controlled substance and possession of a controlled substance for the purpose of trafficking. A second transaction involved a vehicle registered to Eric Lam, who Det. Korobanik had personal knowledge of through a previous drug trafficking investigation and who he believed was involved in drug trafficking.
- b) **December 27, 2017** – Mr. Yong exited the rear detached garage of a residence at 8519 Ellis Link, which by this point in the investigation was viewed as a suspected “stash pad”, and drove the Ford F150 in a circuitous route, using alleyways, to go only a short distance before parking and using his cell phone. A white truck was observed parking across the street and the male driver was also seen using his cell phone. Shortly

thereafter, both vehicles entered an alleyway from opposite ends and were lost to surveillance for 2 minutes before both vehicles exited the alley, going in separate directions. Det. Korobanik described this as a “traditional” or “standard” type of transaction that he had often observed during investigations which he considers consistent with drug related activity.

- c) **January 3, 2018** – Mr. Yong was observed at a Donair shop with a group of males. One of the individuals was identified as Brandon Tran. Det. Korobanik had been involved in a previous EDGE investigation which resulted in Mr. Tran being charged with trafficking cocaine. Another vehicle in the parking lot was registered to Kevin Nguyen, who Det. Korobanik also recognized as having been a past target of a drug investigation.

Mr. Yong left the shop driving the Ford F150 and proceeded to an alleyway near his residence that he had been tracked to on a number of occasions. An interaction with Det. Kemp occurred in the alley, which I describe in further detail later in relation to Det. Kemp’s evidence. Mr. Yong then left the alley and a Kia vehicle, which had been parked on the street, pulled out and followed the Ford F150. Both vehicles entered another alley where visual continuity was lost for approximately 1 minute. The tracker on the Ford F150 showed the vehicle to be stationary and the Kia was observed parked behind it. The vehicles then departed the alley at the same time and went in different directions.

Det. Korobanik believed Mr. Yong had arranged to meet someone and had been surprised by Det. Kemp being there instead. He believed that the person in the Kia was the individual Mr. Yong had been expecting and that a drug transaction occurred when their 2 vehicles were stopped for a brief period in the second alley.

- d) **January 20, 2018** – Mr. Yong left the residence at 13755 -130 Ave. He drove the Ford F150 to the same alleyway where he met Det. Kemp on January 6, 2018. The Ford F150 and a Dodge SUV were seen to be parked with their driver’s windows side-by-side. The surveillance team observed an arm reaching from one window to another. The vehicles then departed in opposite directions. Det. Korobanik believed this to be a drug transaction.
- e) **January 26, 2018** – A number of incidents occurred on this date. First, Mr. Yong and a Dodge Journey met up and traveled in tandem to an alleyway. While in the alley, an unknown male was observed standing alongside the driver’s door of Mr. Yong’s F150 and reaching inside the open window. Mr. Yong then departed. Det. Korobanik believed the unknown male from the Dodge either retrieved something, or deposited something, into the Ford F150.

Later that morning, the Ford F150 was observed parking behind a black Acura vehicle. Mr. Yong exited his vehicle and got into the passenger side of the Acura. Within 1 minute, Mr. Yong went back to his vehicle and returned to his residence. Det. Korobanik describes this as a “classic” drug transaction. The Acura was registered to Eric Lam, who Det. Korobanik believed to be involved in drug trafficking and whose vehicle had also been observed on December 6, 2017.

Next, Mr. Yong was observed driving the Ford F150 into an alleyway. A white Acura that had been parked, running on the curb entered the alley at the same time. Approximately 1 minute later, the Ford F150 was seen reversing out of the alley and the

Acura was located exiting the area. Det. Korobanik viewed this activity as being consistent with a drug transaction and also fitting Mr. Yong's pattern up to this date.

Finally, Mr. Yong traveled to another location where he was observed entering an alleyway at approximately the same time as a Honda vehicle. Both vehicles were observed exiting the alley a short time thereafter. The driver of the Honda was identified as Brandon Tran. This is the same Mr. Tran who had also been observed at the Donair shop on January 3. Det. Korobanik believed another drug transaction took place in this alleyway.

- f) **January 29, 2018** - Mr. Yong drove to an area and parked on the curb for approximately 12 minutes. A Honda arrived and entered an adjacent alley. Mr. Yong then entered the same alley from the other end. Shortly thereafter, both vehicles exited the alley, with the headlights on the Ford F150 having been turned off. Later that day, the Ford F150 was located using the tracker travelling across the city to a parking lot at an LA Fitness gym. A passenger was observed in the Ford F150. After 1 minute, the passenger exited the Ford F150 carrying a large black man-purse and got into a Chevrolet parked in the lot. The Chevrolet left the area and Mr. Yong drove back to his residence. Det. Korobanik believed both of these incidents were likely drug transactions.
- g) **February 6, 2018** – Mr. Yong left his residence and drove the Ford F150 to another residential area. He parked and sat for 5 minutes before driving into an alleyway. The Ford F150 was observed following a Nissan in the alley. The Ford F150 stopped for 10-15 seconds with the Nissan and then both vehicles departed the area. Det. Korobanik stated that this incident followed a similar pattern and he believed it to be drug related activity.

[12] After the tracking device was put on the Ford F150 on December 18, 2017, Det. Korobanik was able to observe and monitor the locations that the vehicle travelled to, the route that was driven to get there and the length of any stops made by the vehicle. He testified that the data from the tracking device allowed him to identify certain driving patterns that he believed were consistent with those that he had observed of other drug traffickers. More specifically, Mr. Yong would not take a direct route to a destination but would instead meander and take circuitous routes; he would use residential streets, rather than major routes; and he would make various short stops.

[13] A pattern also emerged of Mr. Yong attending 2 particular locations repeatedly, both of which were alleyways. The Ford F150 was tracked to one of the alleys (the "137 st alley") on 8 separate occasions. This was the alley where the brief encounter with Det. Kemp occurred and, on another occasion, a brief door to door stop with another car was observed. A second alley (the "Turvey Crescent alley") was visited by the Ford F150 on 5 occasions while the tracker was active. This was the alley where the vehicle being driven by Brandon Tran was also seen.

[14] Det. Korobanik's evidence was that on February 7, 2018 he reviewed the file and came to the conclusion that Mr. Yong was engaged in drug trafficking, that he had sufficient grounds to arrest him and that he would direct the arrest of Mr. Yong at the next available opportunity. This opportunity presented itself on February 9, 2018.

[15] On that date, Mr. Yong was followed and observed engaging in various social activities before returning to the residence on Ellis Link. He parked on the rear driveway and sat in the

Ford F150 while it remained running for about 5 minutes before leaving again. Det. Korobanik believed this to be another one of the waiting periods they had observed previously just prior to Mr. Yong engaging in a suspected drug transaction.

[16] Mr. Yong was then observed driving slowly, in a circuitous route, entering and exiting alleys. The Ford F150 entered an alley from the south end and a Dodge Journey entered the alley from the north. Det. Korobanik stated he believed this to be similar to the driving patterns they had observed previously and further supported his belief that a drug transaction was going to occur.

[17] The vehicles were observed stopped door-to-door in the alley where they remained for approximately 1 minute before driving away in separate directions. Det. Korobanik directed Mr. Yong's arrest at that point.

Detective Kemp

[18] Det. Kemp was another member of the EDGE squad involved in the investigation of Mr. Yong. He has been an EPS member for over 15 years and joined EDGE in 2013-2014. He stated that he had been an undercover officer since 2010. When asked to estimate the number of drug transactions he would have observed by 2018, Det. Kemp's response was "north of 200".

[19] Det. Kemp's involvement in this investigation consisted of assisting in the surveillance of Mr. Yong, participating in his arrest and also the subsequent search of Mr. Yong's vehicle and residence.

[20] Det. Kemp provided further details of the interaction he had with Mr. Yong on January 3, 2018 in the 137 st alley. When Det. Kemp saw the Ford F150 coming down the alley from the other direction, he pulled over onto a driveway and stopped, leaving sufficient space for the Ford to drive past. Instead, the Ford F150 slowed down and stopped, so that the driver's windows were beside each other. Mr. Yong rolled down his window. Det. Kemp initially thought that Mr. Yong was going to challenge him but instead, he gave a quick head nod and Det. Kemp then rolled down his window as well. Mr. Yong turned towards the center console of his vehicle. He then turned back to Det. Kemp and said "hey" before turning back again to the console. Mr. Yong turned back to Det. Kemp a second time but this time with a "panicked" look on his face. Mr. Yong then drove off. Det. Kemp testified that he believed that Mr. Yong had been expecting to meet someone else in the alley to conduct a drug transaction and was surprised when he realized Det. Kemp was not the person he had been expecting.

b. Governing Legal Principles

[21] Section 9 of the *Charter* provides: "Everyone has the right not to be arbitrarily detained or imprisoned". A detention will be arbitrary if it is not authorized by law: **R v Grant**, 2009 SCC 32 at para 54.

[22] In this case, Mr. Yong was arrested without a warrant under the authority of s 495(1)(a) CC. To make a lawful arrest without a warrant, a police officer must have reasonable and probable grounds to do so. Reasonable and probable grounds have a subjective and objective component. The arresting officer must subjectively believe there are reasonable grounds on which to base the arrest. As well, the grounds must be justifiable from an objective point of view such that a reasonable person placed in the position of the arresting officer would conclude there were reasonable and probable grounds for the arrest: **R v Ha**, 2018 ABCA 233 at para 18.

[23] In *Ha*, our Court of Appeal clarified the law relating to reasonable and probable grounds and outlined a number of principles that are to be considered when examining the facts of a particular case:

- police officers are not required to establish a *prima facie* case (para 18);
- “reasonable grounds to believe” requires a factually based likelihood that there are grounds for the arrest, rising above mere suspicion, but less than the civil standard of demonstrating grounds on a balance of probabilities (para 70);
- for this standard, the word “probability” means “likelihood”. The standard of proof is properly expressed as “the point where credibly based likelihood replaces suspicion” (para 63);
- 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 (para 28);
- the fact that there may be other plausible, innocent explanations for police-observed behaviour does not prevent, or preclude, the formation by an experienced, knowledgeable police officer of reasonable and probable grounds that he or she is observing an illegal transaction (paras 33–34);
- only information that a police officer has good reason to believe is unreliable can be disregarded and unequivocal or exculpatory information cannot be ignored (para 36);
- factors that are exclusively innocuous generally cannot be combined together to provide reasonable grounds to believe an offence has occurred. However, factors that can support both an innocuous and a suspicious conclusion can be “mutually reinforcing”, or can be combined together to provide reasonable grounds (para 84);
- the circumstances supporting the objective justification include all information available to the police. Policing is a “team sport”. The knowledge of the entire group is relevant as, in many investigations, there will be no one officer who knew all of the relevant information. One police officer can rely on information conveyed by another without inquiring into the reliability or source of that information (paras 77, 79).

c. Analysis

[24] Mr. Yong’s counsel conceded that, at the time of Mr. Yong’s arrest, Det. Korobanik *subjectively* believed he had the reasonable and probable grounds to do so. Therefore, the only question that the Court must answer is whether the evidence objectively supported Det. Korobanik’s conclusion that he had reasonable grounds to proceed with the arrest on February 9, 2018.

[25] Mr. Yong argues that Det. Korbanik relied upon innocent or, at best equivocal, observations to form his reasonable and probable grounds to arrest. He states that the fact that none of the investigating officers had ever arrested him, or any of the other individuals suspected to be involved in these drug transactions, before February 9, 2018, suggests that Det. Korobanik’s decision to arrest was ultimately based on him having observed a completely arbitrary number of suspected drug transactions. In Mr. Yong’s view, if any member of the public was subjected to similar police surveillance, and had the worst interpretation given to

every observed interaction, then with enough time, the police could justify arresting anyone for possession for the purpose of trafficking.

[26] Mr. Yong further argues that Det. Korobanik relied upon these recurrent, innocuous observations, “without adding more”, to form his reasonable and probable grounds.

[27] Mr. Yong also suggests that the lack of any concrete, positive observations of actual drug transactions taking place makes his arrest unsupportable. He notes that, at no point in the investigation were any drugs or cash observed, and no objects were ever seen passing from one individual to another.

[28] A final argument that was raised by Defence counsel in written submissions was that evidence of the quantity of drugs possessed by an individual was relevant to the determination of whether it could be considered to have been possessed for the purpose of trafficking. This argument was abandoned in oral argument. It is clear from s 2(1) and s 5(2) of the CDSA that the amount of drugs possessed by an individual is not determinative: **R v Chan** (2003), 66 OR (3d) 577 at paras 27–35, 178 CCC (3d) 269, 18 CR (6th) 322 (CA), leave denied, [2003] SCCA No 453. Instead, Det. Korobanik needed only to believe that Mr. Yong was in possession of a drug identified in Schedules I – IV with the intention of trafficking that substance.

[29] The Crown argues that the incidents observed during surveillance of Mr. Yong cannot be considered “normal” or “innocent” at all. He suggests that, for example, it is not typical for people to drive their vehicles in circuitous, indirect routes or to repeatedly meet up with other vehicles for short periods in alleyways. However, even if these events could support an innocent explanation, that conclusion must change when they are viewed through the lens of an experienced police officer such as Detective Korobanik. The Crown also takes the position that the evidence does not support a finding that Det. Korobanik relied only on these equivocal or innocent surveillance observations in forming his reasonable grounds to arrest. Finally, the Crown states that the lack of observed hand-to-hand transactions is not determinative of the issue of whether Det. Korobanik’s reasonable grounds were objectively justifiable.

[30] While I recognize that some of Mr. Yong’s activities observed during surveillance could be considered “odd” or “unusual”, I would not necessarily have viewed them as being criminal in nature. But the test is not whether the particular conduct is “innocent” or “guilty”: **Ha** at para 37. Rather, I am required to assess this information through the eyes of a reasonable person with the experience, knowledge and training of the arresting officer, Det. Korobanik: **R v Storrey**, [1990] 1 SCR 241 at 250-251.

[31] Police training and experience is not to be accepted by the Court uncritically, and hunches and suspicions grounded in an officer’s experience will not suffice: **R v Mackenzie**, 2013 SCC 50 at para 64. However, Courts have certainly recognized that police training and experience may permit an appreciation of the significance of certain facts that someone without this training and experience might overlook: **Mackenzie** at paras 60, 62-3; **R v Rajaratnam**, 2006 ABCA 333 at para 25.

[32] As outlined previously, at the time of Mr. Yong’s arrest, Det. Korobanik had been an EPS member for 13 years and with the specialized EDGE unit for 5 years. He estimated he had conducted 5000 hours of surveillance and been involved in over 100 drug investigations. He was able to provide the Court with a clear, detailed summary of what, in his experience, were common features of a typical drug transaction. He further described, again from his experience,

the common driving patterns of individuals involved in drug trafficking. Finally, he was able to explain why he viewed Mr. Yong's repeated use of, and stops in, alleyways to be of significance. It is clear that Det. Korobanik's experience and training coloured his view of some of Mr. Yong's observed activities, for which there may have been other plausible, innocent explanations. This does not prevent the Court from determining that Det. Korobanik had an objectively reasonable basis for believing Mr. Yong was engaged in an illegal drug transaction: *Ha* at para 34.

[33] However, it is not necessary for me to determine whether Det. Korobanik's interpretation of the observations of Mr. Yong's suspected drug transactions during surveillance, in and of themselves, were sufficient to support an objective finding of reasonable grounds. That is because they formed just a part of the entire "constellation of factors" that informed Det. Korobanik's assessment. As noted in *R v Quilop*, 2017 ABCA 70 at para 28:

Only evidence which indicates the appellant might be committing the indictable offence of possessing a controlled substance for the purposes of trafficking could ground a credible probability that the appellant was committing or was about to commit the offence. Other evidence which provides context for the inculpatory evidence may be part of the so called constellation of facts which may indicate a credibly-based probability, but that other evidence, in and of itself, cannot form the basis for objectively justifiable grounds for arrest. It is correct, as the Crown argues, that the constellation of facts may indicate something completely different from the individual facts of which the constellation is comprised.

[34] It is therefore necessary to consider Det. Korobanik's evidence of the other factors which provided this context for him, all of which combined to inform his decision to arrest Mr. Yong on February 9, 2018. They included the following:

- i. **Information from Confidential Informant (CI)** – The investigation into Mr. Yong was commenced after Cst. Semotiuk received information from a CI that Mr. Yong was trafficking cocaine and fentanyl and using a black Ford F150 to do so. I considered the strengths and weaknesses of this source information in detail in my decision relating to the validity of the Tracking Warrant. In his evidence, Det. Korobanik recalled only having been advised by Cst. Semotiuk that Mr. Yong drove a black truck and trafficked cocaine. These are even fewer details than were included in the ITO in support of the Tracking Warrant.

I previously concluded that I was unable to give much weight to the CI's information. Nevertheless, I accept that this was another piece of information that Det. Korobanik considered in reaching his decision to arrest.

- ii. **Surveillance** – Det. Korobanik stated that he believed the surveillance observations confirmed the information they had received from the CI. The surveillance observations, based on his experience and training, led him to believe that Mr. Yong was engaged in drug trafficking.

I note that the surveillance of Mr. Yong took place over a period of 6 months (August 9, 2017 – February 9, 2018). If only the dates that Det. Korobanik noted as being significant to him are considered, there are approximately 14 suspected drug transactions

involving Mr. Yong that were identified. This does not include the inadvertent meeting that occurred between Mr. Yong and Det. Kemp in the alley on January 3, 2018.

- iii. **Tracking Device** – A tracking device was installed and active on the Ford F150 driven by Mr. Yong from December 28, 2017 – February 9, 2018. Det. Korobanik stated that the data obtained from the tracker was consistent with the information they obtained doing direct surveillance of Mr. Yong. In his view, the tracker data added weight to their surveillance observations.

The data showed that the Ford F150 returned to the 137 st alley (the alley where Mr. Yong had been observed meeting with Mr. Brendan Tran) 8 times during this period and made 5 visits to the Turvey Crescent alley. This further supported Det. Korobanik's belief that Mr. Yong was using alleyways to conduct drug transactions.

- iv. **Interactions** – During the course of the investigation, Mr. Yong was observed associating with 2 known, convicted drug traffickers, Eric Lam and Brandon Tran. Det. Korobanik stated that he had personal experience with these 2 individuals. As well, he noted that the meetings Mr. Yong had with these 2 people were similar to meetings that Mr. Yong had with other individuals that the police were not able to identify or to obtain their vehicle license plates. However, this led Det. Korobanik to believe that Mr. Yong's transactions with these unknown individuals were similarly drug transactions.
- v. **Prior Criminal Record** – In cross-examination, Det. Korobanik indicated that Mr. Yong's history, including his previous conviction for a drug related offence, was another factor that informed his decision to arrest Mr. Yong on this date.
- vi. **February 9, 2018 Surveillance** - On the day of the arrest, Det. Korobanik stated that he was able to observe Mr. Yong engaged in activity which, from start to finish, was "fully, perfectly consistent" with all of the other suspected drug transactions they had seen Mr. Yong involved in over the previous few months and this completely solidified in his mind that he had reasonable grounds to arrest Mr. Yong at that time.

Although Det. Korobanik made the decision on February 7, 2018 to arrest Mr. Yong at the next opportunity, an arrest is not complete until the liberty of the subject is restrained and it is clear that the events that occurred on February 9, 2018 also form part of the constellation of factors relevant to the assessment of reasonable and probable grounds for arrest: *Ha*, at paras 39-40.

[35] I cannot agree with the argument advanced by Mr. Yong that Det. Korobanik relied only on recurrent, innocuous observations, *without adding more*, as the basis for his reasonable and probable grounds to arrest. Instead, I find that his decision to arrest was arrived at after consideration of a number of different factors - source information, surveillance observations, GPS tracking data of the Ford F150 used by Mr. Yong, observations of Mr. Yong associating with 2 other known drug traffickers; his knowledge of Mr. Yong's prior criminal record; and observations of Mr. Yong on the date of his arrest.

[36] Det. Korobanik confirmed that, prior to Mr. Yong's arrest on February 9, 2018, neither Mr. Yong, nor any one of the other individuals he was seen with during the course of this investigation, were ever questioned, searched for drugs, or charged as a result of the suspected drug transactions observed during surveillance. Det. Korobanik's evidence was that they had a goal in mind and that he felt that interviewing these other individuals in the middle of this investigation would not be

fruitful, and might actually jeopardize the investigation. I find this to be a reasonable explanation given that all of the evidence before the Court – the ITO for the Tracking Warrant and the *viva voce* evidence of both Det. Korobanik and Det. Kemp make it very clear that this was a targeted investigation of Mr. Yong.

[37] Finally, Mr. Yong submits that the police officers' failure to observe cash, drugs or any type of exchange occurring during their investigation makes his arrest on these charges unsupportable. He suggests that the hallmarks of a drug deal are essentially that there needs to be a buyer, a seller and the exchange of cash for drugs and the Court should find the lack of any concrete evidence of an actual transaction occurring particularly concerning.

[38] In response, the Crown referenced a number of decisions where Courts have concluded that an officer had reasonable and probable grounds to arrest despite there being no observations of any hand-to-hand transactions. These included: *Ha; R v. Tran*, 2019 ABQB 244; *R v Bui*, 2018 ABCA 62; *R v Hudson*, 2016 ONSC 5582; and *R v Gomez*, 2020 ABQB 439.

[39] In *Hudson*, the Court indicated (at para 57):

Drug transactions frequently occur in automobiles precisely because this shields the actual exchange from public view. It is the brief meeting in the automobile that is indicative of a drug transaction, and “reasonable and probable grounds” in this context does not require the police to actually see the exchange take place.

[40] Det. Korobanik's evidence was that, based on his experience as a drug investigator, it was rare to actually observe anything actually being exchanged as the items were typically small, easily concealable and the transaction was conducted in a vehicle.

[41] I am of the view that the failure of the officers during the investigation of Mr. Yong to actually observe any cash, drugs or the exchange of these items would not necessarily prevent, or preclude a finding that Det. Korobanik had the necessary objectively justifiable grounds to arrest Mr. Yong.

[42] I must assess the cumulative effect of all of the evidence that Det. Korobanik considered, rather than considering it all on a piece meal basis: *R v Luong*, 2010 BCCA 158 at para 17. I am also required to approach the analysis in a common sense, practical, non-technical manner: *Mackenzie* at para 73, recognizing that the factual context is of key importance: *Tran* at para 23; *Ha* at para 30.

[43] I am satisfied that, when the totality of the evidence is considered, and viewed from the perspective of a reasonable person with Det. Korobanik's training and experience, Det. Korobanik had the necessary reasonable and probable grounds to direct the arrest of Mr. Yong and that he not only subjectively believed he had those grounds, but that they were objectively justifiable as well.

d. Conclusion – Arrest

[44] I find that Mr. Yong's arrest was therefore lawful and as a result, his s 9 *Charter* rights were not violated.

III. Search of Ford F150

[45] Mr. Yong argues that his s 8 *Charter* rights were also violated when the police searched the Ford F150 incident to his arrest as it was not conducted for a valid purpose. Further, Mr. Yong argues that as the police officers were aware that a s 11 *CDSA* search warrant was being sought, and likely forthcoming, they should have awaited receipt of the search warrant before searching the vehicle.

a. Evidence on *Voir Dire*

[46] Det. Korobanik testified that on February 9, 2018, when he called for Mr. Yong's arrest, he and Det. Kemp were in separate vehicles at the north end of the alley and Cst. Hu and Cst. Stang went to the south end of the alley to intercept the Dodge Journey. When he arrived on scene, the Ford F150 was backed up against a fence and Det. Kemp's vehicle was parked nose-to-nose with Mr. Yong's vehicle. Det. Kemp had exited his vehicle and Mr. Yong was sitting in the driver's seat of the Ford F150 with his hands up.

[47] Det. Korobanik informed Mr. Yong he was under arrest, asked him to step out of the vehicle and performed a quick pat down. He was handcuffed and placed in Det. Korobanik's vehicle. Mr. Yong was read his *Charter* rights and cautioned and asked if he wanted to consult with a lawyer. Det. Korobanik stated that he gave directions to Det. Kemp to search the Ford F150 and that he then left the scene to take Mr. Yong to police headquarters. Det. Korobanik stated that he directed the search of the vehicle as a search incident to Mr. Yong's arrest.

[48] Det. Kemp testified that he received instructions from Det. Korobanik over the radio to arrest Mr. Yong for possession for the purpose of trafficking. He entered the alley and met up with the Ford F150 face on. Mr. Yong reversed the Ford F150 until it was backed up against a fence. Det. Kemp again brought his vehicle right up to the front of the Ford F150. Det. Kemp put on his vehicle lights and observed Mr. Yong turning to the right towards the passenger side of the vehicle. He yelled at Mr. Yong, who stopped, put up his hands and placed his head on the steering wheel.

[49] Det. Kemp approached the passenger door of the Ford F150 and opened it at the same time as Det. Korobanik was arriving at the driver's side. Det. Kemp opened the passenger door and observed a white grocery bag lying on the passenger side seat. He testified that he "manipulated" the bag by lifting the side and could see that there was cocaine inside. He put the bag back down, leaving it in exactly the same place. Det. Kemp stated that he did this as a search incident to Mr. Yong's arrest and in response to Mr. Yong's reaction at the time of his arrest to turn towards the passenger side of the vehicle.

[50] Det. Korobanik and Det. Kemp both testified that they were aware that a search warrant was coming and that it would include the Ford F150.

[51] Cst. Stang testified that his primary role in this investigation was as exhibit handler. He arrived to search the Ford F150 after Mr. Yong and Det. Korobanik had already left the scene. Det. Kemp was still present. Cst. Stang stated that he concluded his search within 15-20 minutes. He confirmed that his authority for conducting the search was that it was a search incident to arrest. During the search, Cst. Stang located, *inter alia*, a kilo or "brick" of suspected cocaine in a bag on the front passenger seat, a handgun in a hidden compartment in the center console, an extra magazine for the handgun and 6 smaller bags of suspected controlled substances.

b. Governing Legal Principles

[52] Section 8 of the *Charter* provides: “Everyone has the right to be secure against unreasonable search or seizure”.

[53] A warrantless search, such as in this case, is *prima facie* unreasonable. The Crown has the burden of establishing that the search was, on a balance of probabilities, reasonable: *R v. Collins*, [1987] 1 SCR 265 at page 278.

[54] There are 3 prerequisites to a reasonable search pursuant to s 8. The search must be authorized by law, the law itself must be reasonable and the search must be carried out in a reasonable manner: *Collins* at page 278; *R v Mann*, 2004 SCC 52 at para 36.

[55] In order to show that the search was authorized by law, there are 3 further requirements. First, the searching authority must show that a specific statute or common law rule authorizes the search. Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides. Third, the scope of the search is limited to the area and to those items for which the law has granted authority to search: *R v Caslake*, [1998] 1SCR 51 at para 12.

[56] In this case, the Crown relies on the common law power of search incident to arrest to provide the legal authority for the search of the Ford F150. The legality of such a search is derived from the facts of the arrest, and the reasonable and probable grounds upon which the arrest was based: *Cloutier v Langlois*, [1990] 1 SCR 158 at 180-181; *Caslake* at para 17.

[57] A search incident to arrest must be done for a valid purpose: ensuring the safety of the police or the public; protecting evidence from destruction; or the discovery of evidence to be used at the arrestee’s trial. The test for whether the search is truly incident to arrest is both subjective and objective. The police must have one of the purposes for a valid search in mind at the time the search is conducted and the officer’s belief that this purpose will be served by the search must be a reasonable one: *Caslake* at para 19; *R v Fearon*, 2014 SCC 77, [2014] 3 SCR 621.

c. Analysis

[58] Mr. Yong argues that the search in this case was not pursuant to a lawful arrest. I have found that his arrest was lawful, and so this argument fails.

[59] Mr. Yong also argues that the search was not conducted for a valid purpose. He submits that any safety concerns were fully addressed when he was taken into custody. He states that there was no risk of evidence being destroyed as the police had complete care and control of the Ford F150 from the point of his arrest. Finally, he states that the officers involved were aware that a s 11 *CDSA* search warrant was being sought and therefore, the search was both unnecessary and unreasonable and effectively circumvented the purpose of obtaining a judicially pre-authorized warrant.

[60] The Crown argues that the search of Mr. Yong’s vehicle was for the purpose of securing evidence in relation to the offence for which he was being charged – possession for the purpose of trafficking. The Crown submits that this was a valid purpose and that there is no requirement in law that a police officer must hold off conducting a valid search incident to arrest in circumstances where a search warrant is assumed, or known, to be forthcoming.

[61] I agree that, of the three potentially valid purposes to conduct a search incident to arrest, the only one applicable in this case is the discovery of evidence to be used at trial. Det. Korobanik and Det. Kemp both testified to the fact that Mr. Yong was very cooperative and compliant with their demands. He was arrested quickly and without incident. There were no safety concerns. Further, Det. Kemp confirmed that Mr. Yong was the only occupant of the Ford F150, that no one else was in the vicinity of the vehicle and that he felt both the vehicle and its contents were secure. There was no risk of evidence being destroyed.

[62] I accept that the officers subjectively had a valid purpose in mind at the time the search was conducted. Det. Korobanik had just observed Mr. Yong, while operating the Ford F150, engage in what he believed to be a drug transaction. As well, given all of the surveillance that had been conducted of the Ford F150 over the previous 6 months, I have no difficulty concluding that Det. Korobanik's belief that a search of the vehicle might result in the discovery of evidence to be used at trial was also objectively reasonable.

[63] The only issue remaining then is whether it was incumbent on the officers, absent any urgency, to hold off conducting the search until they had the s 11 *CDSA* warrant in hand. Defence counsel conceded that he was unable to find any case authority supporting this position and indeed, included in his written materials (although not referenced in oral argument) the unreported decision in *R v Yip* (ABQB, unreported, Edmonton, September 12, 2018) (Docket No:161313549Q1) in which counsel had raised this same argument, unsuccessfully.

[64] In *Yip*, Michalyshyn J referenced a number of cases where this issue has been raised, including Justice Berger's dissenting decision *R v Chubak*, 2009 ABCA 8; Justice Macklin's decision in *R v Bombuwala*, [2012] AJ No 1355; and the decision of *R v Alia*, [2013] OJ No 5592 (SCJ). However, in his view, the statements in those cases had been made in passing, without any particular analysis or reference to other authorities. He concluded (at page 14):

The sentiments in *Chubak* and *Bombuwala* and *Alia* do not persuade me that there is any legal requirement for a warrant when the principles in *Caslake* and the many cases that come after *Caslake* are applied and followed by the officers in question.

[65] I agree with Michalyshyn J that the cited cases are distinguishable and there is no authority which expressly supports Mr. Yong's argument. I note that in both *Bombuwala* and *Alia*, the trial judges voiced concerns about the police officers' evidence. *Bombuwala* concerned a violation of the accused's s 9 rights. Since the officer did not have reasonable and probable grounds to detain or arrest Bombuwala, reasonable and probable grounds for the subsequent search were absent. In *Alia*, the court concluded that the search had not been conducted reasonably.

[66] The Crown referred to *R v Munro*, 2005 BCCA 610, which was followed in *R v Nolet*, 2009 SKCA 8 at para 146, aff'd, 2010 SCC 24, [2010] 1 SCR 851. In *Munro*, Low JA stated (at para 12):

It appears to me that the police officers could have obtained a search warrant and had time to do so. But there is no requirement in law that a search warrant be obtained if the search is conducted incidentally to the lawful arrest of the suspect for any of three reasons: to ensure the safety of the police and the public; to

protect evidence from destruction; or, to quote from para 19 in *Caslake*, for “the discovery of evidence which can be used at the arrestee’s trial”.

[67] In light of these authorities, I do not agree with Mr. Yong’s argument that the police were required to wait to search the Ford F150 until such time as the search warrant had been secured.

d. Conclusion – Search

[68] I therefore find that there was no violation of Mr. Yong’s s 8 *Charter* rights and that the search of the Ford F150 was a valid search incident to arrest, conducted for the purpose of securing evidence in relation to his arrest for possession of a controlled substance for the purpose of trafficking, and that the search was conducted reasonably.

IV. Overall Conclusion

[69] In summary, I have concluded that Mr. Yong’s arrest and the subsequent search of the Ford F150 incidental to his arrest were both lawful and that Mr. Yong’s ss 8 and 9 *Charter* rights were not violated.

Heard on the 9th and 10th day of September, 2020 and the 2nd day of October, 2020.

Dated at the City of Edmonton, Alberta this 22nd day of October, 2020.

D. J. Kiss
J.C.Q.B.A.

Appearances:

Kurtis Steeper
Public Prosecution Service of Canada
for the Crown

Robert W. Hladun, Q.C.
Hladun & Company
for the Accused