Case Name:

R. v. Mak

Between
Regina, and
Chris Mak

[2005] B.C.J. No. 2346

2005 BCPC 485

Vancouver Registry No. 150219-1

British Columbia Provincial Court
(Criminal Division)
Vancouver, British Columbia

Warren Prov. Ct. J.

Heard: February 24, 25, March 9, April 7, May 19,
September 16, 28, 2005.
Judgment: October 21, 2005.

(63 paras.)

Constitutional law -- Canadian Charter of Rights of Freedoms -- Legal rights -- Protection against unreasonable search and seizure -- Right to retain and instruct counsel without delay -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- The evidence against the accused obtained as a result of the search warrant was excluded, as due to the cumulative effect of several Charter breaches the admission of the evidence would bring the administration of justice into disrepute -- The failure of the officer to include material information of his attendance on the roof in the presence of the fire department and the other officer to examine the vents likely to be the place the grow operation was vented was significant, and led the court to have serious concerns about the reliability of the officer's testimony -- The accused's rights were also breached by the entry with firearms drawn, as a rushed entry with firearms drawn was unreasonable absent exigent circumstances or prior information with respect to potential violence specific to the location or any person associated with that location -- Finally, the questioning of the accused while handcuffed, face down on the ground, and before receiving his Charter rights was in violation of s.10(b) and this evidence was also excluded -- Canadian Charter of Rights and Freedoms, s.8, s.10(b), and s.24(2) -- Criminal law -- Controlled drugs and substances -- Possession or trafficking -- Cultivation or production -- The evidence obtained against the accused, who faced charges of possession of marijuana for the purposes of trafficking, and unlawful production of marijuana, was excluded due to several Charter breaches in this voir dire as its inclusion would bring the administration of justice into disrepute -- Controlled Drugs and Substances Act, s.5(2) and 7(1) -- Criminal law -- Evidence -- Admissibility -- Voir dire -- Possession or trafficking -- Cultivation or production -- The evidence obtained against the accused, who faced

charges of possession of marijuana for the purposes of trafficking and unlawful production of marijuana, was excluded due to several Charter breaches in this voir dire.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms s.8, s.10(b), s.24(2)

Controlled Drugs and Substances Act s.5(2), s.7(1)

Counsel:

Counsel for the Crown: S. Snyder

Counsel for the Defendant: J. Solomon

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1 **WARREN PROV. CT. J.**:-- Chris Mak is charged that on December 4, 2003, he:

a) Possessed Cannabis (marihuana) in an amount exceeding 3 kilograms for the purpose of trafficking contrary to s. 5 (2) of the Controlled Drugs and Substances Act.
b) Unlawfully produced Cannabis (marihuana) contrary to s. 7 (1) of the Controlled Drugs and Substances Act, hereinafter (CDSA).

THE ISSUES

2 Chris Mak alleges that his right to be secure against unreasonable search and seizure provided for under s. 8 of the Charter has been breached because:

a) The Information to Obtain as amplified by evidence on review could not support the issuance of a search warrant and thus the search was unlawful.
b) The police executed the warrant with guns drawn.
c) The fingerprints and photos taken of Mr. Mak were taken prior to charges being laid in contravention of the Identification Of Criminals Act.
d) Mr. Mak was not shown a search warrant until he was released from the RCMP detachment almost 6 hours after he was arrested.

3 Mr. Mak also alleges that his s. 10 (b) rights to counsel were breached:

a) Firstly, when he was questioned by the police immediately after being handcuffed, as to the location of a key to the warehouse; and
b) Secondly, when his right to speak to counsel was delayed following the reading of his Charter rights.

4 Defence submits that the evidence obtained as a result of the breach of the s. 8 Charter rights ought to be excluded under s. 24 (2) of the Charter, particularly when all of the breaches are considered cumulatively.

5 The onus is on the Defence to prove on a balance of probabilities that the alleged breaches have occurred.

THE LAW

6 Defence referred the Court to a number of decisions:

Thomson Newspapers Ltd. v. Canada, [1990] 1 S.C.R. 425

R. v. Monroe, [1997] B.C.J. No. 1002

R. v. Nguyen, [2005] A.J. No. 636

R. v. Bui & Do, [2005] B.C.J. No. 1219, 2005 BCPC 210

R. v. Oakley, [2002] B.C.J. No. 3102

R. v. Tran, [2004] B.C.J. No. 1082

R. v. Bohn, [2000] B.C.J. No. 867

R. v. Blackburn, [2002] B.C.J. No. 3070

R. v. Schedel, [2003] B.C.J. No. 1430, 2003 BCCA 364

R. v. Brown, [2003] B.C.J. No. 1654

R. v. Markowska, [2004] O.J. No. 5153

7 The Crown also referred the Court to a number of decisions including:

R. v. Garofoli (1990), 60 C.C.C. (3d) 161 (S.C.C.)

R. v. Aurojo (2000), 149 C.C.C. (3d) 449 (S.C.C.)

R. v. Pires, [2004] B.C.J. No. 83 (B.C.C.A.)

R. v. Vukelich (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)

R. v. Phillips, [2004] B.C.J. No. 2919, New Westminster Registry X062230 (B.C.S.C.)

R. v. Nguyen, [2004] B.C.J. No. 2679, 2004 BCSC 1467

R. v. Schultz, [2001] B.C.J. No. 2164, 2001 BCCA 601

R. v. Sievert, [2000] B.C.J. No. 2209, 2000 BCCA 575

some of which were in relation to the issue to a right to a voir dire and informer privilege.

8 The Crown also referred the Court to the following cases with respect to the issues of fingerprinting and photographing of accused persons prior to the laying of the Information:

R. v. Nicholson, [1999] B.C.J. No. 1330

R. v. Nguyen, [2001] B.C.J. No. 2986

R. v. Do, [2002] B.C.J. No. 3255

R. v. Le, [2004] B.C.J. No. 1069

R. v. Bui 2004, Vancouver Criminal Registry No 117186-1-D

STANDARD OF REVIEW

9 The standard of review to be applied is set out in R. v. Garafoli, supra at p. 188:

The correct approach is set out in the reasons of Martin J.A. in this appeal. He states (at p. 119):

> If the trial judge concludes that, on the material before the authorizing judge, there was no basis upon which he could be satisfied that the pre-conditions for the granting of the search warrant exist, then, it seems to me that the trial judge is required to find that the search or seizure contravened section 8 of the Charter.
>
> The reviewing judge does not substitute his or her view for that of the authorizing judge. If based on the record, which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere.

10 The review of a search warrant should not be a microscopic analysis of the affidavit. (R. v. Melenchuk and Rahemtulla (1993), 24 B.C.A.C. 97).

11 Amplification may be not only evidence which weakens the force of the information but may also be evidence that strengthens it. (R. v. Jarvis (2000), 149 C.C.C. (3d) 498 (Alta. C.A.)). That being said, however, as set out in R. v. Pilarinos and Clark, [2001] B.C.J. No. 2924 (October 25, 2001) Vancouver Registry, CC001402 (B.C.S.C.)

> It is clear, however, that limits have been placed on the use of amplification in that it cannot circumvent the requirement for an authorization. It cannot circumvent the requirement for reasonable and probable grounds. The Crown cannot repair faulty authorization through amplification. The faulty evidence must be excised, and if errors were deliberate or not in good faith, amplification will not serve to assist the Crown.

EVIDENCE ON THE VOIR DIRE

12 All of the issues raised by the Defence with respect to the various breaches asserted were heard as part of one general voir dire.

13 Cst. Nigel Blake provided most of the evidence with respect to the Information to Obtain. He also testified with respect to the manner of entry, the arrest and right to counsel. Cst. McCuthcheon testified with respect to the execution of the warrant as did Constables Rettie and Thidbodeau. Cst. Floris was called by the Defence on the voir dire with respect to his involvement in the investigation leading to the swearing of the Information to Obtain.

A. Evidence Relating to the Information to Obtain

14 The Information to Obtain is two pages and contains ten paragraphs. It is reproduced in its entirety below:

> (1) Constable Nigel Anthony BLAKE (hereinafter referred to as Cst. BLAKE), the Informant and a peace officer of the Royal Canadian Mounted Police (hereinafter referred to as RCMP), has personal knowledge of the events described herein, save and except where stated.
> (2) That on October 10, 2002 a complaint was lodged with the Burnaby RCMP by an individual who stated to a complaint taker that he/she believed that there was possibly an indoor marihuana grow

operation in the business located at suite number 110 of the commercial complex located at 2544 Douglas Road, in the City of Burnaby. The complainant stated that the suite was rented by a Chris MAK, and that the business was called HARD IRON SECURITY". The complainant made the following observations regarding the business: the windows are always covered with wood of cardboard, there is a "marihuana" smell when the industrial fans in other units are turned on.

(3) That on October 22, 2002 Constable BLAKE sent a Freedom Of Information Request to BC HYDRO to obtain the Hydro Consumption records for the business located at #110-2544 Douglas Road. The response to this request, dated October 25, 2002 showed that HARD IRON SECURITY located at #110-2544 Douglas Road had an active account with BC HYDRO since November 2001. The records showed that the electricity consumption ranged between 26,172 Kilowatt/hours, and 59,859 Kilowatt/hours. Constable BLAKE spoke with Larry HUSTY a lineman with BC HYDRO. HUSTY told Constable BLAKE, that in his opinion, this level of power usage is extremely high, and could be consistent with an Indoor Marihuana Grow Operation that was using approximately Forty Five bulbs.

(4) That on October 24, 2002, Constable BLAKE attended the complex located at 2544 Douglas Road. Constable Blake asked one of the neighboring tenants in that complex if he had made any observations in regard to the business at suite 110. The individual, who did not wish to be named, stated that there had been a strong smell of what he recognized as marihuana that had persisted through the month of August 2002. The individual stated that the smell had ceased to be noticeable by September 2002. The individual also stated that the business did not seem to be active during the day, and he rarely observed activities that he felt were consistent with iron security bar manufacturing. Constable BLAKE observed that at the time of his attendance that day, the business did not appear open, the front door was locked, and the lights in the office appeared off.

(5) That between October 24, 2002 and December 1, 2003, Constable BLAKE attended 2544 Douglas Road approximately 20 times in order to attempt to obtain a smell of growing marihuana. Constable BLAKE observed that the business at that location did not appear open during the times that he attended during the day. Constable BLAKE had been unable to obtain a smell of growing marihuana.

(6) 3) That on September 24, 2003, Constable BLAKE again sent a Freedom Of Information Request to BC HYDRO to obtain the Hydro Consumption records for the business located at #110-2544 Douglas Road. The response to this request, dated October 25, 2003 showed that HARD IRON SECURITY located at #110-2544 Douglas Road had maintained a consistently high level of power consumption, with the latest billing period ending August 2003 showing a consumption of 27,561 kw/hours.

(7) That on December 1, 2003 Constable BLAKE attended #110-2544 Douglas road, and attempted to obtain a smell from the business. Constable BLAKE was able to smell growing marihuana in front of the business, but was unable to tell where the odor was originating. Cst. BLAKE noted a blue Minivan registered to Kitty CHEANG parked outside the business. The lights in the business office were on, but the business did not appear open.

(8) That on December 2, 2003, at approximately 12:00 PM, Cst. BLAKE attended #111-2544 Douglas Road, the business beside HARD IRON SECURITY. Cst BLAKE attempted to obtain a smell of growing marijuana from inside that business, but was unsuccessful. Cst. BLAKE noted that a white Chevrolet Van belonging to Chris MAK was parked outside. The business appeared to be in darkness, and closed.

(9) That on December 3, 2003, at approximately 3:37 PM, Cst. BLAKE attended 2544 Douglas Road, and observed that the Upper story windows of suite #110 appeared in darkness, but appeared to have condensation forming on them. Cst. BLAKE again attended at #111-2544 Douglas Road, the business beside HARD IRON SECURITY. The business at #111 is MERCER ELECTRIC MOTOR SERVICE. This business shares a cinder block fire wall with HARD IRON

SECUIRTY. The shop at MERCER ELECTRIC smells of solvents, lacquers, and welding. Constable BLAKE was familiar with these odors, having attended that business on prior occasions. On this occasion, Constable BLAKE was also able to detect the distinct odor of growing marihuana. This odor is known to Constable BLAKE from prior experience with indoor marihuana grow operations. Constable BLAKE noted that the odor was strongest on the mezzanine level above the shop area. Upon further investigation, Constable BLAKE was able to tell that the odor was coming from a hole in the cinder block wall, a that had been made to accommodate a water pipe that ran through the building. The business on the other side of the wall is HARD IRON SECURITY.

(10) That given all the available evidence, coupled with Constable BLAKEs' personal observations, Constable BLAKE asserts that there is sufficient grounds to believe that a search of the premises located at #110-2544 Douglas Road, will yield evidence to support a charge of Production of a Controlled Substance against Chris Mak.

I verily believe this information to be true to the best of my knowledge, and ability.

15 On the voir dire, Officer Blake testified that he began his investigation of the complaint October 22, 2002 and visited the property about 20 times between that date and December 1st but did not make any notes until December 1, 2003. On December 3, 2003, when he commenced writing the Information to Obtain he based it on his notes from December 1st to December 3rd, the Freedom of Information requests made to BC Hydro and his memory. The officer acknowledged that without localizing the smell of growing marihuana at the hole in the cinder block wall between units 111 and 110, on December 3, 2003, he would not have had reasonable grounds upon which to request a search warrant.

16 Officer Blake did not have a clear recollection of the details of his investigation and relied heavily on his notes. There were many inconsistencies and errors in his testimony, not surprising perhaps, given the passage of time and the lack of note-taking.

17 For instance, at first the officer testified that on December 1st he smelled marihuana from the front of the building but couldn't tell where it came from. On cross-examination, Officer Blake testified that he had a specific recollection of smelling marihuana in two places both inside and outside the shop on December 1. He later admitted that he could not do so; that he could only smell it outside and that smell was fleeting and faint.

18 He also testified on December 2nd he went to the business next door and attempted to obtain a smell but was not successful. Then after looking at his notes he testified that he was able to detect an odor in the shop next door on December 2nd but was unable to localize it.

19 He testified on December 3rd, he was able to smell marihuana in the shop area of the business next door and was ultimately able to localize it through a hole in the wall where a pipe came through by standing on a ladder and putting his nose about 1 or 2 inches from the hole.

20 On cross-examination Officer Blake was asked twice if December 2nd was the first time he ever went onto the mezzanine level of the shop next door. He testified that he believed that he was there on December 1, 2003 as well but then looked at his notes and testified that he could not be sure if he went to the mezzanine on December 1st or not. He did agree that he had made no mention in his notes of going into the shop on December 1st or trying to get a smell and being unable to do so.

21 Initially on cross-examination the officer denied the use of a ladder on the mezzanine level on December 2nd to try to locate the smell of growing marihuana from the shop next door but then agreed that his notes for December 2nd said the same thing as they did for December 3rd, namely, "Attempted to obtain smell through pipe hole in wall shared with 110".

22 Officer Blake acknowledged that there was no mention in his Information to Obtain of any attempt to obtain the smell through the wall at the pipe on December 2nd. He testified he could not recall using the ladder on December 2nd but admitted it looked from the notes that he did the same thing on both days. He testified he left this information out of paragraph 8 of his Information to Obtain because he did not believe it was important but agreed that the inclusion of the failure to smell marihuana in exactly the same place would diminish the force of the Information to Obtain.

23 Although Officer Blake testified he made no notes between October 22, 2002 and December 1, 2003, he acknowledged on cross-examination that he had completed a few continuation reports. He testified, however, that he had not relied on these to prepare his Information to Obtain as they did not contain any evidentiary matters. Upon production of these documents during the voir dire Officer Blake acknowledged that one of the continuation reports indicated that on September 24, 2003, he had arranged for the Vancouver Fire Department to assist him to get onto the roof of the target building so that he could check the roof vents for the smell of growing marihuana. Officer Blake testified that they attended at night because that was the most likely time a marihuana grow operation would be vented. He acknowledged however that he did not smell any marihuana at the roof vents. Although he was not able to get too close to the rear vents he said he could not smell marihuana from those locations either.

24 At first the officer testified that he was alone on the roof. Then he testified that another officer was with him. He testified that he had brought this other Officer Floris, to see if Floris could smell the marihuana. Officer Blake testified that because he had allergies which blocked his nose from time to time he thought Officer Floris might be more successful in obtaining a smell.

25 Officer Floris called by the Defence, testified that he attended on the roof with Officer Blake because Blake told him that he didn't want to be on the roof by himself for safety. Floris did not recall being told by Officer Blake about any allergy or congestion problem nor that he, Floris, had been brought to the roof to see if he could smell growing marihuana. Floris did recall, however, that he did not smell marihuana. He did not make any notes.

26 It is clear that without the inclusion of paragraph 9 of the Information to Obtain, a search warrant could not have been issued. The cumulative effect of the balance of the paragraphs would raise suspicion but not more.

27 The paragraphs with respect to Hydro consumption only led the BC Hydro employee to say that the Hydro consumption "could be" consistent with an indoor marihuana grow operation using forty-five bulbs. (My emphasis)

ANALYSIS

28 The Court in R. v. Monroe, supra, dealt with a situation similar to the case at bar. There the officer who swore the Information to Obtain had failed to disclose the fact that he had attended at the premises on two other occasions and had been unable to detect the odour of marihuana.

29 The Court said in para. 15:

> It is not disputed that the informant presented sufficient grounds upon which the justice could properly issue a warrant. That, however, should have been the starting rather than ending point of the inquiry. The judge was then required to assess the evidence placed before the justice, in the light of the evidence brought out at trial, in order to determine whether, after expunging any misleading or erroneous information, sufficient reliable information remained to support the warrant. Had the trial judge considered the whole of the evidence, he would, in my view, have had to conclude that, in addition to the non-disclosure of the two visits to which he referred, there were errors in respect of the matter of window coverings and electrical consumption of such significance as to require those parts to be expunged.
>
> [37] In para. 23 the court says in part:

> ... That leaves the fact that the informant detected the smell of marihuana on two occasions and was advised by Detective Barber that he detected such a smell on the second occasion.
>
> And in paras. 24 and 25:
>
> [paragraph]24 I accept that reliable evidence of an odour of marihuana having been detected outside a building might be a sufficient basis to support the issuance of a warrant, although one would generally expect an explanation for other factors not being established. But the question here is not whether a "clean" information setting out such facts could properly be acted on by a justice. The question at this stage must be approached from the point of view of a reviewing judge who has before him, in the words of Garofoli, the record which was before the justice "as amplified on the review". The warrant should be upheld only if, in the language of R. v. Bisson, there was "sufficient reliable information to support it" (Emphasis added). Having found that some parts of the information must be expunged by reason of error or being misleading, the reviewing judge should nevertheless uphold the warrant if, to paraphrase the language of the last sentence in R. v. Bisson, [1994] 3 S.C.R. 1097, he is satisfied that there was sufficient independently verifiable information which was not affected by that finding and upon which an authorization could reasonably be based.
>
> [paragraph]25 The question, then, is whether the court can be satisfied that the remaining information is reliable, independently verifiable, and not affected by the finding that two major factual assertions were misleading. The assertion of having detected an odour "coming from the house" is affected by the finding that other aspects of the information were misleading. The trial judge gave some weight to the consideration that the officer had "wrapped his long experience as a police officer" around the three facts to which he testified. In some circumstances, that could be a proper consideration. But where it turns out that two of the three facts were stated deceptively, the fact of the informant having wrapped his experience around the facts must tell against the reliability of the third fact which is, by its nature, not independently verifiable. In my view, nothing remains which could validly support the issuance of the warrant. It follows that the search was unreasonable within the meaning of s. 8 of the Charter.

30 Here, notwithstanding the inclusion of the information in paragraph 5 that Officer Blake attended 20 times to obtain a smell and was unsuccessful, the failure to include material information of his attendance on the roof in the presence of the fire department and Officer Floris, to examine the vents likely to be the place that the grow operation would be vented, is very significant.

31 The failure to include this information coupled with the officer's inability to recollect which observations were made on which day, the discrepancies between the few notes there are and the Information to Obtain lead me to have serious concerns about the reliability of Officer Blake's testimony.

32 The evidence of the smell on December 3 which would provide reasonable and probable grounds is not independently verifiable. As I am not satisfied with the reliability of Officer Blake's testimony I must conclude that the search warrant could not have been issued.

33 Before I turn to consider whether the evidence discovered is admissible under s. 24 (2) of the Charter, I will deal briefly with the evidence and arguments with respect to the other alleged breaches.

B. Evidence Relating to Entry and Arrest

34 Of the officers who testified on the voir dire with respect to the entry of the premises, the execution of the warrant, the arrest and chartering of Mr. Mak, I find the evidence of Cpl. McCutcheon to be the most clear, detailed and consistent. He appeared to have made careful notes. The only aspect of his testimony about which he was not clear was the exact number of officers who attended initially to assist in the execution of the warrant.

35 I am satisfied however, having heard evidence from Officers Blake, Floris, McCutcheon, Rettie and Thibodeau, that all of those individuals plus an officer named Wilson who carried a battering ram, rushed into the small office in which Mr. Mak was sitting at a desk talking on a cell phone. The time was 13:25. There was no prior knock and announce. Both the outside door and the door leading the office were unlocked so the battering ram was not used.

36 I am satisfied on the evidence that at least four of those officers had their guns drawn; most in the "low ready" position described as pointed down and at an approximately 45 degree angle from the body. Of the four, Officer Blake testified that he believed he pointed his gun at the accused.

37 Cpl. McCutcheon also acknowledged that his gun would have been pointed in the accused's direction but not directly at his head.

38 The evidence of most of the officers was that whether they had their guns drawn or not was a matter of personal choice, depending on the threat each perceived to his safety. Each testified that there had been no specific information given to them of any particular risk associated with the execution of this warrant. There was no evidence as to whether or not the officers with guns drawn were uniformed.

39 I find on the evidence of Cpl. McCutcheon that immediately upon entry of the officers into the front office, there were shouts of "POLICE, GET DOWN" and the accused, Mak, was assisted to the ground by Cpl. McCutcheon and other officers, placed on his stomach and handcuffed.

40 As soon as Mr. Mak was on the ground and handcuffed, he was asked where the keys to the warehouse were. This was in advance of any Charter warnings.

41 Mr. Mak remained facedown on the ground in the presence of Cpl. McCutcheon for a period of 15 minutes until McCutcheon was satisfied that the warehouse had been cleared. At this time, 13:40, Mr. Mak was advised of the reasons for his arrest and given his Charter rights and warnings. There is no evidence that the accused asked to see a copy of the search warrant although Officer Blake testified he had the warrant with him and McCutcheon testified he had checked the warrant prior to entry.

42 The evidence of Cpl. McCutcheon is that Mr. Mak said he understood his rights and wished to speak with a lawyer. Cpl. McCutcheon believed that Mr. Mak wished to speak with a lawyer there and then, but he told Mr. Mak that he could speak to a lawyer back at the detachment. Mr. Mak was not given the opportunity to speak to a lawyer at the scene. The reasons given on the voir dire were officer safety and lack of privacy.

43 At 13:46, Mr. Mak was handed over to a uniformed officer for transport to the detachment. At 14:01, Cpl. McCutcheon retook custody of the accused at the detachment. Legal Aid was called. No interpreter was provided for Mr. Mak although both Cpl. McCutcheon and Officer Blake understood that English was Mr. Mak's second language. At 14:42, Legal Aid called back and at 14:50, Mr. Mak told Cpl, McCutcheon he had spoken to a lawyer.

44 At 14:52, Mr. Mak's photo and fingerprints were taken prior to charges being laid. Cpl. McCutcheon used the photo to refresh his memory prior to making an "in court" identification of the accused.

45 Officer Blake returned to the detachment at 6:00 p.m. to interview the accused whom he found in the cell block. Officer Blake said he sought the assistance of Cst. Cheung in conducting the interview as he had been told that

sometimes Mr. Mak seemed conversant in English and at other times his English seemed halting.

46 Officer Blake testified that he had no knowledge of Officer Cheung's competence in the Cantonese language. The interview began at 18:34 and by 18:45 Mr. Mak asked to contact counsel. This was arranged through Legal Aid. Again no attempt was made to obtain an interpreter. At 18:52, Mr. Mak completed his conversation with counsel and came back. The interview finally completed at 7:12. Shortly thereafter Mr. Mak was released with a Promise to Appear and a copy of the search warrant. The Crown did not seek to have the contents of the interview admitted into evidence.

ANALYSIS

Manner of Entry

47 Although the cases provided by Defence counsel dealt with "no knock" entries into private residences by the police, the principles set out in those cases have applicability here. Clearly the Courts have found that the "knock and announce" rule for private residences was necessary to ensure the personal safety of the residents and the police. Here, the premises were business premises and as such open to the public. Nonetheless, there remains a considerable risk to both individuals inside such premises and the police when the police attend suddenly en masse without notice with guns drawn.

48 The Court in Schedel, supra, refers to a few cases in which individuals were fatally shot in the course of "no knock, no notice" entries in Vancouver. One individual was playing with a toy pistol when the police entered and another had a television channel changer in his hand. Mr. Mak had a cellular phone.

49 When the police enter a premise, even a business premise, unannounced with firearms in their hands ready to be discharged, it creates a high degree of risk to any occupants and to the police. This risk would be substantially reduced with notice as the occupant is less likely to respond instinctively to an unknown and possibly dangerous intruder.

50 I conclude that although this was a business premise, a rushed entry with firearms drawn is unreasonable, absent exigent circumstances or prior information with respect to potential violence specific to the location or any person associated with that location. I conclude Mr. Mak's s. 8 rights were breached by the manner of entry.

RIGHT TO SEE THE SEARCH WARRANT

51 Section 29 of the Code provides that a warrant must be produced upon request. There was no evidence of any request. There was no failure to comply with this section.

PRE-CHARTER QUESTIONING

52 The questioning of Mr. Mak while he was handcuffed and facedown on the ground prior to receiving his Charter rights was in breach of his s. 10(b) rights. This is fairly acknowledged by the Crown who agreed this evidence ought not to be admitted.

RIGHT TO COUNSEL

53 With respect to the alleged breach of Mr. Mak's s. 10(b) rights following the reading of the Charter, I am satisfied that although Mr. Mak was not given the opportunity to call counsel from the business premise, this is not a case such as R. v. Brown, supra, where the accused had to wait 1 1/2 hours for a transport vehicle before being taken to the police station. Here Mr. Mak was transported shortly after he was read his rights and as soon as he was at the station, Legal Aid was called for him. I am not satisfied that the delay in this case amounted to a breach of Mr. Mak's Charter rights.

54 Nor am I satisfied on the evidence that Mr. Mak's English was such that he failed to understand or be able to exercise his rights.

PRE CHARGE PHOTO

55 Finally, with respect to the allegation of the breach of Mr. Mak's Charter rights by taking his fingerprints and photo contrary to the Identification of Criminals Act, I am satisfied that Cpl. McCutcheon had reasonable and probable grounds to believe that an offence had been committed. He detained and arrested Mr. Mak. He believed the warrant was valid.

56 I have reviewed the cases provided by Crown which indicate that in the majority of the more recent decisions of the BC Supreme Court, the taking of a photo and fingerprints does not constitute a breach but even where the taking of fingerprints and photos prior to arrest does constitute a breach the evidence has been admitted under s. 24(2) of the Charter.

57 In the case at bar, I conclude that the taking of Mr. Mak's photo and fingerprints following his arrest and prior to charges being laid did not constitute a breach of his s. 8 Charter rights.

SECTION 24(2) OF THE CHARTER

58 I turn now to the consideration of s. 24(2) of the Charter.

59 The evidence is real evidence and thus its admission on the trial proper would not render the trial unfair. On the basis of the R. v. Stillman, [1997] 1 S.C.R. 607 decision:

> The analysis for exclusion is therefore limited to the seriousness of the breach and the effect of the exclusion on the repute of the administration of justice. R. v. Bohn supra.

SERIOUSNESS OF THE BREACH

60 A search of commercial premises without a valid warrant is not so serious as a search of a residential premise where there is a much higher expectation of privacy. However, coupling the insufficiency of the Information to Obtain with the manner of entry and the demand for information from the accused prior to being given his rights, demonstrates an inattention by the police to the rights of the accused. The cumulative effect of these breaches is serious

EFFECT OF EXCLUSION

61 One of the factors to be considered here is that this was a very large marihuana grow operation with a relatively sophisticated set up. Although there was no evidence of the value of the operation, there was testimony that there were 912 plants, both mature and immature and this was close to the largest grow operation Officer Rettie had been in at the time. The complexity of the cooling system was apparent. Officer Rettie said it took several hours and several police officers to dismantle the operation and the number of plants filled both of the cargo vans.

62 In R. v. Bohn, supra, the Court of Appeal referred in para. 46 to the decision of R. v. Golub, [1997] O.J. No. 3097. The Court in Golub said at para. 60:

> In addressing the effect of the exclusion of the evidence on the administration of justice, I bear in mind the comments of Iacobucci J. in R. v. Burlingham (1995), 97 C.C.C. (3d) 385 (S.C.C.) at 408:
>
> > ... [W]e should never lose sight of the fact that even a person accused of the most heinous crime ... is entitled to the full protection of the Charter. Short-cutting or short circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques, are

of fundamental importance in applying s. 24(2).

> Iacobucci J. reveals the heart of the third part of the s. 24(2) inquiry in this passage. The moral authority to apprehend and punish those who commit crimes rests on the community's commitment to the rule of law. Convictions procured by state violations of our most fundamental law lack that moral authority. Respect for the rule of law and the long-term viability of the justice system suffers where the police engage in "short cuts" or fail to respect the constitutional rights of those they encounter in the course of the exercise of their duties. The long-term harm to the justice system is not worth the short-term gain made by the admission of the evidence which was obtained in a manner that ignores the rule of law.

63 In the case at bar, notwithstanding the size of this marihuana grow operation and its apparent complexity, I am satisfied that given the cumulative effect of the Charter breaches, the admission of this evidence would bring the administration of justice into disrepute. I therefore exclude the evidence obtained as a result of the search warrant.

WARREN PROV. CT. J.

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