QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2014 SKQB 145**

Date: **2014 05 16**
Docket: Q.B.J. No. 26 of 2012
Judicial Centre: Battleford

BETWEEN:

HER MAJESTY THE QUEEN

- and -

[redacted]

Counsel:

Denis I. Quon — for the Crown
Patrick C. Fagan, Q.C. — for the accused

JUDGMENT ON *VOIR DIRE*
May 16, 2014

GABRIELSON J.

INTRODUCTION

[1] The accused, [redacted], is charged with two offences:

1. THAT on or about the 23rd & 24th day of June, 2010, at or near Springwater, in the Province of Saskatchewan, did unlawfully produce cannabis marihuana, a controlled substance included in Schedule II of the *Controlled Drugs and Substances Act*, [S.C. 1996, c. 19], contrary to section 7(1) of the said *Controlled Drugs and Substances Act*.

2. That on or about the 24th day of June, 2010, at or near Springwater, in the Province of Saskatchewan, did unlawfully possess cannabis marihuana, a controlled substance included in Schedule II of the *Controlled Drugs and Substances Act*, in an amount exceeding 3 kilograms for the purpose of trafficking, contrary to section 5(2) of the said *Controlled Drugs and Substances Act*.

[2] The accused pled not guilty to both counts in the indictment.

[3] Prior to the commencement of the trial, counsel for the accused provided a *Charter* notice pursuant to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11, (the "*Charter*") in which it was alleged that the accused's rights under ss. 8, 9 and 10 of the *Charter* had been infringed. At the opening of the trial, counsel for the accused indicated that the accused was abandoning his application in respect to ss. 8 and 9 of the *Charter*, but was still maintaining that his right to counsel was not facilitated contrary to s. 10(b) of the *Charter*. In the *Charter* notice filed, counsel submitted that the Royal Canadian Mounted Police ("RCMP") did not fulfill their informational and implementational duties with respect to facilitating the applicant's s. 10(b) *Charter* rights, and as such, any and all statements made by him must be excluded. Accordingly, at the outset of the trial the court entered into a *voir dire* to consider the *Charter* application. Five RCMP officers were called by the Crown in the course of the *voir dire*.

[4] As part of its case, Crown counsel sought to introduce Certificates of Analyst concerning the drugs seized during the RCMP investigation. Defence counsel objected to the introduction of the Certificates of Analyst on the basis that s. 51(3) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ("CDSA") had not been complied with. Although the certificates and the notices in respect to such certificates were marked as exhibits in the *voir dire*, whether they became evidence in the trial was an issue subject to later determination.

[5] Following the *voir dire*, I reserved my decision on both issues. I now render judgment in respect to them.

BACKGROUND

[6] In May of 2010, the RCMP at Biggar, Saskatchewan obtained information that a residence in Springwater, Saskatchewan had an abnormal power usage. Believing that the power usage might be as a result of a drug grow-op operation, the RCMP commenced periodic surveillance of this property. On June 24, 2010 the RCMP obtained a search warrant for the property. At approximately 3:15 p.m. the RCMP entered the Springwater residence pursuant to the search warrant. In the residence they initially found two persons who they determined were the accused, [redacted] and also [redacted]. At 3:17 Mr. [redacted] and Mr. [redacted] were arrested for the production of cannabis (marihuana). They were placed in handcuffs. A third individual, [redacted] was later found to be hiding in the residence and was also arrested. A fourth individual, [redacted] who had been seen in the house, but who had left in a van before the RCMP entry, was arrested a short time later.

[7] After the arrest, one of the RCMP officers, Cpl. Wayne MacDonald, asked the accused his name, birth date, residence and contact numbers. The accused gave his name as [redacted] his date of birth as August 6, 1982, his residence as at a specific Calgary, Alberta address and his contact numbers as Alberta numbers. At trial Cpl. MacDonald testified that as he was asking for the same information from Mr. Wood, the accused then stated, "This is my house now. That address I gave you was my parents."

[8] At approximately 3:32 p.m. Cpl. MacDonald gave a standard police warning to the accused regarding his right to counsel. When asked if he wished to exercise this right, the accused reportedly stated, "No. When I get to a phone I will." At approximately 3:49 p.m., another member of the entry team, Sgt. David Larocque from

the Saskatoon Police Service, began to question the accused as to whether there were any booby traps in the house. The accused responded stating that there were none. When asked by Sgt. Larocque how he knew this, the accused allegedly stated that he knew this by virtue of having done the wiring in the house.

[9] Cpl. MacDonald later took both Mr. [redacted] and Mr. [redacted] out of the house and to the North Battleford RCMP detachment. They arrived at approximately 5:20 p.m. The accused, Mr. [redacted] was taken into the phone room and called legal counsel at approximately 5:25 p.m.

[10] The RCMP searched the house at Springwater and found a sophisticated drug grow-op operation as well as a considerable amount of plant material they believed to be marihuana. This material was bagged and sent to Health Canada for analysis. The analysis confirmed that the material was cannabis (marihuana) and/or cannabis resin. Six Certificates of Analyst (the "certificates") dated November 3, 2010 were provided by the Department of Health Canada analyst.

[11] On July 27, 2011, Cpl. MacDonald made copies of the Certificates of Analyst and delivered them to the law offices of Mr. Brent Little, the accused's legal counsel at that time. The certificates were accompanied by a document entitled Notice of Intention to Produce in which it was indicated that the Crown intended to produce in evidence at the accused's preliminary hearing the said six certificates and that notice was being given pursuant to s. 28(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("CEA"). Mr. Little acknowledged receipt of a copy of the Notice by way of faxing the copy back to Cpl. MacDonald on July 28, 2011. A preliminary hearing was never held as the Crown proceeded by way of direct indictment.

[12] At trial, Cpl. MacDonald testified that in February of 2014 he prepared a further Notice of Intention to Produce the Certificates of Analyst, forwarded it and copies of the certificates to the Calgary police and requested that the police undertake personal service of them upon the accused. Cpl. MacDonald testified that he was advised by the Calgary police that they were unable to serve Mr. [redacted] Cpl. MacDonald then received instructions from Crown counsel to serve current counsel for Mr [redacted], Mr. Fagan, with the new Notice of Intention to Produce and the certificates. On March 5, 2014 Cpl. MacDonald faxed copies of the new Notice of Intention to Produce and copies of the Certificates of Analyst to the offices of Mr. Fagan.

[13] At the trial, a report from Cst. Kory Davidsen was produced and marked as Exhibit P-41. Counsel for the accused confirmed that it was admitted that Cst. Davidsen was an expert in the production, usage and trafficking in cannabis marihuana. Crown counsel confirmed that he was not tendering Cst. Davidsen's report for proof that the green material seized was cannabis marihuana, but rather to prove the potential output of the grow-op operation and the potential profits that could be made. There was a formal admission by the defence that, assuming that the Crown has proven the material seized was cannabis marihuana, that the volume of the product was inconsistent with production for personal use and would constitute possession for the purpose of trafficking.

[14] At trial counsel agreed that there were two threshold issues to be determined as to the admission of certain evidence:

(1) Proof of the substance seized – was the accused given reasonable notice of the Crown's intention to introduce the Certificates of Analyst at trial so as to comply with s. 51(3) of the *Controlled Drugs and Substances Act* as amended?

(2) Was there a violation of the accused's s. 10(b) *Charter* rights, and if so, should evidence by way of statements/admissions of the accused be excluded?

A *voir dire* was held to determine these issues. I reserved judgment on these issues, and the trial was adjourned pending my decision.

ANALYSIS

Issue number 1: proof of the substance seized – was the accused given reasonable notice of the Crown's intention to introduce the Certificates of Analyst at his trial?

[15] The provisions of the *CDSA* which are relevant to this issue are as follows:

> 45. (1) Analysis - An inspector or peace officer may submit to an analyst for analysis or examination any substance or sample thereof taken by the inspector or a peace officer.
>
> (2) Report - An analyst who has made an analysis or examination under subsection (1) may prepare a certificate or report stating that the analyst has analysed or examined a substance or a sample thereof and setting out the results of the analysis or examination.
>
> ...
>
> 51. (1) Certificate of analyst - Subject to this section, a certificate or report prepared by an analyst under subsection 45(2) is admissible in evidence in any prosecution for an offence under this Act or the regulations or any other Act of Parliament and, in the absence of evidence to the contrary, is proof of the statements set out in the certificate or report, without proof of the signature or official character of the person appearing to have signed it.
>
> (2) Attendance of analyst - The party against whom a certificate or report of an analyst is produced under subsection (1) may, with leave of the court, require the attendance of the analyst for the purpose of cross-examination.

(3) Notice - Unless the court otherwise orders, no certificate or report shall be received in evidence under subsection (1) unless the party intending to produce it has, before its production at trial, given to the party against whom it is intended to be produced reasonable notice of that intention, together with a copy of the certificate or report.

52. (1) Proof of notice - For the purposes of this Act and the regulations, the giving of any notice, whether orally or in writing, or the service of any document may be proved by the oral evidence of, or by the affidavit or solemn declaration of, the person claiming to have given that notice or served that document.

(2) Proof of notice - Notwithstanding subsection (1), the court may require the affiant or declarant to appear before it for examination or cross-examination in respect of the giving of notice or proof of service.

POSITION OF THE CROWN

[16] Crown counsel stated that the Crown's position was that:

(1) The accused was given the notice required by s. 51(3) on two occasions:

(a) when copies of the Certificates of Analyst were delivered to the law office of his original counsel, Mr. Little, in July of 2011. On July 28, 2011, Mr. Little acknowledged receipt of the notice which was served with the certificates;

(b) on March 5, 2014 when a second Notice of Intention to Produce and copies of the Certificates of Analyst were faxed to the law offices of the accused's current counsel, Mr. Fagan.

(2) Alternatively, that the administration of justice would be brought into disrepute if the evidence represented by the Certificates of

Analyst was excluded. Accordingly, even if the proper Notice of Intention together with copies of the certificates were not served upon the accused in the fashion required by s. 51(3), the court ought to "otherwise order" that the certificates be admitted into evidence as provided for in s. 51(3).

POSITION OF THE DEFENCE

[17] Defence counsel submitted that although Cpl. MacDonald made two attempts to serve the Certificates of Analyst upon the accused, neither attempt complied with s. 51(3) of the *CDSA* for the following reasons:

(1) The original Notice of Intent, which the accused's then counsel, Mr. Little, acknowledged receipt of by way of his fax of July 28, 2011, indicated that the notice was being given pursuant to s. 28(1) of the *Canada Evidence Act* rather than s. 51(3) of the *Controlled Drugs and Substances Act*.

(2) The attempted service by fax on March 5, 2013 was not effective because there was no evidence of any consent or acknowledgement by defence counsel to allow service by fax and, furthermore, was only faxed two business days before trial, which counsel submits is not reasonable notice as required by s. 51(3).

CONSIDERATION OF ISSUE 1

[18] In the case of *R. v. Marcil* (1976), 31 C.C.C. (2nd) 172, [1976] S.J. No. 418 (QL) (Sask. C.A.), Chief Justice Culliton was dealing with a Certificate of Analyst given

pursuant to s. 9 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1 (since rep.), which contained similar provisions regarding notice to those found in s. 51(b), when Certificates of Analyst were intended to be filed as evidence, stated at para. 7:

> 7 I think it is obvious that Parliament intended that the trial Judge must find and determine there was compliance with s-s. (3) before admitting the certificate in evidence. Whether or not there was reasonable notice is a question of fact: R. v. Flegel (1972), 7 C.C.C. (2d) 55. Reasonable notice, as well, refers to the substance as well as the time of the notice: R. v. Henri (1972), 9 C.C.C. (2d) 52, [1972] 6 W.W.R. 368. Thus, the admissibility of the certificate depends upon the trial Judge's finding of fact. ...

[19] In a recent decision of this court, *R. v. Santos*, 2014 SKQB 5, [2014] S.J. No. 24 (QL), Justice Gunn also considered whether the Crown had complied with s. 51(3). Starting at para. 110, she stated:

> 110 The onus remains on the Crown throughout to prove each and every element of the offence beyond a reasonable doubt. This includes a requirement to prove that the substance seized was cocaine as set out in the indictment filed with the court.
>
> 111 The *CDSA* provides a convenient method by which the Crown may satisfy this requirement by permitting the proof to be provided by the introduction of a certificate of analyst. ...

[20] In the *Santos* case, Justice Gunn held that copies of the certificates had been mailed by regular mail to defence counsel, but that this was insufficient because there was no evidence presented to indicate whether the package was actually received by defence counsel. She also held that although a copy of the notice and the certificates were faxed to defence counsel on the eve of trial, defence counsel had made it clear to the Crown that he was not prepared to, nor instructed to accept service by fax and that, in any event, there was no evidence that the fax was ever received by defence counsel. Finally, Justice Gunn held that the notice itself was not accurate because it indicated that the certificates were being tendered pursuant to s. 28 of the *Canada Evidence Act* and not the *CDSA*. Justice Gunn held, therefore, that the certificates would not be received in evidence under s.

51(1) as the Crown had not provided reasonable Notice of an Intention to Produce the certificates as required by s. 51(3). I am advised by counsel in the case before me, both of whom were also counsel in the *Santos* case, that the *Santos* decision is currently under appeal.

[21] The *Santos* case is distinguishable from the case before me. Here the Crown has proven that copies of a Notice of Intention to Produce the certificates at the preliminary hearing and the certificates were delivered to the office of the accused's previous counsel, Mr. Brent Little, on July 27, 2011. Mr. Little acknowledged receipt of the notice on July 28, 2011. Although the acknowledgement simply says "I acknowledge that I have received a copy of this notice", I accept the evidence of Cpl. MacDonald that he delivered the certificates with the notice. Therefore, unlike in the *Santos* case, there was evidence that the Certificates of Analyst were received by defence counsel.

[22] Defence counsel also submitted that regardless of whether the Certificates of Analyst were delivered by Cpl. MacDonald to Mr. Little, the Notice of Intention to Produce, which was delivered with the certificates, was inadequate since it stated, "This notice is given pursuant to s. 28(1) of the *Canada Evidence Act*" (the "*CEA*"). Since the notice did not make any reference to s. 51 of the *CDSA*, defence counsel submitted that the notice did not meet the requirements of s. 51(3) of the *CDSA*.

[23] Section 28(1) of the *Canada Evidence Act,* which was referred to in the Notice of Intention, provides as follows:

> 28. (1) No copy of any book or other document shall be admitted in evidence, under the authority of section 23, 24, 25, 26 or 27, on any trial, unless the party intending to produce the copy has before the trial given to the party against whom it is intended to be produced reasonable notice of that intention.

[24] Although, as was pointed out by defence counsel, ss. 23 to 27 and 28 of the *CEA* are not applicable in the circumstances of this case, in my opinion this does not mean that the accused was not given notice of the Crown's intention to use copies of the Certificates of Analyst as required by s. 51(3). Other cases have held that reference to the wrong subsection of the *CDSA* or even a reference to the *Criminal Code*, R.S.C. 1985, c. C-46, rather than the *CDSA* does not render a notice void or unreasonable. (See: *R. v. Woodward* (1975), 23 C.C.C. (2nd) 508, [1975] O.J. No. 91 (QL) (Ont. C.A.); *R. v. Taylor* (1983), 5 C.C.C. (3d) 260, [1983] O.J. No. 66 (QL) (Ont.C.A.).

[25] I am further satisfied that the accused would not have been misled or prejudiced by the reference to the *CEA* rather than the *CDSA*.

[26] Furthermore, in this case Cpl. MacDonald also took steps to provide current defence counsel with the appropriate notice by faxing the notice and copies of the certificates to him on March 5, 2013. Counsel for the accused acknowledges that the notice which was faxed to him was appropriate, but submits that he has never advised Crown counsel he would accept service in such a fashion. Without deciding whether such service would have been appropriate if no prior Notice of Intention had been served, the faxed Notice of Intention did ensure that the accused was not prejudiced by the reference in the first notice to the *CEA* rather than the *CDSA*. Based upon the cumulative effect of the two notices, I am therefore satisfied that the provisions of s. 51(3) were met.

[27] Furthermore, and in the alternative, I also find that this is one of the circumstances in which I would exercise my discretion to admit the certificates based upon the opening words of s. 51(3), "unless the court otherwise orders". In the text by Bruce A. MacFarlane, Robert J. Frater & Chantel Proulx, *Drug Offences in Canada*, 3d ed., looseleaf (Toronto: Canada Law Book, 2013) at para. 13.2240 the learned author sets

out the factors that a judge can take into account when considering the circumstances in which he ought to "otherwise order" as follows:

- Was the accused prejudiced?
- Was the accused misled as to the *effect* of the certificate or report?
- Is there an air of reality to the objection raised respecting the admissibility?
- Was the notice sufficient to allow the accused to make an informed decision under s. 51(2) (cross-examination of the analyst) and s. 52(2) (cross-examination of the affiant)?
- At what point, if at all, did the accused (or counsel) bring concerns respecting service to the attention of the Crown or the court?
- Would exclusion of the evidence bring the administration of justice into disrepute.

[28] I have already determined that the accused was not prejudiced because his original counsel, Mr. Little, had been provided with copies of the certificates in July of 2011. I am also satisfied that by sending the second notice by fax, the accused and his current counsel were given sufficient time to raise any objection so that the analyst could be called for cross-examination or an adjournment could be sought if required by the defence to prepare for any issues raised by the evidence sought to be admitted pursuant to s. 51(3). Finally, in my opinion the exclusion of the evidence in the circumstances of this case would bring the administration of justice into disrepute if s. 51(3) was interpreted so technically. In my opinion these factors are sufficient in the alternative to allow me to admit the certificates into evidence notwithstanding the issues raised by the defence.

Issue number 2: Were the accused's s. 10(b) rights violated?

THE POSITION OF THE ACCUSED

[29] The accused's position as set out in his *Charter* notice was as follows:

> 11. When the Applicant was arrested, he was *Chartered* and cautioned. When asked if he wished to contact a lawyer, he purportedly stated, "Uh...no. As soon as I get to a phone book." This statement clearly communicates a desire to speak to counsel.
>
> 12. At this point, the police were *required* to refrain from eliciting incriminatory evidence from the Applicant until he had a reasonable opportunity to reach counsel. Further, as the Applicant asserted his right to counsel, the Crown has the onus of demonstrating he was given a reasonable opportunity to contact counsel.
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> 13. The Applicant states that the Police did not fulfill their informational and implementational duties with respect to facilitating the Applicants' section 10(b) *Charter* rights. The Applicant also states there was no waiver of his right [sic] 10(b) rights. As such, there was a breach of the Applicant's section 10(b) rights and any and all statements made by him must be excluded.

THE POSITION OF THE CROWN

[30] The position of Crown counsel was that the questions asked of the accused by Cpl. MacDonald prior to him being advised of his rights to counsel were "administrative acts" carried out as part of his arrest and that the subsequent statement that "he lived in the house" was a spontaneous utterance given by the accused to correct the original information which he had given to Cpl. MacDonald. Alternatively, Crown counsel submits that using the analysis of s. 24(2) of the *Charter* recommended in the case of *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, the statement should be admitted

notwithstanding any technical s. 10(b) *Charter* breach.

CONSIDERATION OF ISSUE 2

[31] Section 10(b) of the *Charter* provides as follows:

> 10. Everyone has the right on arrest or detention
> ...
> (b) to retain and instruct counsel without delay and to be informed of that right ...

[32] In this case, I am satisfied that the evidence established that the accused, [redacted], was arrested and detained at 3:17 p.m. on June 23, 2010. According to the evidence of Cpl. MacDonald, by 3:17 p.m. the accused had been told that he was arrested, that he had been handcuffed, and seated on the couch. Cpl. MacDonald testified that it was not until 3:32 p.m. that he read the standard right to counsel to the accused. Cpl. MacDonald also testified that when Mr. [redacted] was asked if he wished to contact legal counsel Mr. [redacted] had said, "No. When I can get to a phone I will". However, there is no significance to the wording of Mr. [redacted] response since in cross-examination Cpl. MacDonald acknowledged that the accused had "made it clear to him that he did wish to consult with a lawyer". The issue is whether the statement that the accused made between the arrest at 3:17 p.m. and the giving of the right to counsel warning at 3:32 p.m. was a spontaneous utterance and should be admitted for the proof of its contents. Cpl. MacDonald testified that Mr [redacted] stated, "I live at this residence now". This utterance becomes very significant as it is the only evidence tendered by the Crown that the accused was anything more than a temporary guest at the residence. Crown counsel acknowledges that the statements made by the accused to Sgt. Larocque which followed the accused's expression of intent to consult with counsel are not admissible as they were made after the accused made it clear he wished to exercise his

right to counsel.

[33] The purpose and intent of s. 10(b) of the *Charter* was clearly enunciated by the Supreme Court of Canada in the case of *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460. At paras. 40, 41 and 42 the court stated:

> 40 ...the purpose of s. 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.
>
> [Emphasis added]

> 41 A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.

> 42 To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.
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> [Emphasis added]

[34] In the *Suberu* case, the issue before the court was whether Suberu had been detained within the meaning of the *Charter*. The court held that, where the police officer in that case had simply said to the accused, Suberu, that he was to wait a minute because "he needed to talk to him before he went anywhere", that this was not a detention within the meaning of s. 10(b). However, that case is distinguishable from the case here since Cpl. MacDonald testified and acknowledged that he had arrested the accused and placed him in handcuffs at 3:17 p.m., a full 15 minutes before advising him of his right to counsel. As the purpose of s. 10(b) is to ensure that accused persons are advised of their right to counsel and have access to counsel if they request it so as to protect against the right of self-incrimination, any statement made by the accused after his arrest and detention and prior to being advised of his right to counsel is presumptively in breach of s. 10(b). In my opinion, the accused has met the burden of establishing that Cpl. MacDonald was in breach of his duty pursuant to s. 10(b) to inform the accused of his right to retain and instruct counsel immediately upon the accused's arrest. This duty was triggered by the accused's detention.

[35] However, this does not result in the automatic exclusion of any evidence obtained in the interim as a result of this breach. Section 24 of the *Charter* must be considered. It provides as follows:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

In *R. v. Grant, supra*, the court considered the remedy provided for in s. 24(2) and stated at paras. 91, 92 and 98:

> 91 There is no absolute rule of exclusion of *Charter*-infringing statements under s. 24(2), as there is for involuntary confessions at common law. However, as a matter of practice, courts have tended to exclude statements obtained in breach of the *Charter*, on the ground that admission on balance would bring the administration of justice into disrepute.
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> 92 The three lines of inquiry described above support the presumptive general, although not automatic, exclusion of statements obtained in breach of the *Charter*.
>
> ...
>
> 98 In summary, the heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements taken in breach of the *Charter*, while the third factor, obtaining a decision on the merits, may be attenuated by lack of reliability. This, together with the common law's historic tendency to treat statements of the accused differently from other evidence, explains why such statements tend to be excluded under s. 24(2).

[36] The three lines of inquiry recommended in *R. v. Grant*, each of which must be determined separately from the other, are as follows:

(1) The seriousness of the Charter infringing state conduct

[37] In this case, the issue of the accused's control over the house and the items found in it are vital to the Crown's case. The Crown must establish beyond a reasonable doubt that the accused was in possession of the cannabis marihuana. In his cross-examination Cpl. MacDonald acknowledged that, as a 12-year veteran of the force, he knew that the issue of residence or occupancy was important to the investigation. He also acknowledged in cross-examination that he was "supposed to" advise an accused of his rights to counsel before questioning him and that there had been nothing preventing him from doing so upon the arrest of the accused. Finally, he acknowledged that as the

accused was his prisoner and had stated that he wished to speak to counsel once advised of that right, in hindsight he should not have allowed Sgt. Larocque to question the accused. In my opinion, the *Charter* breach is therefore at the serious end of the spectrum.

(2) The Impact of the Breach on the Charter Protected Rights of the Accused

[38] In this case, the statement that "I live here now" is the only evidence tendered by the Crown to establish that the accused exercised some degree of control over the house in which the drugs were found. But for his self-incriminating statement, there is nothing linking the accused to the grow-op operation. As mentioned previously, Crown counsel acknowledged that any statements made by the accused to Sgt. Larocque were inadmissible. Although fingerprints were taken of several parts of the grow-op operation, none were identified as being those of the accused. In my opinion, the breach of the accused's s. 10 rights would have a serious impact on the *Charter* protected rights of the accused.

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

[39] There is no doubt that society has a strong interest in the adjudication of drug cases on their merits, especially where the case involves a grow operation of the size that was found here. However, society also has an interest in proper police conduct in obtaining statements from prisoners in detention and/or under arrest. In my opinion, on balance, both interests are of equal importance in the circumstances of this case.

[40] In *R. v. Salmon* (2012), 258 C.R.R. (2d) 219, [2012] O.J. No. 1976, (QL)(Ont. Sup. Ct.), a case which has many similarities with the current case, the accused

was also detained and handcuffed immediately following a dynamic entry of a residence by police who were searching for firearms. Similar to the case before me, the arresting officer engaged the accused, Mr. Salmon, in conversation without advising him of his rights under s. 10 of the *Charter*. The officer asked the accused his name as well as his address. When asked whether he lived in the apartment, the accused, Mr. Salmon, said that he did. As in the case before me, Crown counsel in the *Salmon* case submitted that the questioning by the officer could be characterized as "routine" or "innocuous". The trial judge, however, held that it should have been clear to the officer that the issues of knowledge and control would be critical to establishing the guilt of persons found in the apartment. The judge referred to the analysis of the Ontario Court of Appeal in the case of *R. v. Nguyen*, 2008 ONCA 49, 231 C.C.C. (3d) 541, as persuasive. The trial judge therefore found that the accused's s. 10 *Charter* rights had been broken, and based upon his analysis of the *R. v. Grant* factors the judge excluded the accused's utterances.

[41] I also find the case of *R. v. Nguyen, supra*, to be persuasive. In that case, the accused had driven up to a house which the police were in the process of searching and seizing grow-op materials. When Mr. Nguyen started to leave, one of the police officers told him to stop and asked him if he lived there, to which the accused responded in the affirmative. The Ontario Court of Appeal held that the accused's s. 10 rights had been infringed. It stated at para. 21:

> 21 Once detained, an individual is at the mercy of state actors. Thus, in circumstances where the informational component of s. 10(a) of the *Charter* is easy to fulfill - as it was in this case - the breach of the obligation to provide that information cannot be considered a trivial matter. We say this because, as the jurisprudence illustrates, the right against self-incrimination is fundamental to the spirit of s. 10 of the *Charter*.

[42] Similarly, in the circumstances of this case, Cpl. MacDonald had the opportunity to advise the accused of his right to counsel as soon as he arrested the

accused. There was no need to obtain information concerning his residence for the purposes of the arrest as he had already arrested and detained the accused. In my opinion, the request for information as to where the accused lived was not innocuous or simply administrative.

[43] Crown counsel also submitted that Mr. [redacted] statement that "I live here now" was a voluntary, spontaneous utterance similar to that found admissible by the court in *R. v. Yaeck* (1991), 68 C.C.C. (3d) 545, 6 O.R. (3d) 293 (Ont. C.A.). The *Yaeck* case is also distinguishable because there the self-incriminating statements had been made after the accused had been properly advised of his right to counsel but prior to accessing counsel. That is not the situation here. There was a 15-minute delay between the time that the accused was arrested and when the s. 10(b) notice of his right to counsel was given. It was in that 15-minute interval that the self-incriminating statement was made.

[44] In the second case cited by Crown counsel, *R. v. Nicholson* (1990), 53 C.C.C. (3d) 403, 47 C.R.R. 232 (B.C.C.A.), the voluntary statement was also made by the accused after the right to counsel warning had been given, not before as was the circumstances of this case.

[45] Finally, in the circumstances of this case, it is questionable as to whether the utterance was voluntary at all since it was in response to the initial question asked by Cpl. MacDonald as to where the accused's residence was. In my opinion, the statement by the accused that "I live here now" was not a spontaneous utterance, but rather was his correction of his initial response to Cpl. MacDonald's original question as to the accused's residence. Furthermore, it would have been very simple for Cpl. MacDonald to have given the appropriate s. 10(b) informational warnings before commencing his "administrative" questions even if I accepted Crown counsel's characterization of

Cpl. MacDonald's questions.

[46] When considering the balancing of the effect of admitting the evidence on society's confidence in the administration of justice as required in the *R. v. Grant, supra*, case, I am cognizant of the finding of Justice Gunn in the *R. v. Santos, supra*, case at para. 250 that "Society has a strong interest in the adjudication of drug cases on their merits". However, in my opinion, society also has a strong interest in ensuring that *Charter* rights are respected. The Crown has acknowledged that the accused's *Charter* rights were not respected when Sgt. Larocque questioned him after Mr. [redacted] had indicated that he wished to exercise his right to counsel. Even though the accused had stated to Cpl. MacDonald that he wished to speak to counsel, Cpl. MacDonald allowed the accused, who by that time was his prisoner, to be questioned by Sgt. Larocque. Cpl. MacDonald also recorded the accused's answers to Sgt. Larocque's questions as to whether there were any safety issues that the police should be concerned about in their search of the house and how the accused would know this. Crown counsel acknowledged that the Crown could not rely upon the accused's response to Sgt. Larocque's questions because to do so would have been in breach of the accused's s. 10(b) rights. If the Crown was prepared to acknowledge that it would not be appropriate to rely upon statements made after the accused exercised his s. 10(b) right, in my opinion this indicates that the Crown would also have taken a similar position in respect to his comment "I live here now" if the accused had been advised of his s. 10(b) rights immediately after his arrest and had similarly requested counsel.

[47] After considering all three factors in the *Grant* analysis, in my opinion, to admit this evidence would bring the administration of justice into disrepute. Therefore, the statement made by the accused to the effect that "I live here now" should be excluded pursuant to s. 24(2).

CONCLUSION

[48] I therefore hold that the Certificates of Analyst are admissible evidence pursuant to s. 51(3) of the *CDSA*, but also hold that the statement of the accused that "I live here now" is excluded by virtue of s. 24(2) of the *Charter*.

J.
N.G. GABRIELSON