

Action No.: 080451610Q1

E-File No.: [REDACTED]

Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

HER MAJESTY THE QUEEN

v.

[REDACTED]

Accused

TRIAL
EXCERPT

Calgary, Alberta
April 1, 2011

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

TABLE OF CONTENTS

Description		Page
April 1, 2011	Morning Session	1
Ruling (Voir Dire)		1
Certificate of Transcript		21

1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, ~~Calgary~~,
2 Alberta

3
4 April 1, 2011

Morning Session

5
6 The Honourable
7 Mr. Justice Lutz

Court of Queen's Bench
of Alberta

8
9 G. Harlow

~~For the Crown~~
For the Crown

10 P. Fagan

For the Accused

11 S. Hawkins

Court Clerk

12 L.B. Bratland, CSR(A), RMR

Official Court Reporter

13
14
15 THE COURT:

Good morning.

16
17 MR. FAGAN:

Good morning, My Lord.

18
19 MR. HARLOW:

Good morning, My Lord.

20
21 **Ruling (Voir Dire)**

22
23 THE COURT:

Crown counsel had asked at the opening of the

24 proceeding that the evidence would be in the form of a voir dire only, and that at the
25 conclusion that that evidence become part of the evidence at trial and the exhibits to be
26 marked accordingly; and I so order.

27
28 The accused, [REDACTED] has pleaded not guilty to a charge that he,
29 on or about the 10th day of April, 2008, at or near Calgary, Alberta, did unlawfully
30 possess a controlled substance, to wit: cannabis marihuana, in an amount exceeding three
31 kilograms for the purpose of trafficking, contrary to section 5(2) of the *Controlled Drugs
32 and Substances Act*.

33
34 The proceeding began with the evidence of one Matthew McGinnis, a Child Welfare
35 investigator who, with his partner, Darcy Sorochan, responded to a call his office received
36 from a Belfast school official to an emergent situation of what they believed to be
37 imminent risk to a 7-year-old school girl student absent from the school for two weeks
38 and who lived with her father, the Accused herein, and one believed to be under the
39 influence of alcohol on the morning of April 10, 2008.

40
41 The girl's school official, when he spoke to the father, said that the Accused told him that

1 she, [REDACTED] would not be attending the subject school any longer.

2
3 Where there is an allegation of influence or presence of alcohol or drugs in a child's
4 residence, the protocol of Social Services is to ask for police assistance, which was done
5 here. That directive to McGinnis and Sorochan emanated from their team leader,
6 whereupon Constables Salmon and Tait of the Calgary City Police Service became
7 involved and met them at the accused's house at 160 Pinewind Road, North East, Calgary,
8 where the Accused resided with his daughter [REDACTED].

9
10 The protocol further directs an assessment risk upon seeing the child first. They knocked
11 on the door and, on the second knock, the door was partially opened by the Accused.
12 McGinnis and Sorochan identified themselves and told the Accused that they were there
13 to assess risk to [REDACTED]. They asked to enter, as they were required to observe the child in
14 their environment and the condition of the parent. There was a little bit of resistance,
15 they said, and then the Accused permitted their entry. McGinnis said he was not
16 aggressive, but assertive, and explained that pursuant to the *Child, Youth and Family*
17 *Enhancement Act*, or CYFE, section 9(13), they believed they had authority to enter, to
18 see a child for apprehension without an order if they felt it warranted, if they could show
19 cause within three days.

20
21 McGinnis entered the house, and then Darcy Sorochan, and then the City of Calgary
22 police officers. There was a marijuana smell from the entry. The Accused, McGinnis
23 said, responded to the questions asked of him. Sorochan met [REDACTED]. McGinnis went to
24 the kitchen with the Accused, telephoned his team leader, and told him of the presence of
25 marijuana that he said Sorochan showed him in a computer room on a desk located there,
26 and in the master bedroom that Sorochan showed him later. Sorochan went to the
27 basement and found marijuana in some quantity in a freezer. The Accused was then
28 arrested, cuffed, Chartered, and taken from the house.

29
30 Jamie Adams of McGinnis's office made the decision to take [REDACTED] from the house and to
31 place her in a foster home. McGinnis telephoned the team leader to see where to take
32 her, having determined that her biological mother lived in Lethbridge. Of the Accused,
33 McGinnis said he presented of marijuana influence and told McGinnis he'd smoked some
34 within the last two hours.

35
36 Counsel agreed McGinnis and Sorochan are persons in authority for the purposes of this
37 trial.

38
39 On cross-examination McGinnis said Sorochan was with him from 9:30 to 10 in the
40 morning on the subject day as they arrived at the accused's residence; that they engaged
41 the police for purposes of security. The residence, they said, was a nice home on

1 approach. The Accused was not belligerent or threatening, ever. It was McGinnis's
2 intention to enter the residence to see if [REDACTED] was safe. He agreed he could have asked
3 to see [REDACTED] at the front door, but did not recall if he did ask or not. He said [REDACTED]
4 looked healthy and normal and well fed and well taken care of.

5
6 [REDACTED] showed Sorochan the house, including her bedroom, which was their practice to ask
7 for. He did not know the Accused had sole custody of [REDACTED] until after the fact.
8 McGinnis said they entered the house "pre-noon," "not 3 PM," that he was at the house
9 for two hours, and saw the marijuana a half an hour after his arrival. He said he saw no
10 marijuana in the kitchen.

11
12 Darcy Sorochan testified that he was a seven-year social worker, that he was the assistant
13 to Mr. McGinnis. He felt [REDACTED] was at risk, as in a telephone conversation with the
14 school official the latter felt the Accused sounded intoxicated and that [REDACTED] had been
15 absent from the school for two weeks. At the front door he said the accused's entry
16 allowance was reluctant at first until Sorochan explained their authority, noting he told the
17 Accused he had a right to enter. The Accused, he said, was not happy but he opened the
18 door and said "okay."

19
20 Sorochan promptly noted the pungent smell of marijuana in the house, which he described
21 as "strong smell." He took [REDACTED] McGinnis took the Accused to the kitchen. [REDACTED] did
22 not know what marijuana was. There was no indication of any mistreatment of her care;
23 and she took Sorochan to her bedroom, which he said was appropriate and clean. In
24 another bedroom he discovered two little bags of marijuana. He said he took Constable
25 Salmon on a trip around the house, firstly to the accused's bedroom. He saw marijuana
26 cigarettes smouldering in an ashtray and three little bags of marijuana, and a scale as well,
27 and then Sorochan went to the kitchen with Constable Salmon, taking the three bags of
28 marijuana with him. He said he observed -- Sorochan viewed the cupboards and the
29 freezer while Constable Salmon observed his activity.

30
31 Then they went downstairs, and the freezer, he said, was full of bags of marijuana. The
32 upstairs they went to next, and by then the Accused had been removed to a police car.

33
34 Sorochan said he and McGinnis took [REDACTED] and he testified that they arrived at the house
35 at 1 to 2 PM and left about 3 PM, contrary to the evidence of McGinnis. In
36 cross-examination he was asked why he did not see [REDACTED] at the door. He said part of his
37 investigation is to go through the house. He said, "I opened a closet door in the bedroom
38 and Constable Salmon saw bags of marijuana there." And throughout he said Salmon was
39 behind him.

40
41 From the vantage point of the first bedroom, Sorochan could see the smouldering cigarette

1 joint in the next bedroom. At the freezer site downstairs he said there was a marijuana
2 smell that was stronger than the smell through the house.

3
4 Constable James Keith Salmon of the City of Calgary Police Service, who had four and a
5 half years service here and 17 years in the United Kingdom, testified that he went to 160
6 Pinewind Road, North East, with Constable Tait, his partner, on what he was told was a
7 Child Welfare matter involving a child and possible drug use matter. He said, "We were
8 there to assure no breach of peace." From the open window from outside before entry to
9 the house he said he smelled marijuana. From a window he saw clutter. He saw the
10 Accused lying on the bed. He and Tait stood back at the front door and noted the
11 Accused was somewhat reluctant to open the door fully, but that he did and they all
12 entered.

13
14 Salmon said he went with the Accused to the kitchen. Inside the house he noted nothing
15 by way of smell. Sorochan, he said, left him and returned to say that he saw marijuana in
16 the bedroom, believed to be the room where he saw the Accused lying on a bed from
17 outside. Sorochan and he, Salmon, went to the bedroom. He and Sorochan opened a
18 closet door and saw three to four large bags of marijuana. They saw small bags on the
19 table. He agreed that when he first saw the marijuana he felt he had grounds to arrest the
20 Accused. He said, and I quote, "I was there for protection initially." And once Sorochan
21 concluded his investigation, "I decided to arrest the Accused."

22
23 The Accused, he said, remained in the kitchen and "Sorochan and I -- that is to say,
24 Salmon -- went downstairs." Marijuana plant rings were noted on the floor. Then he said
25 Sorochan opened the freezer where he saw many bags of marijuana. He then told
26 Sorochan that he was going to arrest the Accused. It was now, he said, a police
27 investigation and so "I felt we now needed a warrant." At no time did the case worker
28 direct the City of Calgary Police Service activity, or vice versa. He arrested, cuffed,
29 searched and Chartered the Accused at 1529 hours, having arrived at the house at 3:03
30 PM that afternoon. The Accused said he wished to speak to a lawyer. He seized nothing
31 there, said Constable Salmon. Rather, he waited for his fellow CPS officers to arrive to
32 do so.

33
34 At 1555 hours he left with Constable Tait to go to headquarters, arriving there at 1529
35 hours at 5 District. There, he said the Accused said he longer wished to speak to a
36 lawyer. The Accused was cautioned. Again, a warrant was prepared and granted at 2247
37 hours. At 2140 hours, however, he said the Accused had spoken to a lawyer.

38
39 In the house upon his arrival at 0012 hours he went to the main bedroom, found scales,
40 the second set of scales on a shelf, blue box with hotel receipts for the Accused, and H &
41 R Block documents. Under the desk he found Ziploc bags of marijuana, and he left at

1 0115 hours. Salmon said he did not seize anything, but Constable Tait did.

2
3 At the detachment at 1507 hours, the Accused was taken to the processing room where he
4 and Tait did a DVD recording from 0138 hours to 0244 hours. As Salmon, in the
5 interview room alone, said he identified himself to the Accused, that he was wearing his
6 uniform and sidearm. He said he had no physical contact with the Accused, who was
7 under arrest. There was no threat, gesture or promise made to the Accused. It was a
8 question and answer format by Constable Salmon only.

9
10 The issue was whether any statements made therein were made voluntarily. The
11 discussion, in part, centred around the accused's daughter, [REDACTED], the 7-year-old who lived
12 with the Accused and his copain, Melinda, in the subject rented property at 160 Pinewood
13 Road, North East, Calgary, a bungalow under some renovation. The Accused told
14 Constable Salmon he had only the use of the main floor and basement and not the
15 backyard or the detached garage; that he had one key that fit the front door, and he
16 thought it might fit the back door but he had not tried it so he did not know whether it fit
17 or not, as he gave the impression he knew nothing of the garage or whose path it was
18 from the back door of the house to the garage entry door.

19
20 Questioned about how much marijuana he smoked, he denied he told the Social Services
21 worker he had smoked that morning. Rather, he said he told him that he smoked
22 marijuana occasionally. Constable Salmon began a discussion about the accused's
23 relationship with [REDACTED] and the accused's loss of her focusing on learning, others who
24 were connected with the Accused, and the large amounts of marijuana found in what was
25 clearly a stash house. This led Constable Salmon to learn that [REDACTED] mother had
26 abandoned her for a Lethbridge gravel crusher boyfriend and had no interest in her. There
27 was extensive discussion respecting paraphernalia, that is, scales, plastic baggies, grow-op
28 fertilizer, and so on. The Accused gave little response to Constable Salmon's suspicion
29 there were others involved. From time to time the subject of [REDACTED] reappeared, leading to
30 defence counsel's submission on the lack of voluntariness of the statements made by him
31 to Constable Salmon. I ruled against the Accused on this occasion, as I failed to find
32 there was any inducement, threat or promise that was evident in the discussion with the
33 Accused. Thus, the Crown met its obligation in that respect.

34
35 Defence counsel's cross-examination of Salmon was agreed that he had no judicial order
36 or warrant when he and Constable Tait arrived at the accused's house with McGinnis and
37 Sorochan. He said, however, he never asked and did not believe he needed one. "I
38 thought I had authority as Social Services did." He saw [REDACTED] on the entry and said she
39 was a normal looking girl. Upon entry Salmon went to the Accused, and Social Services
40 went to [REDACTED]. Ten to 15 minutes later he started to go through the house. He did not
41 question the Accused and stood where he could keep an eye on things.

1
2 Constable Salmon then said he followed Sorochan to a hallway and bedrooms after he,
3 Sorochan, passed him in the hallway and indicated he'd seen drugs. Constable Salmon
4 was clear that he waited to be summoned by Sorochan.
5

6 In the master bedroom he said he saw bags of marijuana, and Sorochan opened the closet
7 door and saw more marijuana. He denied that he, Salmon, was searching for anything.
8 He said, "That's his job," referencing Sorochan. The constable testified that he was not
9 investigating an offence then. He took marijuana from the master bedroom, which
10 comprised three or four small bags, to the kitchen, where he witnessed Sorochan viewing
11 the fridge and cupboards. Sorochan took him to the basement. He saw rings on the floor
12 which indicated places where marijuana po's had been sitting. There was smell of
13 marijuana. He said Sorochan opened the freezer and, upon Salmon noting the bags of
14 marijuana there, he decided to arrest the Accused, and did so at 1529 hours, removed him
15 from the house, charged and cautioned him, and put him in the police car at 1541 hours.
16

17 He testified that police presence was to accompany Social Services to prevent a breach of
18 peace and as security for social services employees, which I find was initiated as a result
19 of information both Social Services and City Police had about drug presence and possible
20 alcohol presence. I will elaborate on this in more detail later herein.
21

22 Defence counsel, in his usual fairness, conceded continuity of the seized items, including
23 that it was cannabis marijuana, and related certificates of the governmental laboratory.
24

25 Crown called Constable Cory William Tait, Constable Salmon's partner. He was there as
26 the exhibit person at the subject house. He understood he was there to assist Social
27 Services, he said, to keep the peace over perceived concern with the violent nature of the
28 Accused. The entry followed a knock by Social Services on the door; that the Accused
29 was reluctant to open the door at first, but they told him what their authority was and why
30 they were there, and they were allowed entry. Tait said he did not speak to the Accused.
31 He said a 7-year-old girl appeared, and Sorochan took [REDACTED] to the living room. Then he
32 sought permission from the Accused to tour the house.
33

34 Sorochan escorted Salmon through the house. Tait said he learned of the marijuana in the
35 master bedroom in its closet and in a downstairs closet. Tait, in the bedroom, denied he
36 was searching or looking for anything. The Accused was arrested, and Tait decided that a
37 warrant was then necessary.
38

39 Tait and Salmon left the house at 1555. Tait said they arrived at the police headquarters
40 at 1559. He noted a key in the accused's possession that fit the small garage door. At
41 1816 hours he spoke to the Accused, who asked to speak to a lawyer.

1
2 At 2305, Constable Tait went to the house and took over continuity of the exhibits. At
3 the house he took numerous photographs. From the three bags of marijuana seized in the
4 master bedroom, he said these were the amounts of weight: 1.4538 kilograms and 0.8741
5 kilograms. The basement was 7.1511 kilograms. The other were 19 bags of bud
6 weighing 67.7 kilograms and three small baggies, the same as was found in the master
7 bedroom. He found marijuana stalk that weighed 15.816 kilograms. In the master
8 bedroom the weight was 1.4538 kilograms. In the garage, 2.5411 kilograms.

9
10 The Crown's last witness was Detective Douglas Alan Hudacin, who had 25 1/2 years
11 service, 13 of those laterally in the Drug Unit with the City of Calgary Police Service. His
12 qualifications were proffered and accepted by defence counsel as an expert in the general
13 area of drug distribution of marijuana, pricing, packaging, user habits, consumption, and
14 the like.

15
16 The master bedroom find, he said, of marijuana would, on the street, sell for \$23,975, on
17 average; in bulk, \$13,200. With the upper user limit per day, he said it would last a
18 person 1.6 years, on average. And to hold this, he said, would see the quality degrade
19 after one and a half years.

20
21 In the garage he found 2.5411 kilograms, which he said on the street would sell for
22 \$25,400, and by the pound, \$13,980. He had no opinion on the bud and shake in the
23 freezer downstairs.

24
25 The defence conceded the quantity was sufficient to satisfy trafficking under 5(2) of the
26 *CDSA Act*.

27 28 Parties' Positions

29
30 The Accused argues that the Social Services workers had no authority to enter the home
31 or to search the home, nor did the police. The Accused argues that the *Child, Youth and*
32 *Family Enhancement Act* did not provide lawful authority to enter the accused's residence.
33 Thus, the entry, he argues, was unreasonable and contrary to section 8 of the *Charter*. In
34 this case there was no warrant or court order at the time that the police and Social
35 Services workers entered the accused's residence. The Accused submits that Justice
36 Rawlins' decision for judgment, delivered orally on May 4, 2004, in *R. v. Hung Xuan*
37 *Nguyen* supports his position.

38
39 The Accused submits that the police obtained a warrant to search the accused's home
40 based on evidence seized in violation of section 8 of the *Charter*. He argues that the
41 illegally obtained evidence ought to be excised from the Information to Obtain the Search

1 Warrant. The remaining evidence, he says, would then be insufficient to justify the
2 granting of a Warrant to Search.

3
4 During oral arguments Accused's counsel advised that he no longer seeks to raise a
5 violation of section 9 and 10 rights.

6
7 During the voir dire the Accused also challenged the voluntariness of the accused's
8 statement given to the police. I reiterate that I found that statement was voluntarily made.
9

10 The Crown agrees with the Accused that the *Child, Youth and Family Enhancement Act*
11 does not provide the authority to conduct a search as was conducted in this case.
12 However, the Crown submits that the search was authorized at common law. The Crown
13 argued that there is authority at common law for social workers and police officers to
14 enter a home and conduct a search in appropriate circumstances. The Crown submits that
15 the situation in this case is very similar to a 911 situation as described in *R. v. Godoy*,
16 [1999] 1 S.C.R. 311. In the case at bar, the information they used was that the child had
17 not attended school for two weeks, that the father may have been intoxicated, and was
18 acting belligerently.

19
20 The following sections of the appropriate statute are pertinent for this application:

21
22 Investigation and response

23
24 6(1) If a director receives information in the form of

25
26 (a) a request for intervention services,

27
28 (b) a report under section 4 or 5, or

29
30 (c) any other allegation or evidence that a child may be in need
31 of intervention,

32
33 the director must investigate the child's need for intervention
34 unless the director is satisfied that the information was provided
35 maliciously or is unfounded or that the report or allegation was
36 made without reasonable and probable grounds.

37
38 (2) During an investigation, a director may convey a child to any
39 place in order to complete the investigation if in the opinion of the
40 director it is necessary.
41

1 (3) If, after an investigation referred to in subsection (1), the
2 director is of the opinion that the child is in need of intervention,

3
4 (a) the director must,

5
6 (i) if the director is satisfied that it is consistent with
7 the child's need for intervention, provide family
8 enhancement services to the child or to the child's
9 family in accordance with this Act, or

10
11 (ii) if the director is not satisfied that the child's need
12 for intervention can be met under subclause (i), take
13 whatever action under this Act that the director
14 considers appropriate, including the provision of
15 protective services in accordance with this Act,

16
17 and

18
19 (b) the director may, if the director is satisfied that it is
20 consistent with the child's need for intervention, convey the
21 child to the person who has custody of the child or to a
22 person who is temporarily caring for the child.

23
24 (4) If family enhancement services are provided to the child or to
25 the child's family, the person or a member of the organization
26 providing those services must report to the director any matter
27 respecting the child that may require further investigation by the
28 director.

29
30 **Apprehension Order**

31
32 19(1) If a director has reasonable and probable grounds to believe
33 that a child is in need of intervention, the director may make an *ex*
34 *parte* application to a judge of the Court, or if no judge is
35 reasonably available, to a justice of the peace, for an order

36
37 (a) authorizing the director to apprehend the child, or

38
39 (b) if the judge or justice is satisfied that the child may be
40 found in a place or premises, authorizing the director or any
41 person named in the order and any peace officer called on

1 for assistance, to enter, by force if necessary, that place or
2 premises and to search for and apprehend the child.

3
4 (2) If

5
6 (a) a child who is in the custody of a director under
7 Division 2 or this Division has left or been removed from
8 the custody of the director without the consent of the
9 director, and

10
11 (b) the director has reasonable and probable grounds to
12 believe that the child may be found in a place or premises,

13
14 the director may make an *ex parte* application to a judge of
15 the Court or, if no judge is reasonably available, to a justice
16 of the peace, for an order under subsection (3).

17
18 (3) A judge of the Court or a justice of the peace, if satisfied on
19 reasonable and probable grounds that the child may be found in
20 the place or premises, may make an order authorizing the director
21 or any person named in the order and any peace officer called on
22 for assistance, to enter, by force if necessary, the place or premises
23 specified in the order and to search for and remove the child for
24 the purpose of returning the child to the custody of the director.

25
26 (4) If a director has reasonable and probable to believe that a
27 child referred to in subsection (2) may be found in a place or
28 premises and that the life or health of the child would be seriously
29 and imminently endangered as a result of the time required to
30 obtain an order under subsection (3) or (5), the director may,
31 without an order and by force if necessary, enter that place or
32 those premises for the purposes specified in subsection (3).

33
34 [. . .]

35
36 (12) Notwithstanding subsection (1), a director or peace officer
37 may apprehend a child without an order if the director or peace
38 officer has reasonable and probable grounds to believe that the
39 child's life or health is seriously and imminently endangered
40 because
41

1 (a) the child has been abandoned or lost or has no
2 guardian,

3
4 (b) the child has left the custody of the child's guardian
5 without the consent of the guardian and, as a result, the
6 guardian is unable to provide the child with the necessities
7 of life, or

8
9 (c) the child has been or there is substantial risk that the
10 child will be physically injured or sexually abused.

11
12 (13) A person who is authorized to apprehend a child under
13 subsection (12) and who has reasonable and probable grounds to
14 believe that the child may be found in a place or premises may,
15 without an order and by force if necessary, enter that place or
16 those premises and search for the child.

17
18 (14) Notwithstanding subsection (1), a director or peace officer
19 may apprehend a child without an order if the director or peace
20 officer has reasonable and probable grounds to believe that the
21 child has left or been removed from the custody of the child's
22 guardian without the consent of the guardian.

23 24 Analysis

25
26 The onus is on the Crown to prove that the warrantless search was reasonable. The
27 Crown argues that the search was authorized at common law and that its execution was
28 reasonable. The Accused argues that no such authority exists and, if it did, the
29 circumstances did not give rise to an emergency situation which would have justified such
30 a search.

31
32 In *Hung Xuan Nguyen*, a telephone call was made from Social Services in Ontario to
33 Social Services in Calgary with respect to the wife or common-law partner of the
34 Accused. While in Ontario she had been the subject of a Social Services investigation
35 which led them to conclude that the mother had drugs problems. As a result, four of her
36 children were removed from her care and placed in foster or adopted homes. Alberta
37 Social Services were alerted to this history because it was believed that this woman had
38 two more children and there was a concern with respect to the potential risk based on the
39 mother's drug use. Based on that information, a Child Welfare investigator attended the
40 accused's home and requested entry into the house in order to satisfy himself that there
41 was no drug activity. The investigator admitted that he saw the six-month-old twin

1 children upon entry and they appeared to be well fed and clothed. At that time the mother
2 was at work. The investigator viewed the upstairs of the home, which included the
3 children's bedroom and the parents' bedroom, both of which appeared to be appropriately
4 furnished for their purposes. A third bedroom was locked. The investigator requested
5 entry in it, but it was denied by the Accused, who said that it belonged to a roommate and
6 would not open it. The investigator expressed his wish that he wanted to see this room,
7 and access was again denied. The Accused then asked the investigator to leave. The
8 investigator advised the Accused that he would be returning later with the police in order
9 to have access to the third bedroom. The investigator returned later, accompanied by
10 police officers and another Child Welfare worker.

11
12 In that particular case Justice Rawlins of this court said that although the investigator
13 alleged that he called the police for his own personal safety, she concluded that the threat
14 to the Accused to return with the police was actually made to ensure entry into the
15 accused's home. After accessing the third bedroom, it was apparent that there had been a
16 grow operation there. The Child Welfare worker discovered a door to the basement that
17 was locked, and the Accused produced the key. Over 400 marijuana plants were found
18 growing in the basement. The Accused was arrested following that.

19
20 Justice Rawlins found that even though the Accused stepped aside when the investigator,
21 the Child Welfare worker and police officers returned, he did not consent to their entry,
22 particularly given the fact that he had denied entry to the investigator earlier that day.
23 She disagreed that the investigator and Child Welfare worker had authority under the
24 *Child Welfare Act* to enter the accused's home. She noted that under the Act there were
25 no provisions which set out how the investigation should be conducted. She found that in
26 the case before the Court the investigator was looking for drugs and the protection of the
27 children and their welfare was not his concern. She said:

28
29 [15] I recognize that the welfare and safety of children may
30 require the state to provide for different standards of privacy than
31 are accorded for criminal proceedings; however, such intrusion
32 into a person's privacy must be clearly enunciated so that the
33 potential abuse can be avoided. The *Child Welfare Act* provides
34 the authority to enter a person's dwelling without their consent in
35 very limited circumstances, as provided in s. 19(3) and (4). There
36 are no provisions to allow entry to a person's house without such
37 order.

38
39 [16] I appreciate that the *Child Welfare Act* requires the director
40 to investigate Child Welfare matters that are properly reported. I
41 also acknowledge that the investigation, in some cases, may reveal

1 illegal activity as occurred here.

2
3 [17] However, I find that the mere requirement of an
4 investigation must have some recognition of the seriousness of the
5 intrusion that can accompany such investigation to ensure that
6 basic legal rights are considered.

7
8 [18] In this instance, I find that the Child Welfare investigators
9 exceeded the jurisdiction accorded to them under the *Child*
10 *Welfare Act*. They were acting as agents of the state and the
11 police and triggered the provisions of s. 8 of the *Charter*. The
12 search was not authorized by law, being the *Child Welfare Act*,
13 and was not reasonable under the circumstances, nor was it
14 conducted in a reasonable matter (sic). Section 8 of the *Charter*
15 has, therefore been breached. As a result, the police were not
16 authorized to be in the accused's premises and, therefore, would
17 not have discovered the marihuana grow operation. The evidence
18 should be excluded.

19
20 In oral argument the Crown here conceded the only authority to enter the home was for
21 the purpose of apprehending the child. However, the Crown argued that there is authority
22 at common law for social workers and police officers to enter a home and conduct a
23 search in appropriate circumstances. The Crown submits that the circumstances of this
24 case are very similar to a 911 situation. In this case the information they used was that
25 the child had not attended school for two weeks, that the father may have been intoxicated
26 and was acting belligerently. The Crown argued that after entering the Accused's
27 residence the smell of marijuana was still a concern for the safety of a child. It was
28 reasonable to search the home, given the smell in the home. The Crown submits that the
29 fact that it was possible to smell marijuana in the house was sufficient to raise legitimate
30 concerns for the child. The Crown argues that the existence of children services,
31 especially teams that are constituted to answer emergency calls, is similar to a 911 call.
32 The Crown added that the courts also need to take into consideration that children are
33 often not able to make a call on their own volition.

34
35 In *Godoy*, the issue of the scope of police powers in responding to emergency 911 calls
36 was raised before the Supreme Court of Canada. Lamer C.J., writing for the Court,
37 agreed with the Court of Appeal that the police had a common-law duty to investigate a
38 911 call and, accordingly, had the authority to forcibly enter a dwelling in a search of the
39 caller. In *Godoy*, there had been an unknown trouble call to 911 which had disconnected.
40 The police procedure was to respond with backup. The officers arrived at the residence
41 from which the call originated. The appellant opened the door and said that there was no

1 problem. One of the officers prevented the appellant from shutting the door by putting
2 his foot in the way. The four officers then entered the dwelling. They heard a woman
3 crying. The common-law wife of the appellant was found in their bedroom, curled in a
4 fetal position and sobbing. One of the issues before the Court was whether the Court of
5 Appeal for Ontario erred in finding that the police were acting in the execution of their
6 duty to protect life and prevent injury when they forcibly entered the appellant's
7 apartment in response to a disconnected 911 call. Lamer C.J. stated that public policy
8 clearly requires that the police *ab initio* have the authority to investigate 911 calls, but
9 added that whether they may enter a dwelling-house in the course of such an investigation
10 depends on the circumstances in each case.

11
12 At paragraph 22, Lamer C.J. wrote as follows:

13
14 [22] Thus in my view, the importance of the police duty to
15 protect life warrants and justifies a forced entry into a dwelling in
16 order to ascertain the health and safety of a 911 caller. The public
17 interest in maintaining an effective emergency response system is
18 obvious and significant enough to merit some intrusion on a
19 resident's privacy interest. However, I emphasize that the
20 intrusion must be limited to the protection of life and safety. The
21 police have authority to investigate the 911 call and, in particular,
22 to locate the caller and determine his or her reasons for making
23 the call and provide such assistance as may be required. The
24 police authority for being on private property in response to a 911
25 call ends there. They do not have further permission to search
26 premises or otherwise intrude on a resident's privacy or property.
27 In *Dedman*, supra, at p. 35, Le Dain J. stated that the interference
28 with liberty must be necessary for carrying out the police duty and
29 it must be reasonable. A reasonable interference in circumstances
30 such as an unknown trouble call would be to locate the 911 caller
31 in the home. If this can be done without entering the home with
32 force, obviously such a course of action is mandated. Each case
33 will be considered in its own context, keeping in mind all of the
34 surrounding circumstances. (I specifically refrain from
35 pronouncing on whether an entry in response to a 911 call affects
36 the applicability of the "plain view" doctrine, as it is not at issue
37 on the facts of the case at bar.

38
39 In *V.S. v. Alberta (Director of Child Welfare)* 2004 ABQB 892, in an appeal from
40 Provincial Court, Binder J. of this court acknowledged that section 6 did not implicitly
41 include the authority to enter and search without obtaining prior judicial authorization

1 where no consent was given. He stated, and I quote:

2
3 [59] It is neither possible nor desirable to attempt to list the
4 circumstances which might raise a legitimate concern for the life
5 or health of a child. At a minimum, a police officer would be
6 acting within his common law duty where facts existed which
7 meet the criteria under the Act for apprehension without an order,
8 for example where there are reasonable and probable grounds to
9 believe that the child's life or health is seriously and imminently
10 endangered because the child has been or there is substantial risk
11 that he will be physically injured.

12
13 In determining whether section 8 had been breached, Binder J. looked at the history and
14 context of the duty being performed:

15
16 [64] The relevant considerations in determining whether an
17 unauthorized search was reasonable in those circumstances include
18 the duty being performed, the extent to which some interference
19 with individual liberty is necessary in the performance of that
20 duty, the importance of the performance of the duty to the public
21 good, the nature of the liberty being interfered with, and the nature
22 and extent of the interference: *Dedman*.

23
24 [66] Therefore, on his arrival at the home on August 26, 2001,
25 Sgt. Henderson would have had a reasonably good idea as to the
26 reason for the smell. He testified that he believed the children
27 were at imminent risk and it would be neglectful to leave them in
28 the house even for half an hour. However, to his knowledge, the
29 children likely had been living in such conditions for some time.
30 In my view, from an objective point of view, the circumstances
31 were likely not exigent in the sense that the children's health
32 would be further compromised if they took the time to obtain an
33 authorization to apprehend the children. However, absent the ten
34 year history that existed in this case, and in particular the
35 knowledge of the cleanliness problems, I may well have concluded
36 otherwise.

37
38 [67] In reaching my conclusion, I do not suggest that
39 apprehension orders should be used in order to assess living
40 conditions which may pose a significant danger to children's
41 health. As was emphasized in *K.L.W.*, apprehension should be

1 used only as a measure of last resort where no less disruptive
2 means are available. Therefore, there may be circumstances where
3 a search without apprehension is warranted as a justifiable use of
4 police power in fulfilling the common law duty to protect life.
5 Given the very intrusive nature of an apprehension, logic dictates
6 that factors other than those set out in s. 1(3)(b) of the Act may
7 justify such a search. However, this was not a case where an
8 unauthorized search was justified as reasonably necessary. The
9 CARRT Team had already formed the belief on the doorstep that
10 there were reasonable and probable grounds to apprehend the
11 children, and the circumstances were not so exigent as to warrant
12 unauthorized entry to effect that apprehension.
13

14 In *Chatham-Kent Children's Services v. J. K.*, [2009] O.J. No. 5423 (Ont. Ct. Just.), the
15 Court found that the initial entry was sufficient to apprehend the child. Once Social
16 Services determined that it was a case of apprehension, no reentry or further search should
17 have been done. The Court found that the second entry was beyond the scope of what
18 was authorized. The Court stated at paragraph 44:

19
20 [44] In the case at bar, the worker attended at the home in
21 response to a report that the child was unattended at her home.
22 She quite properly engaged in investigative activities directed at
23 locating any adults in the home and when she found them and was
24 unable to rouse them, she was quickly able to confirm the truth of
25 the report. Once this was done she apprehended the child. Even
26 though it is not specifically authorized by subsection 40(11), her
27 investigation, which allowed her to confirm the truth of these
28 allegations of risk along with the observations that she made of the
29 condition of the child and the home that were in plain view while
30 she was completing this limited investigation (without going
31 throughout the house), were reasonable in the circumstances and
32 not in violation of the mother's section 8 *Charter* rights. This
33 evidence alone undoubtedly would have been credible and
34 trustworthy enough to support the need to apprehend the child. In
35 my view, her actions up to this point were not in contravention of
36 the *Charter*.
37

38 [. . .]
39

40 [47] In our case, after apprehending and removing the child from
41 the premises, the worker had no further right to re-enter the home

1 and to continue any search whatsoever. Although I do not fault
2 the worker for trying to tell the mother who had just been roused
3 that her child had been apprehended, she should have left
4 immediately when it became clear that the mother was in no mood
5 to talk. The intake worker's right to be in the residence expired
6 once the child was removed from the premises.

7
8 [48] The worker's re-entry into the home was not only illegal, but
9 it went far beyond the areas that had been in plain view when she
10 was legitimately there in the first place. Even prior to determining
11 that the child should be apprehended, there was nothing in the
12 initiating report that would have justified taking pictures of every
13 corner of the home including the interior of the closet, toilet, tub,
14 freezer and refrigerator. The evidence that was collected by the
15 worker and the assisting police officer during this stage of the
16 investigation was in violation of the mother's section 8 *Charter*
17 rights. Even if the worker had first obtained a warrant to
18 apprehend the child under subsection 40(2) of the Act, her
19 authority under subsection 40(6) of the Act would not have been
20 any greater than that allowed by subsection 40(11) on a
21 warrantless apprehension since the restriction on a worker's
22 activities are identical.

23
24 In this case there was a person who placed a telephone call in the morning which
25 informed Social Services that the accused's daughter had not been in school for two
26 weeks; that the Accused was belligerent and sounded intoxicated. Social Services
27 attended the Accused's residence to verify whether they should apprehend the Accused's
28 daughter. After entering the home they saw that she looked fine. For the purpose of this
29 case, I do not need to decide whether there is a common-law duty. The circumstances of
30 this case show that after a few minutes the social workers thought that the Accused's
31 daughter looked fine and the Accused did not look intoxicated. Moreover, it took several
32 hours before getting to the Accused's residence, which leads me to conclude that the
33 situation was not similar to a 911 call. There was no exigent circumstance which may
34 have justified a search of the home without a warrant or a judicial order.

35
36 I find here that the search was not authorized by common law and thus was unreasonable,
37 and that section 8 of the *Charter* was violated.

38
39 Section 24(2) *Charter* Analysis

40
41 I found that the evidence was obtained in breach of the Accused's *Charter* rights. I must

1 now determine whether the evidence should be excluded under section 24(2) of the
2 *Charter*, in light of *R. v. Grant*, 2009 S.C.C. 32, [2009] 2 S.C.R. 353. In order to
3 determine whether the issue of the marijuana would bring the administration of justice
4 into disrepute, I will assess and balance the effect of admitting the evidence on society's
5 confidence in the justice system, having regard to: (1) the seriousness of the *Charter*-
6 infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of
7 the Applicant/Accused, and (3) society's interest in the adjudication of the case on its
8 merits.

9
10 i. The seriousness of the *Charter*-infringing state conduct

11
12 The first line of inquiry under *Grant* is to determine the seriousness of the *Charter*-
13 infringing state conduct, in this case of the social workers and police officers. In the facts
14 of this case, no one acted in bad faith. It must have been obvious, despite the social
15 worker's information, that the Accused -- if it was the Accused -- appeared to be
16 inebriated and belligerent on the telephone to the Social Services Department in the
17 morning of the day in question. He was not when he responded to their knock on the
18 door in the afternoon.

19
20 Upon finding the child well kept, neat, tidy and responsive, that should have satisfied their
21 inquiry. To go rummaging through the Accused's residence at that juncture is to add
22 insult to injury, since apprehension on the facts here is the reduced scope only enjoyed by
23 Social Services on this occasion. In other words, when ██████ appeared immediately upon
24 Messrs. McGinnis and SoroChan's arrival, ██████ could have been apprehended if that was
25 felt to be in order; but the other activities pursued by McGinnis and SoroChan, with two
26 police officers in tow, were a blatant invasion of the Accused's privacy. In other words,
27 privacy was trumped by what was thought at the time to be the safety of persons, except
28 the only person whose safety could have been in issue was that of this well-cared for,
29 neat, tidy, alert little girl. There was no indication that there was anything amiss except
30 the odour of marijuana, which could not rouse the suspicion of McGinnis and SoroChan
31 sufficiently to cause them (with police in tow) to ransack the house.

32
33 Child Welfare proceedings are difficult to infuse in criminal law proceedings, as the
34 former is restricted to protection of persons -- that is here, children; but the real issue, as
35 events unfolded, illustrates that the state is to be held to a higher standard, and that is the
36 foundation of the *Charter of Rights and Freedoms* under this head of *Grant*.

37
38 If the social workers were acting in accordance to what they thought was legitimate, it is
39 clear that the issue with respect to the limits on their investigative powers is no longer
40 novel since at least 2004. Social Services cannot simply ignore the *Charter* and continue
41 to do their work as if they had the authority to search as they see fit without lawful

1 authorization. Under the first inquiry, I therefore conclude that admitting the evidence
2 would undermine public confidence in the rule of law.

3
4 ii. The impact of the breach on the *Charter*-protected interests of
5 the Applicant/Accused
6

7 This second line of inquiry under section 24(2) of the *Charter* focuses on the seriousness
8 of the impact of the *Charter* violation of the *Charter*-protected interests of the
9 Applicant/Accused. Marijuana is real evidence which was independently discoverable. In
10 this case the home of the Applicant/Accused, a place where intimate and private activities
11 are most likely to take place, was searched. The social workers and the police officers
12 did not just look at what was in plain view; they opened a closet, opened cupboards,
13 looked in the refrigerator and freezer. The privacy interest of the Applicant was seriously
14 breached. Under this second inquiry, I conclude that the impact of this breach is
15 important.

16
17 iii. Society's interest in the adjudication of the case on its merits
18

19 Relevant considerations under the inquiry relating to public interest in the adjudication of
20 the case on its merits in this case include whether truth-seeking function of the criminal
21 trial process would be better served by the admission of the marijuana or by its exclusion,
22 whether the evidence is reliable and its importance to the Crown's case. The marijuana
23 seized in the Applicant/Accused's home is highly relevant and reliable evidence. The
24 marijuana is essential to a determination on the merits. This third inquiry weighs in
25 favour of admitting the evidence.

26
27 VI. Conclusion
28

29 The weighing and balancing process under *Grant* leads me to conclude that the marijuana
30 found in the Applicant's house should be excluded under section 24(2) of the *Charter*. Its
31 admission into evidence would bring the administration of justice into disrepute.

32
33 Accordingly, I grant the *Charter* challenge on this voir dire, and the evidence of the
34 Crown is excluded.

35
36 Mr. [REDACTED], I find you not guilty.

37
38 Anything further, gentlemen?

39
40 MR. HARLOW:

No, My Lord.

41

1 MR. FAGAN: No, My Lord.

4 PROCEEDINGS CONCLUDED

1 Certificate of Transcript

2

3 I, Lynne B. Bratland, Official Court Reporter, certify that the foregoing pages are a
4 complete and accurate transcript of the proceedings, taken down by me in shorthand and
5 recorded by a sound-recording machine and transcribed from my shorthand notes to the
6 best of my skill and ability.

7

8

9

Digitally Certified: 2011-04-21 11:41:45

10

Lynne Bratland, CSR(A), RPR, RMR

11

Order No. 4313-11-1

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35 Pages: 23

36 Lines: 918

37 Characters: 40416

38

39 File Locator: 7ce51536d90f10008001001a4b0a479e

40 Digital Fingerprint: 7adcabe8e4ae9dbabe860f44e155c648be02d1cc9a113e21681cb586d00e6025

41