Citation: *R. v. Callahan-Smith,* 2025 YKTC 24

Date: 20250523
Docket: 24-00080
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Gill

REX

v.

BILLY DEAN HANK CALLAHAN-SMITH

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Kathryn Laurie — Counsel for the Crown
Kimberly M. Eldred — Counsel for the Applicant/Accused

RULING ON *VOIR DIRE* No. 1

[1] The accused applicant, Billy Callahan-Smith (the accused, or the applicant), is charged with sexual offences in relation to a complainant, G.B. who was at the time of the allegation, 14 years old.

[2] This *voir dire* (*Voir Dire* No. 1) addresses the warrantless seizure of a vehicle and motor home from the residential property located within the Kwanlin Dün First Nation ("KDFN") (hereinafter, "the property") where the accused resided and where he was located at the time of the said seizure. It also addresses whether the accused was, at the time of the seizure, arbitrarily detained.

[3] Additional issues to be addressed relate to the manner in which the car and motor home were seized and held by police, for almost two weeks until they obtained an authorization to search them, and whether during that interval, the report to justice was properly filed.

Brief Summary of Events

[4] On August 11, 2023, at approximately 3:15 a.m., police received a complaint of sexual assault on G.B., which they proceeded to investigate for the next two hours.

[5] At approximately 5:30 a.m., police attended at a residential property in Whitehorse, where they seized a car and a motor home located on that property.

[6] The police believed that both the car and the motor home were crime scenes and that they each contained evidence of the commission of the offence of sexual assault by the applicant upon the complainant. They believed that this would include DNA evidence proving the offence. They also believed that the need to preserve this DNA did not allow them sufficient time to obtain authorizations in advance of the seizures.

[7] The accused was located inside the motor home. Although he was neither arrested, nor informed as to precisely why the property was being seized, he was directed to vacate the motor home so that it could be towed away.

[8] While in the course of having the applicant vacate the motor home, a police officer briefly poked his head inside and viewed the interior of the motor home.

[9] On August 11, or two days after seizing the car and motor home, police sought an authorization to search them. This application was dismissed.

[10] A second application, made August 21, was granted. The granted authorization will be the subject of a subsequent *voir dire*.

[11] In between making the first and the second application to search the car and motor home, police filed a report to a justice on August 17, 2023, or eight days following the initial seizures. In that report to a justice, the applicant asserts that police did not disclose, that as at the time of filing, their retention of the car and motor home remained warrantless.

[12] Although details of the evidence tendered will be described under different headings outlined in this ruling, that is mostly for convenience. Much of any given aspect of the described evidence may actually bear on a number of the issues within in this ruling, and it has been considered as such.

[13] Overall, the seizures, made without police having obtained a prior judicial authorization, are asserted by the Crown as being nonetheless valid because they are authorized by law, in principally one or both of two ways:

a. Under exigent circumstances, pursuant to s. 487.11 of the *Criminal Code* (the "*Code*");

b. Pursuant to s. 489(2) of the *Code*, which does not require exigent circumstances.

There is also a suggestion by Crown that the seizures were authorized by police common law powers, to preserve evidence in the absence of any need for exigent circumstances.

[14] The applicant contests each of the avenues to seize relied on by the Crown and, as regards s. 489(2), challenges the constitutionality of that section to the extent it bears on this application.

[15] Having regard to the foregoing, the issues arising on the present *voir dire* are as follows:

a. Did the warrantless seizures meet the requirements of s. 487.11 and/or s. 489(2) of the *Code*?

b. If the warrantless seizures met the requirements of s. 489(2) of the *Code*, is that section, as applied to the circumstances of this case, constitutionally compliant with s. 8 of the *Charter*?

c. Did the police infringe the applicant's s. 8 *Charter* right to be free from unreasonable search or seizure, by virtue of one or more of the following events:

    i. The manner of the warrantless seizures at the property;

    ii. By the delay of eight days before filing the report to justice;

    iii. By the failure to disclose in the report to justice that the application to search the vehicles had been dismissed;

    iv. By continuing to retain the seized vehicles after dismissal of the first application to search on August 11, 2023, and

the granting of the second authorization on August 21, 2023;

d. Was the applicant detained by police during his interactions with them at the property? (Here it should be noted that if a detention is determined to have occurred, the Crown concedes a breach of the applicant's section 10(a) and (b) rights to counsel.)

[16] Depending on the outcome of some of these issues, some of them may not need to be determined. As such, the order of their consideration will be important.

Issues relating to Seizure and Retention

[17] Section 8 of the *Charter* provides that:

> 8. Search or Seizure
>
> Provision
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

[18] A useful summary of the underlying principles pertaining to this section of the *Charter* may be found in *R. v. Jones*, 2011 ONCA 632:

> 19 A search and seizure is only lawful if it is authorized by law and if both the law and the manner in which the search is carried out are reasonable: R. v. Collins, [1987] 1 S.C.R. 265, [1987] S.C.J. No. 15, at p. 278 S.C.R.; Law, at para. 29. The onus is on the person seeking to establish the breach to show that his or her s. 8 rights have been violated. A warrantless search is prima facie unreasonable, however, and therefore a breach of s. 8, and the onus is on the Crown in such circumstances to prove that such a search was reasonable.

> 20 To give effect to the s. 8 right involves an assessment in each case of whether the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals -- in particular, those related to law enforcement. The Charter's bias is in favour of the former and, accordingly, in order to prevent unjustified searches, a legally valid pre-authorization, such as a warrant, is a pre-condition to a lawful search and seizure, where it is feasible to obtain one. See Hunter v. Southam Inc., [1984] 2 S.C.R. 145, [1984] S.C.J. No. 36, at pp. 159-61 S.C.R.
>
> 21 As Hunter and its progeny tell us, the primary value underpinning the s. 8 right is the need to protect an individual's reasonable expectation of privacy in the target of the proposed search against unreasonable intrusion by the state: see, also, for example, R. v. Dyment, [1988] 2 S.C.R. 417, [1988] S.C.J. No. 82, at pp. 426-27 S.C.R.; [page249] R. v. Edwards (1996), 26 O.R. (3d) 736, [1996] 1 S.C.R. 128, [1996] S.C.J. No. 11, at paras. 30 and 32; R. v. Law, supra, at paras. 15-16. The privacy expectation encompasses not only property interests, but personal and informational privacy too. As Bastarache J. observed in Law, at para 16:
>
> > This Court has adopted a liberal approach to the protection of privacy. This protection extends not only to our homes and intimately personal items, but to information which we choose...to keep confidential.

[19] Given the common understanding that the seizures on this application were executed without a prior authorization, they are prima facie unreasonable such that the burden rests with the Crown to establish compliance with s. 8 of the *Charter*.

[20] And finally, much of the caselaw, focusing often on both seizures and searches together, is equally applicable to instances of seizure alone. This was made clear in *R. v. Hart,* 2002 BCSC 659, at para. 55:

> … I conclude that the language of s. 8 of the Charter guarantees the right to be secure against unreasonable search or seizure. It does not draw a distinction between the two and, in my respectful view, none should be drawn. ...

[21] This is not to say that the distinction between what is a search, and what is a seizure, is always easy to discern. This question was the subject of extensive analysis in *R. v. Frieburg*, 2013 MBCA 40, as to whether police opening a car trunk, after a positive indication of narcotics by a sniffer dog thereby revealing drugs therein, constituted a further search, or a seizure.

[22] Unless there is a particular need to distinguish between them, the terms are usually interchangeable and the caselaw will be considered in that way. Neither of the parties suggested any specific need to distinguish.

The Codified Provisions

[23] Section 487(1) of the *Code*, principally addressing searches in cases of this nature, stipulates the requirement of a prior authorization:

> Information for search warrant
>
> 487 (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
>
> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
>
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
>
> (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
>
> (c.1) any offence-related property,

> may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
>
> (d) to search the building, receptacle or place for any such thing and to seize it, and
>
> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect of it to, a justice in accordance with section 489.1.

[24] Given the seizures were not conducted pursuant s. 487(1)(d), and were therefore warrantless, the Crown asserts they were instead authorized by sections 487.11 and 489(2) of the *Code*.

[25] Section 487.11 provides as follows:

> Where warrant not necessary
>
> 487.11 A peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, may, in the course of his or her duties, exercise any of the powers described in subsection 487(1) or 492.1(1) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.

[26] Section 489(2) provides as follows:

> Seizure of things not specified
>
> 489
>
> (2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

> (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
>
> (b) has been used in the commission of an offence against this or any other Act of Parliament; or
>
> (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[27] From the foregoing, it will be seen that although neither ss. 487.11 nor 489(2) require a prior authorization, and that one of the sections (s. 487.11) is premised on the requirement of exigent circumstances, both sections nonetheless require the existence of reasonable grounds to make the seizure, even if the actual articulation of that requirement is worded differently in each of the sections.

[28] In the case of s. 487.11, the requirement for reasonable grounds to seize is worded in the phrase, "…if the conditions for obtaining a warrant exist…".

[29] In the case of s. 489(2), the reasonable grounds requirement is worded in the phrase, "…seize any thing that the officer believes on reasonable grounds…".

[30] As such, in order to be authorized by law, the seizures in question, despite having been made without a warrant, would still require, at the time of the seizures, the existence of reasonable and probable grounds to believe that the offences under investigation were committed by the accused, and further, that evidence of the commission of the said offences would be found in the car and in the motor home.

Defining Reasonable and Probable Grounds

[31] Reasonable and probable grounds are the same as a credibly based probability.

[32] Broadly speaking, the test at a minimum requires more than suspicion but falls short of the need for belief on a balance of probabilities. It requires looking at everything as a whole. This standard is articulated in *R. v. Ha*, 2018 ABCA 233:

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

[33] A credibility-based probability may co-exist with other possible inferences, including those supporting innocence (*Ha*, at para. 34).

[34] Some facts may themselves be capable of multiple inferences, in other words supporting innocence or guilt. Great care must be taken when considering these factors, and this is evident in the Court's guidance in *Ha* at para. 84:

> In *R. v Urban*, 2017 ABCA 436, 358 CCC (3d) 55 five observations were said to support reasonable grounds to believe an offence had been committed. The Court reasoned:
>
> > 43 The dictum in *Chehil*, at para 31, that innocuous factors that "go both ways" cannot support reasonable suspicion on their own but may when combined with other factors, should not be understood as endorsing a kind of alchemy whereby a group of severally innocuous factors somehow become grounds for reasonable suspicion when considered together. Individually innocuous factors do not support a reasonable suspicion when they are combined with other innocuous factors, unless one factor provides support to another or the innocuous factors, together, are mutually reinforcing: *MacKenzie* at paras 82 - 83. With that said, most

> of the factors relied on by Cst. Shule in this case were either neutral or "went both ways".
>
> Factors that are exclusively innocuous generally cannot be combined together to provide reasonable grounds to believe an offence has occurred. However, factors that can support both an innocuous and a suspicious conclusion can be "mutually reinforcing" or can be combined together to provide reasonable grounds, because the mere fact that an observation might have an innocent explanation does not prevent a police officer from having reasonable grounds to believe that it was sinister in nature. As noted in *R. v Chehil*, 2013 SCC 49 at para. 31, [2013] 3 SCR 220, factors that "go both ways" can support reasonable grounds to believe an offence has been committed when combined together.

[35] *R. v. Chehil*, 2013 SCC 49, addressed the use of a sniffer dog under circumstances that were found justified on the basis of the officer having formed a reasonable suspicion of illicit activity by the specific individual under observation. The guidance provided by the Court as regards how investigative information ought to be assessed, is equally helpful when considering the standard of credibly based probability relating to the present application, particularly for the assessment of observations that may be generalized, neutral, or equivocal. Drawing from paras. 27 to 34, and 47, the following conclusions emerge:

a. While reasonable suspicion is a lower standard than reasonable grounds, each of them must be grounded in objective facts;

b. While the reasonable suspicion standard necessarily increases the chances of innocent people being suspected, even that lower standard cannot be applied so broadly that it becomes a generalized suspicion, including a suspicion merely attaching to a particular activity or location, rather than to a specific person;

c. A collection of factors will be insufficient even for a reasonable suspicion, (much less for reasonable grounds) where they would include so many presumably innocent persons as to approach a subjectively administered, random basis for a search;

d. While specificity of a given factor may support a reasonable suspicion, some factors may not achieve such distinction, except when combined with other factors. This includes factors that could be regarded as ones that "go both ways", for example someone making, or failing to make, eye contact;

e. Exculpatory, neutral or equivocal information may not be disregarded and both favourable and unfavourable factors must be weighed in arriving at any conclusion, even if there is no obligation to further investigate or rule out possible innocent explanations;

f. Police may not consider factors learned after having executed the search, (or as in the present application, the seizure); and

g. Although training or experience of a police officer may be a relevant consideration, it requires specific evidence, and even then will not support decisions grounded on intuition, hunches or even "educated guesses".

[36] The defence contends there to have been a lack of reasonable grounds to seize. The Crown, bearing the onus to establish their existence, presented detailed testimony

of the information gathered and considered by the police leading up to the decision to seize. Having reviewed the guidelines for assessment of a credibly based probability to seize, I will now review, in greater detail, the evidence tendered on this application.

[37] However, before doing so, there is a preliminary issue raised by counsel, relating to the nature of the review to be undertaken in this regard.

Nature of the Review for Reasonable and Probable Grounds

[38] As noted in para. 9 above, the initial application seeking an authorization validating the vehicular seizures, and to search them, was dismissed by the reviewing Judge. The reason given for the dismissal, as set out in the related message filed as Exhibit G, was the finding by the Judge that the seizures lacked reasonable and probable grounds. Crown and defence now take opposing views on whether or to what extent the prior dismissal ought to factor into my determination of the issue.

[39] While the defence asserts that this prior dismissal is binding, or at least that it deserves deference, the Crown says it is not, and that the determination of reasonable and probable grounds for the warrantless seizures must be evaluated on the basis of the evidence tendered on this *voir dire*. The defence argues that the denial, not having been sought to be judicially reviewed at the time, should not be now revisited.

[40] The Crown asserts that any treatment of the prior dismissal as constituting either *res judicata*, or as issue estoppel, or even as being persuasive, would be an error. This is because any denial of this type is not a final order but may be considered anew.

[41] For reasons that follow, I agree.

[42] In *R. v. Price*, 2017 BCSC 330, Punnet, J. determined that a prior ruling by the Judge during a Preliminary Inquiry on the voluntariness of a confession by an accused is not binding at the trial, because the prior ruling, being interlocutory in nature, and not going to jurisdiction in relation to the Preliminary Inquiry, is not judicially reviewable.

[43] Relying on the authority of *R. v. Duhamel*, [1984] 2 S.C.R. 555, the Court at para. 32 observed that "The concepts of issue estoppel and *res judicata* arise where the decision in question was final."

[44] In *R. v. Van Den Meerssche* (1989), 53 C.C.C. (3d), 449 (B.C.C.A.), the British Columbia Court of Appeal upheld a lower court ruling that re-considered the validity of the same authorization to search that had been rejected at a different trial on different charges involving the same accused. The Appeal Court approved the reasoning of the trial judge, which was duplicated at page 463 of the appeal decision:

> However, as I mentioned at the outset, I ruled earlier that the doctrine of issue estoppel does not apply to a ruling made in a *voir dire* as distinct from one made during the trial proper. Moreover, there are significant differences between the testimony heard by Judge Wong and that given in this *voir dire*.

[45] I therefore conclude that my assessment of whether the police had reasonable and probable grounds to seize the vehicles in question, at the time of those seizures, need not be determined with reference to any prior rejection.

[46] That said, the basis for the review on this *voir dire* must only consider information that the police knew, believed, and acted upon at the time of the warrantless seizures.

It cannot consider any investigative information police may have learned, gathered or modified subsequent to the seizures.

Evidence Tendered on Reasonable and Probable Grounds to Seize

[47] Broadly speaking, the information received by police related to:

a. the type of offences;

b. the times and places of the offences;

c. the individual offenders; and

d. the events.

[48] At approximately 3:15 a.m. on August 9, 2023, police received a call from the complainant's father, who advised his daughter, then aged 14 years, had arrived some time earlier and said she had been sexually assaulted. Cst. Marland assumed the role of lead investigator. Both she and Cst. Cook independently began driving toward the home.

[49] While on his way, leaving the Whitehorse downtown core northbound on Two Mile Hill, Cst. Cook happened to see a black Chevrolet Cobalt car approaching from behind, and then slowing. He testified that when this vehicle slowed down, he allowed it to pass. He then recognized the car and its driver as the applicant, with whom he had had previous interactions. This sighting alone made him suspicious and, as will be seen, either immediately then or shortly thereafter, made him mindful of a potential role of the applicant in this investigation.

[50] By the time of their roughly simultaneous arrival at the home, both officers learned the complainant had already been taken to the hospital by emergency services. It appears that for a short time, the complainant's father spoke to both, Cst. Marland and Cst. Cook, after which Cst. Cook remained behind to further interview the complainant's father, and Cst. Marland went to see the complainant at the hospital.

[51] Cst. Cook testified that he learned that the complainant said she had been sexually assaulted that evening by two males. He testified that Cst. Marland told him the males were in a "black cobalt type car", which he said he took to mean it was a black Chevrolet Cobalt. He testified that he did not hear it as being a cobalt blue car, and later in his testimony entirely disagreed that the car had ever been described as any type of blue colour. He later agreed that the car had not been described to him as being black after all, but when referred to his police officer notes, he agreed he wrote the colour as being a "dark" car, because he knew the car he had recognized on Two Mile Hill, on his way to the dispatch was a black car.

[52] Cst. Marland also testified about information she had gathered, both from the complainant's father as well as directly from the complainant, about the suspect car. She testified the complainant's father said his daughter had told him the car was an older black Cobalt car. However, she was at the same time unable to recall if he may have instead, or also, described it as a cobalt blue car. When referred to her officer notes in cross-examination, she agreed the actual notation was of it being a cobalt blue car, and she agreed this was more accurate. She was not sure if "cobalt" referred to the brand (ie. model) of car, or the type of blue.

[53] Cst. Marland's testimony regarding the car did not become any clearer when she described her conversation specifically with the complainant at the hospital. In her direct examination, she said the car was described to her as an older, dark colour blue or black car. In cross-examination, she agreed the complainant said it was an older blue four-door car, agreeing the complainant did not ever say the car was dark coloured, and unable to recall if she ever said it was black. Eventually, in cross-examination, the officer settled on the car having been described a blue old car, not described as dark coloured nor described as black. She did not follow up with the complainant as to whether the blue car was light blue, dark blue, or cobalt blue.

[54] Later when relating her findings to other members back at the detachment, Cst. Marland testified that she likely told them that the complainant described the car as a blue older car.

[55] I will now address the information received regarding the suspects.

[56] Cst. Cook testified the information he received was that the perpetrators were two First Nation males, one of them being bigger, or heavier set, with facial hair.

[57] Cst. Marland testified the information she had received, from the complainant's father at his home, was that they were two males, describing "the first guy" as fat, slightly taller than her with black hair, a beard and brown eyes. She said the other man also had black hair and a beard but was skinnier and slightly shorter than her, and that the first guy called him "Trap". For reasons unexplained, she neither sought nor received any information from the complainant regarding their ethnicity.

[58] Police also obtained information about what happened. Much of this information was obtained by Cst. Marland directly from the complainant while with her in the presence of the examining doctor at the hospital. The complainant told police she was picked up by the two males in the car earlier that evening, at around 9:40 p.m., which would be August 8, 2023. She said they took her to a lake.

[59] She said she was sexually assaulted in the car at the lake. One man assaulted her by means of vaginal, anal and oral penetration. The other man, she said, fingered her. She could not name the lake but when the doctor suggested if it might have been Schwatka Lake, she agreed. She said her pants were left behind at the lake.

[60] She said they then took her to the KDFN, which was about two minutes by car from the Petro Canada gas station, to a property on which there was a trailer. She said they again sexually assaulted her in the trailer. She specified the trailer as being of the type that would be towed behind a car. The Constable agreed that the complainant might have also said the trailer was actually hooked up to a vehicle at the time.

[61] The complainant was unable to provide any description of the interior of the car. She described the interior of the trailer as messy, having two beds and a TV.

[62] She said after the assault in the trailer, they thought she was asleep, and she heard them say they would dump her at Marsh Lake. As they departed in the car, they discussed the need for gas for the vehicle, and she said that she told them they could go to the FasGas station, at the Kopper King Trailer Court, which she said was open 24/7. She said when they stopped there for the gas, she jumped out and ran to her father's home nearby, where she then reported the sexual assault.

[63] The complainant said the men gave her cocaine, at 10:00 p.m. and again at 2:00 a.m. She said they also gave her a lot of alcohol.

[64] This essentially comprises the information given to police by the complainant, either directly or to a limited extent, through her father. The recipients of this information were Cst. Cook and the lead investigator, Cst. Marland.

[65] Based on the information received from the complainant, Cst. Cook attended Schwatka Lake to search for evidence of the crime, including locating the complainant's pants that she said were left there. No evidence was located.

[66] Cst. Cook also attended at the FasGas station in order to review what would be video footage that might corroborate the complainant's assertion of escaping from the car while being fuelled there during the relevant time period.

[67] Cst. Cook testified that at 2:41 a.m. as displayed on the video playback, a car seen in the video came northbound off the Alaska Highway into the Kopper King residential area, and at 2:43 a.m., a car left the said area, returning to the Alaska Highway, proceeding southbound. Although the actual footage viewed by the officer was not made available on this application, still photographs taken by him, in black and white, at the time and exhibited at these proceedings show, in the case of the vehicle entering Kopper King as well as shortly thereafter leaving Kopper King, in the far upper portion of each photograph, the outline of what can be made out as a vehicle, viewed in each instance from a side profile.

[68] Although what are likely a headlight and a taillight can be discerned from my own viewing of the photographs, it is impossible to see the colour of the vehicle or how many doors it has. Other than that, the officer, when viewing the video, must have seen the car moving, one cannot on seeing only the photograph, otherwise discern even that it has wheels. This is because the dimensions of the vehicle as depicted in each of the 8”x10” photographs are extremely small, on the order of only about ¼ inch in length and perhaps 1/16 inch in height. While it might be possible to conclude that the vehicle is a dark colour, given that cars much closer to the camera are a brighter shade of grayscale, even this may not be a safe conclusion to draw, given the differences imposed in size, distance, and lighting.

[69] Despite the aforementioned limitations, Cst. Cook asserted that the vehicle seen entering the Kopper King housing division, and the one seen leaving about two minutes later, was the same vehicle. The only objective basis for this conclusion would be that in each instance it appears to be dark, it has the same rough shape, and because it has what appears to be lights on each end and is now moving in the direction opposite to that when seen the first time. While he agreed he could not say anything about its make or model, and even agreed he could not tell its actual colour, he claimed to conclude it was the same because he believed it to be a similar style of car in each instance. I find his conclusions in this regard, including his belief that the colour of the car was black, to be something of an overreach.

[70] Another limitation on Cst. Cook’s testimony regarding the review of the gas station video, is that he cannot remember if he saw any other cars depicted in the footage he viewed. Testifying that this was the only black-looking vehicle he saw, he

did not capture or retain any of the others he may have also seen. This is unfortunate because it would have been very helpful to see, for example, if other vehicles at the same far distance, scale and lighting of this vehicle looked different in size, shape, number of doors, and shade of greyscale. While there are vehicles parked at much closer distances, they are in much stronger lighting, so there is really nothing to compare to the subject vehicle. As earlier noted, the actual video footage was not produced. Overall, this raises a risk that the officer selected what looked to be the car most closely resembling the applicant's car rather than seeing how many other cars might look very similar if not identical from that distance and lighting, as observed by him.

[71] Moreover, upon Cst. Cook's review of the video footage, he discovered, firstly, that the gas station was not even open during those hours. Having obtained and viewed the video footage (the officer reached the maintenance worker on an emergency basis), no car was seen stopping at the closed pumps, and therefore no one was seen escaping any such car and running away. While this may not have any bearing on whether or not a sexual assault occurred, seeing what he believed to be the suspect car enter and leave the residential area where the complainant said she escaped from, Cst. Cook agreed this was more consistent with the complainant having been dropped off by a car at her father's home rather than having escaped from it.

[72] Cst. Cook testified that having reached this stage of the investigation, based on the description of the vehicle as related by the complainant's father, and based on the aforementioned video footage reviewed by him, he believed that the car seen in the distance in that footage was the same car he had seen the applicant driving earlier on

Two Mile Hill. He believed the applicant to be one of the two perpetrators of the offence of sexual assault on the complainant. He formed these beliefs because the applicant was also a heavy Indigenous man with facial hair driving in Whitehorse in a Cobalt car. It would appear that he believed the applicant was not the person described as skinny and slightly shorter than the complainant, but rather "the first guy", she described as heavier and slightly taller than her.

[73] Cst. Cook agreed that the description of the suspects provided to him would fit many people in Yukon. Nonetheless, rather than doing a search that would output all people matching that generic description, the search he performed on the police database was one directed specifically at the applicant, to see how closely he matched that generalized description. His query revealed the applicant's build, the subject car which he said was registered to him (actually it may not have been), his address, telephone number, and recent contacts.

[74] Cst. Cook took his observations back to the detachment for discussion with other members, including the lead investigator, Cst. Marland. He testified that he told Cst. Marland he believed there existed reasonable and probable grounds to obtain a search warrant for the applicant's car and that he believed the car would contain DNA evidence connected to the offence.

[75] He believed, that because the application for a search warrant would take "multiple hours" in his experience, this constituted exigent circumstances due to what he described as the common knowledge potential for any DNA evidence in a car to become lost or destroyed. Although he testified it was also based on his own

experience in other cases involving DNA, he did not explain that experience or how it might connect to his present beliefs.

[76] As a result, Cst. Cook believed the vehicle needed to be located, seized and secured as quickly as possible, and that an application to search it could follow thereafter.

[77] It is at this point, at the RCMP detachment, at approximately 5:15 a.m. or about two hours after the initial call for service, that a decision was made by the police that they had reasonable and probable grounds to arrest the accused for the offence of sexual assault on the complainant, and that evidence, including DNA evidence of the offence would be found in his black car. They decided to attend the property where he lived and to seize that car, without a warrant, and to apply for a warrant to search it thereafter.

[78] Upon their arrival at the property, police made additional observations that Crown says buttressed the seizures. Firstly, they saw the car they were looking for actually located at the property. I find that to be of little corroborative assistance, since Cst. Cook had earlier already seen this car going in the direction he knew to be the applicant's home. This is why they went there, and not any other place instead.

[79] Next, they saw from the street not only the car they expected to be parked in the driveway of the residence, but also a recreational vehicle parked further back in the yard. This vehicle was however not a trailer of the type that can be towed, as described by the complainant. Rather, it was a Coachman motor home, in other words a motorized recreational vehicle.

[80] Seeing the motor home, police immediately linked it to information the complainant had provided about being taken to a trailer. While the complainant had not specified whether the trailer's location was in any way connected to locations that might relate to the perpetrators, and while the vehicle actually seen by police was in fact not a trailer of the type that could be towed behind a vehicle, as the complainant had specified, police nonetheless saw the co-location of the car they went to seize, with this recreational vehicle they also encountered there, as establishing their belief that the motor home was the trailer referred to by the complainant.

[81] Cst. Cook testified that even though police would have been looking for a trailer rather than a motor home, the discovery of the motor home on the same property as the applicant's car provided a sufficient basis to seize it, on the theory that a 14-year-old complainant might have confused the two different types of recreational vehicles.

[82] Realizing that this discovery was at variance from the complainant's actual description, police first deliberated on what to do. Cst. Cook, who was one of three officers then in attendance at the property, consulted with Cst. Marland and the Watch Commander, both of whom remained at the detachment. A decision was ultimately taken to also seize the motor home and, on the same basis as with the car, to apply for a warrant to search it thereafter.

[83] Police considered the co-location of this motor home on the property as further enhancing the grounds for their belief that the car they had already decided to seize was indeed the one used in the commission of this offence.

[84] This concludes the evidence tendered as regards the issue of reasonable and probable grounds to seize the car and the motor home. There is additional testimony going to the manner of the seizure and whether the applicant was, at the time of the seizure, detained. It will be reviewed later in this ruling.

Analysis and Conclusion on Reasonable and Probable Grounds

[85] As already noted, the information gathered in this investigation leading up to the decision to seize was gathered by Cst. Cook and Cst. Marland. Although Cst. Marland was the lead investigator, it would appear that Cst. Cook contributed significantly, if not exclusively, to the ultimate decision to attend the property and to seize the car on the basis of exigent circumstances. He is the officer primarily determining the strength of the connection of the offence to the applicant. The decision to seize the motor home was made with the permission of Cst. Marland and the Watch Commander. As such, the decisions have a collaborative and consultative nature to them and may be ascribed to the police as a collective.

[86] Having given careful consideration to the tendered evidence, I conclude that the belief by police, while subjectively held, cannot be regarded as objectively reasonable and it therefore falls short of the necessary credibly based probability to seize. This conclusion requires further elaboration.

[87] First, it must be recognized that much of the identifying information provided by the complainant is of a generalized nature. Her description of the perpetrators, and in particular of “the first guy”, was conceded by Cst. Cook to cover much of the local Whitehorse population.

[88] The search by Cst. Cook on the police database was conducted not to identify persons who might match this description. This is understandable, because it is so broad, it would return a high number of matches. Rather, it was conducted to confirm that the applicant fell within that generalized description. As such this was not an investigative step helping to identify a suspect, but rather it was a form of police confirming what they already believed to be the case.

[89] In matching the applicant to the offence, the police ignored a specific factor that did not match, namely the perpetrator's height. Described by the complainant as being slightly taller than her, it turns out that the applicant is actually five inches, or almost a half-foot taller. While the term "slightly taller" is a subjective description, it nonetheless calls into question just how much taller the complainant believed this perpetrator to be. Police could have obtained greater specificity from the complainant, but did not, and this is because they had already concluded it to be the applicant.

[90] Based on the foregoing, and without any more information about this specific perpetrator, the police would not be able to suspect anyone in particular, much less form any credibly based beliefs about them.

[91] Police however did not rely only on the general description of the perpetrator, but more importantly, considered that description in conjunction with the specific car in which the applicant had been seen on the road at or about the time of the call for service. This, almost immediately, became the suspect car operated by the suspect applicant. Again, there are difficulties with this.

[92] It must be recognized that even in his own notes (reflecting information obtained via second hand hearsay from the complainant's father, and possibly also comprising third hand hearsay from Cst. Marland who also spoke with the father), the father did not say the car was "black", only that it was "dark". Cst. Marland is herself even further afield, obtaining a description directly from the complainant that the car was not black, or even dark coloured at all, but rather some type of blue.

[93] Compounding the difficulties inherent to generalized descriptions, is the fact that the complainant herself was providing information that police knew to be at odds, or potentially at odds, with other information they also had, which might therefore further call into question the reliability of any of the information she provided:

a. That no car stopped for gas, nor was fled from by the complainant, as she alleged; and

b. That despite the complaint's assertion of being given narcotics and large quantities of alcohol, she appeared sober.

[94] All of the testimony given by Cst. Marland and Cst. Cook about the car being "dark", or possibly even black, must be discounted by the far stronger evidence they actually collected, as revealed in their own notes not to mention directly from the complainant herself, that the car was no other colour than blue. Describing the car as black or even dark would appear to be an unfortunate instance of police attempting to "connect the dots", as it were, by inferring that the description of the car as blue might be consistent with it being black or dark in colour, similar to that seen by Cst. Cook on

Two Mile Hill. Much of what occurred thereafter was nothing more than confirmation of this bias.

[95] This is not to say that police may not have been on the right track, or that their suspicion, or perhaps only their hunch, may not have borne fruit. That a blue coloured car could certainly be a dark colour, or that the complainant might herself be mistaken about the colour being blue, when in fact it might have been black, or at least a dark colour cannot, without more, be translated into a belief that it might have been so.

[96] Acting on a mis-interpreted description of the car from the complainant and her father by connecting it to a vehicle randomly encountered earlier in town, and attending at the address where they would normally expect to find it, only to discover a motor home also there, police essentially connected an item (a motor home) not matching the complainant's description, to another item (a car) about which their hunch brought them there in the first place. Linking one mis-described item to another one, in conjunction with a generic description of the perpetrator drawing on a large portion of the local population, cannot increase the strength of the inference relating to any of them, much less of all of them together, to the level of a credibly based probability.

[97] Based on the foregoing, I conclude that the subjective belief held by police that the applicant was one of the perpetrators who sexually assaulted the complainant and that evidence of the commission of this offence would be found in the car and the motor home they seized, to not be objectively reasonably grounded. The warrantless seizures therefore violated s. 8 of the *Charter*.

[98] This conclusion as to the lack of reasonable and probable grounds on August 9, 2023, applies regardless of whether the police relied on s. 487.11, or s. 489(2), or both of those sections. Each of these sections require the same degree of credibly based probability.

[99] Although this finding obviates the need to determine whether any of the other preconditions under either of ss. 487.11 or 489(2) were met, as well as whether s. 489(2) survives constitutional scrutiny, I will nonetheless outline my findings in respect of at least some of those issues, even if in some instances with some brevity.

Were there Exigent Circumstances?

[100] Police have the authority to seize property without warrant, under exigent circumstances to prevent loss or destruction of evidence, pending the obtaining of an authorization. This authority appears to be sourced both by codified provisions, in this case s. 487.11 of the *Code*, as well as common law or ancillary police powers to preserve evidence.

[101] The defence asserts exigent circumstances are required in this case for police to have made any seizure pursuant to s. 487.11. The defence further asserts that even though exigent circumstances is not an enumerated precondition for seizures pursuant to s. 489(2), such a condition should be read into that section in order for any seizure thereunder to be constitutionally compliant with s. 8 of the *Charter*. This latter submission will be addressed, even if briefly, later in this ruling.

[102] In *R. v. Kelsy*, 2011 ONCA 605, the Court, at para. 24, recognized the foundations for a finding of exigent circumstances in the following terms:

> Exigent circumstances have been recognized at common law as a basis for searching property without a warrant. Cases that have addressed the issue of exigent circumstance appear to rest on two bases. The first basis relates to the risk of imminent loss or destruction of the evidence or contraband before judicial authorization could be obtained. The second basis emerges where there is a concern for public or police safety.

[103] The Court heard testimony that the police, on attendance at the property and deciding to seize the car and the motor home, had a concern about evidence being lost or destroyed should there be any further delay in securing these vehicles. Cst. Cook testified that this believed exigency authorized police entry onto the private property for the warrantless seizure.

[104] Exactly why this decision was made, in terms of not first obtaining an authorization, varies depending on which police officer testified about it.

[105] Cst. Cook had already looked for evidence of the offence at Schwatka Lake, including the complaint's pants as described by her, but not located anything. Based on her description of what happened, they also expected there would be evidence of the offence in both a car and in a trailer that the complainant described.

[106] Having located a car and motor home that were believed to have been those described by her, a determination was made to seize these items immediately, without any prior authorization. This determination was made primarily by Cst. Cook, even though he was not the lead investigator. Cst. Cook believed there to exist exigent

circumstances providing him the authority not only to seize, but also to enter onto private property to do so.

[107] Cst. Cook testified he considered the following factors in concluding that police could not preserve the vehicles on site, pending the obtaining of a warrant:

a) He mentioned safety risks arising from an inability to control who went into or out of the residence. I fail to understand why this would itself pose any safety risk since, by his own admission, the residence was believed to have nothing to do with the investigation and there was nothing untoward that was seen as going on there;

b) He felt that police presence while obtaining a warrant would be intrusive to the residents of the dwelling on the property. This fails to recognize the three-hour police presence which, by virtue of the complicated nature of seizing the motor home, itself posed a greater intrusion than any period of simply guarding and awaiting arrival of an authorization;

c) He felt that obtaining a warrant would take until the evening of that day, which was too long a period. He offered no explanation as to why it would take so long, especially since any number of the officers attending at the property, as well as those back at the detachment, including the lead investigator, Cst. Marland, could have undertaken that task immediately.

A different police officer, Cst. Moore, who eventually drafted the Information to Obtain (ITO) days later, testified it may have taken up to a day or more depending if she was multi-tasking with other work. She could not recall how long it actually took, but agreed it did not involve a large amount of investigative material;

d) He agreed there was indeed no concern on his part that anyone may try to remove the car or motor home during the police presence. This undercuts the very argument for exigency.

[108] It is useful now to note that while police were seizing a car and a motor home, they were not interested in those items just for their own sake; rather it was their contents, and in particular, any DNA of the offence they believed would be found therein. This is important in the sense of defining any reasonable expectations in privacy, in the sense that those expectations may also relate to privacy in core biographical data and not just the mechanical objects in which that data might be located.

[109] Cst. Cook's belief in the existence of exigent circumstances was rooted in his belief that anyone committing a sexual offence in this fashion would know to clean or destroy any DNA evidence that might have resulted, and that unless prevented, they would take steps to do that at their first opportunity. He did not offer any objective observations to underpin his subjective belief in this particular case and indeed, agreed that he had none.

[110] It also appears the officers gave little or no consideration to the likelihood that if DNA destruction or contamination were to be anyone's intention, something on the order of three or four hours would have already elapsed by that time for this to have been undertaken.

[111] When asked why it was he, and not the lead investigator who made the determination of exigent circumstances, Cst. Cook replied that one would have to ask her.

[112] Cst. Marland, on the other hand as the lead investigator, testified that the decision to seize the applicant's car was a group decision, because of a suspicion, as she described it, that it was that car that was involved in the commission of the offence. She testified this decision was made at the detachment bullpen before some officers then went to the property to see if the car was there and if so, to seize it. The officers thereafter first attending at the property were Cst. Cook, Cst. Wideman, and Cst. Isabelle. Cst. Marland remained at the detachment, with the watch commander.

[113] Cst. Marland testified that upon learning the three officers attending the property had also discovered a motor home at the back of the property, a telephone discussion then ensued whether it too ought to be seized. She testified that this decision was made by the watch commander and Cst. Cook, and that her own role was limited to relaying the description of the trailer as earlier provided by the complainant.

[114] Cst. Marland agreed that the basis for belief in exigent circumstances was rooted in a fear of loss or contamination of DNA evidence, in particular, and that this concern

was based on the sensitive nature of DNA itself. No evidence, expert or otherwise, was tendered supporting this broad, generalized belief.

[115] A concern about people going into or out of the vehicle(s) or the vehicle(s) being mobile and therefore capable of being moved elsewhere (for some reason Carcross was suggested) was also given by Cst. Marland. This concern was not rooted in any specific information or concern.

[116] The further difficulty with the foregoing is that at the time of police attendance at the property, all the lights were off and the car and motor home were both parked. No one was seen in the car. There was not the remotest appearance that either vehicle was imminently to be moved by anyone, and the only person located in the motor home, being the accused, was quickly directed outside of it. As such, I am at a loss to understand the basis for any of the expressed concerns.

[117] Cst. Marland testified that the alternate option of guarding the vehicles to prevent entry or tampering, while an Information to Obtain was prepared, would take too many officers. Testifying she has never completed such a document in less than four hours and that during this time they would have to station at least two officers at the property to ensure officer safety, is puzzling.

[118] While the exact duration of attendance by police at the property was not precisely tendered in evidence, it is known that police first arrived at roughly 5:25 a.m., and they were still in attendance as late as 8:12 a.m. when the tow operator was placing the motor home onto a flat deck. The officers in attendance at various times included officers Cook, Wideman, Isabelle, Rimanelli, Dowling and Lafleur, at least six in total.

While Cst. Marland, as lead investigator remained at the detachment, it is not entirely clear to me why she, while there, did not immediately prioritize, as she ought to have, working on an application to obtain a warrant for the seizures that would have then, if approved, rendered the seizures warranted.

[119] When police attended there was no one in the yard at all to be concerned about, either in terms of tampering or officer safety, and any subsequent agitation by the residents was not because of police attendance itself, but because of the seizure. And in any event, there were always at least two, and at times even more than two officers present during the approximately three hours of their ensuing presence, a period that spanned the end of one police shift and the commencement of the next one.

[120] All told, the asserted belief in exigent circumstances was not based on any specific, objectively reasonable facts or observations, and instead, the observations that were available to police actually pointed away from any such concerns.

[121] Exigent circumstances require reasonable and probable grounds. The requirements were summarized at para. 114 in *R. v. Campbell*, 2024 SCC 42:

> The standard of reasonable and probable grounds requires the Crown to establish the reasonable probability of the claimed exigency, based on the experience and expertise of the police and the relevant facts before them; it does not require the Crown to establish the exigency on the balance of probabilities (see *R. v. Beaver*, 2022 SCC 54, at para. 72, discussing the standard of reasonable and probable grounds for a warrantless arrest). The Crown must show that the officers' reasonable belief in the exigency was "objectively grounded in the circumstances of the case" (*R. v. Pawar*, 2020 BCCA 251, 393 C.C.C. (3d) 408, at para. 73; see also para. 79; *Beaver*, at para. 72; *Hobeika*, at para. 45). The subjective views of the police must have been objectively reasonable (*Beaver*, at para. 72; *R. v. McCormack*, 2000 BCCA 57, 133 B.C.A.C. 44, at para. 25). A vague, speculative, or general concern that delaying a search to obtain a warrant

> would risk the loss of evidence does not meet the exigency threshold (*Pawar*, at para. 72).

[122] Exigent circumstances require something more than mere convenience but rather urgency. In *R. v. Grant*, [1993] 3 S.C.R. 223, the Court at para. 32 ruled there to be no basis for any blanket exception for motor vehicles as always qualifying to justify exigent circumstances regarding their search or seizure:

> ...Exigent circumstances will generally be held to exist if there is an imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed. While the fact that the evidence sought is believed to be present on a motor vehicle, water vessel, aircraft or other fast moving vehicle will often create exigent circumstances, no blanket exception exists for such conveyances.

[123] In *R. v. Paterson*, 2017 SCC 15, summarized exigent circumstances as applied to s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ("CDSA") (and by inference to s. 487.11 of the *Code*), as requiring more than mere impracticality in the following terms, at paras. 36 and 37:

> 36 While I am not persuaded that the strict condition of impossibility urged by the appellant is denoted by Parliament's chosen statutory language of impracticab[ility], neither am I satisfied by the Crown's argument equating impracticability with mere impracticality. Viewed in the context of s. 11(7), however - including its requirement of exigent circumstances - "impracticability" suggests on balance a more stringent standard, requiring that it be impossible in practice or unmanageable to obtain a warrant. The French version of "impracticable" in s. 11(7) - "*difficilement réalisable*" - is also consistent with a condition whose rigour falls short of impossibility but exceeds mere impracticality of obtaining a warrant. So understood, then, "impracticable" within the meaning of s. 11(7) contemplates that the exigent nature of the circumstances are such that taking time to obtain a warrant would seriously undermine the objective of police action - whether it be preserving evidence, officer safety or public safety.
>
> 37 In sum, I conclude that, in order for a warrantless entry to satisfy s. 11(7), the Crown must show that the entry was compelled by urgency,

> calling for immediate police action to preserve evidence, officer safety or public safety. Further, this urgency must be shown to have been such that taking the time to obtain a warrant would pose serious risk to those imperatives.

[124] I conclude the evidence tendered in support of exigency indicates little more than police seeking a blanket exemption, and as such, it has not been established by Crown to the requisite standard.

Did police comply with all preconditions of s. 489(2) of the *Code*?

[125] In the event I am wrong in my determination that police lacked a credibly based probability to seize the car and the motor home, I will address the question of whether such seizures were otherwise lawful pursuant to s. 489(2).

[126] Section 489 is headed “Seizure of Things Not Specified”. Section 489(1) addresses situations where police, while executing a warrant, discover other things not specified in that warrant that are believed, on reasonable and probable grounds, to constitute proof of an offence. It permits police to seize those items without further warrant. Given police were not executing a warrant, this is not the section on which the Crown relies in this case.

[127] It is s. 489(2) upon which the Crown relies as constituting the lawful authority for the warrantless seizures in this case, without need of either a related warrant or any exigent circumstances. Set out once again below for ease of reference, that subsection provides as follows:

> 489(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law, and whose duties include the enforcement of this or any other Act of

> parliament, who is lawfully present in a place pursuant to a warrant or otherwise, in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
>
> (a) has been obtained by the commission of an offence against this, or any other Act of Parliament;
>
> (b) has been used in the commission of defence against this or any other Act of Parliament; or
>
> (c) will afford evidence in respect of an offence against this or any other Act of Parliament

[128] For the purpose of this analysis, reasonable grounds are hypothetically assumed. The contested issue here, as regards the applicability of this section, is whether the police were "lawfully present in a place…in the execution of their duties".

[129] The Crown asserts that the police, while in the execution of their duties to investigate this offence and believing the car and the motor home they encountered at the subject property would afford evidence of the offence, were "…lawfully present…" on that property and were therefore in compliance with all of the requirements of the section to make the warrantless seizures.

[130] For reasons that follow, I respectfully disagree.

[131] Whether or not the police were in a lawful place at the time of the seizures requires a careful analysis of the police intention in being in that place, how they conducted themselves while there, and of the reasonable expectations of privacy thereby engaged. As described by the Supreme Court of Canada in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this requires an assessment of the totality of the circumstances, "…as to whether in a particular situation the public's interest in being left

alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement".

[132] In *R. v. Singer*, 2023 SKCA 123, the Saskatchewan Court of Appeal, at para. 24, adopted a useful summary by Fontana and Keeshan of the relevant case authorities (including *R. v. Edwards*, [1996] 1 SCR 128), regarding the totality of circumstances to be considered when assessing a reasonable expectation of privacy. That summary provides as follows (footnotes omitted)[1]:

> As set out in *Edwards*, therefore, a resemble expectation of privacy has both subjective and objective element. An individual must first subjectively, hold an expectation of privacy in a place or thing in order for section 8 to be engaged. At the same time, however, that expectation must be objectively reasonable. More recently, in this regard, the court has grouped the factors enunciated above in *R. v. Edwards* under the following four headings:
>
> 1. the subject-matter of the alleged search;
>
> 2. the claimant's interest in the subject-matter;
>
> 3. the claimant's subjective expectation of privacy in the subject-matter; and
>
> 4. whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances. In determining this, the court must consider factors such as:
>
>   a. the place where the alleged "search" occurred; in particular, did the police trespass on the appellant's property and, if so, what is the impact of such a finding on the privacy analysis?
>
>   b. whether the informational content of the subject-matter was in public view;

[1] James Fontana & David Keeshan, "The Law of Search and Seizure in Canada", 13th ed., LexisNexis Canada, 2024, at ch.1

> c. whether the informational content of the subject-matter had been abandoned;
>
> d. whether such information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?
>
> e. whether the police technique was intrusive in relation to the privacy interest;
>
> f. whether the use of this evidence-gathering technique was itself objectively unreasonable;
>
> g. whether the informational content exposed any intimate details of the appellant's lifestyle, or information of a biographic nature.

[133] In the present case, the seizures concern a car and a motor home, each of which carry significant expectations of privacy, even if not at the same level as a dwelling, although here it must be noted that the motor home was itself occupied by the applicant at the time of its seizure, and the car is one the police understood to be owned by him and indeed, operated by him only a couple hours earlier. Both vehicles, and their contents, were therefore intimately connected to the accused and under his control. Each were themselves parked on private property where the accused resided, thereby further enhancing the associated privacy expectations. The car was parked in the driveway of the home. The motor home was located further back at the rear of the property, behind one other car that had to be moved out of the way.

[134] I find the applicant had a significant expectation of privacy in the car and the motor home, at the time of their seizure, indeed, an expectation that he attempted to assert at the time, and that this expectation was objectively reasonable having regard to

the normative totality of the circumstances as above considered. As will be seen further in this ruling, the location of the vehicles on private property requires additional considerations in terms of the applicability of s. 489(2) of the *Code*.

[135] There are a number of cases addressing warrantless seizures having reasonable grounds but lacking exigent circumstances and relying on s. 489(2). The cases are helpful in establishing the balance between the state's authority in detecting crime by warrantlessly searching or seizing property, and the individual's reasonable expectation of privacy in that property. Having reviewed all of the cases provided by counsel, I will refer to some of them below.

[136] A number of the cited cases involve police, while executing a warrant for one offence, discovering items relating to a different offence not covered by the warrant, (whether in plain view, or otherwise) but nonetheless extending their search or seizure to those new items. I consider those cases to be of limited assistance in in present context, given that here the police discovered and seized without warrant the very thing or things they were looking for in the first place. Therefore, it is not a situation where it can be said that one authorized search had some kind of permissible nexus to another, unauthorized one. Nonetheless, I will review those cases on the basis they were referred to by counsel, and the cases do provide helpful commentary on s. 489(2) generally.

[137] The preconditions applicable to s. 489(2) should not be conflated with the requirements for a seizure under the plain view doctrine. A review of that doctrine, both alone as well as in the context of seizures under s. 489(2), follows.

[138] *R. v. Jones*, *supra*, addresses s. 489 of the *Code* as well as the plain view doctrine, albeit in the context of computer searches and the informational privacy therein. In *Jones*, the police, while executing a warrant to search a computer for a particular type of offence and seeing files on the computer constituting a different offence, one not covered by the warrant, expanded their search to seek out evidence on the computer going to that offence as well.

[139] The Court found that the initial discovery of a picture on the computer grounding a belief in the commission of the different offence could be justified under both the plain view doctrine as well as under s. 489(2)(c) of the *Code*.

[140] However, given the warrant did not authorize police to search the computer for such material, the accused was determined to have retained a reasonable expectation of privacy in the device holding it, even if that information constituted an offence. The computer could not be treated in the same fashion, as for example, a physical object such as clothing that might be later forensically tested in different ways.

[141] The Appeal Court therefore determined that although the initial discovery of this evidence on the computer legitimately fell within the plain view doctrine, as well as within the ambit of s. 489(2)(c) of the *Code*, the subsequent continuation of the search for more evidence could not be justified under either method, and was therefore a violation of s. 8 of the *Charter*.

[142] *Jones*, at para. 56, provides a useful summary of the essential ingredients of the plain view doctrine:

> The "plain view" doctrine operates when a police or peace officer is in the process of executing a warrant or an otherwise lawfully authorized search with respect to one crime and evidence of another crime falls into plain view. Resort to this common law power is subject to the following restraints, however:
>
> > (i) The officer must be lawfully in the place where the search is being conducted ("lawfully positioned", in the language of the authorities);
> >
> > (ii) The nature of the evidence must be immediately apparent as constituting a criminal offence;
> >
> > (iii) The evidence must have been discovered inadvertently;
> >
> > (iv) The plain view doctrine confers a seizure power not a search power; it is limited to those items that are visible and does not permit an exploratory search to find other evidence of other crimes.

[143] At para. 58, noting both s. 489 of the *Code* and the plain view doctrine to be exceptions to the general rule that warrantless searches are unreasonable, the Court did not accept that s. 489 is a codification of that doctrine.

[144] While noting there to be relatively little jurisprudence dealing with s. 489, the Court went on to describe its view of how that section ought to be viewed:

> 73 Implicit in the s. 489 power is the premise that the law enforcement officer has come across or seen something in the course of a lawful search. The law enforcement officer must have reasonable and probable grounds to believe that that something "will afford evidence" of a crime. For the reasons expressed above, Sgt. Rimnyak did not come across or see the video files in the course of his initial seizure and search of the computer. Like the plain view doctrine, s. 489 provides law enforcement agencies with a right to seize. It does not provide them with a right to search for further evidence.

[145] In *R. v. Makhmudov*, 2007 ABCA 248, police seizure of a bag believed to contain marijuana at a bus depot, to preserve the evidence while police sought and obtained a

warrant to search the contents thereof, was found to be a valid exercise of s. 489(2)(c) of the *Code*. Not requiring fulfilment of the more stringent requirements of the plain view doctrine, all that was needed was that the police be lawfully placed, in the execution of their duty, and in possession of reasonable grounds that the item contained drugs. This case is a good example of a straightforward application of s. 489(2) being employed to preserve evidence of narcotics believed to be in the bag, pending the obtaining of a warrant to search it.

[146] In *Frieburg*, police searched a home pursuant to an authorization and found narcotics. Around the same time, they had also arrested the accused, driving a car about one mile away from the home, and in a search incidental to that arrest, found contraband. A different car (a Dodge Charger), that the accused had earlier parked in front of the home was subsequently indicated by a sniffer dog to be positive. Police opened the trunk and found drugs.

[147] At paras. 58 and 59, the warrantless seizure of these drugs was held a valid exercise of the s. 489(2) seizure authority, in part because there had been no trespass in accessing the car:

> 58 Applying s. 489(2) in this case, the Crown's position is that the police had the statutory power under that provision to seize the drugs in the Dodge Charger. It argues that s. 489(2) has three requirements, being that the officer: (1) is lawfully in a place; (2) is acting in the execution of his duties; and (3) has reasonable grounds to believe that the item seized will afford evidence of a federal offence.
>
> 59 The Crown states that the first two requirements are not [c]ontentious, the first being that the officers were conducting a drug investigation and the second being that there was no trespass, given that the car was parked on a public street.

[148] The plain view doctrine was again distinguished from seizures under s. 489(2) in *R. v. R.M.J.T.*, 2014 MBCA 36, where the Manitoba Court of Appeal upheld the decision of the trial judge concluding the warrantless entry by police to the home of the accused, on the invitation of his co-resident partner, and the resulting reasonably grounded seizure of a computer therein, was a valid exercise of police seizure powers pursuant to s. 489(2) not requiring anyone's further consent. Finding the purpose of that section being to preserve evidence, the Court at para. 35 rejected the notion that the police necessarily had to be engaged in some lawful activity for a purpose unrelated to the seizure, because this would thereby incorrectly premise the search under the plain view doctrine:

> The above conclusion is the same as that reached by the trial judge. That is, unlike the plain view doctrine, it is not necessary for the evidence seized to have been discovered in the course of a search in an unrelated investigation. Failure to incorporate this requirement does not make the application of s. 489(2) of the *Code* unconstitutional. Indeed, in *Frieburg*, the seizure of drugs in question resulted from a drug dog sniffer search.

[149] Here I note what I find to be an essential difference between *R.M.J.T.* and *Frieburg*, namely that *Frieburg* did not involve police entry onto private property, invited or otherwise, to effect the seizure.

[150] In the present case, no one gave police any explicit permission to enter upon the property. Indeed, this case turns not on express invitation to enter a property or dwelling, but rather on whether there was a waiver of what would otherwise constitute a trespass, via an implied licence to enter upon the property.

[151] In *R. v. Clarke*, 2017 BCCA 453, a warrantless police search of a residence with the permission of a co-tenant of the accused was found to be a valid exercise of the s. 489(2) powers for the common areas of the home (where nothing was found) but not extending to the garage, an area known to be used exclusively by the accused. Moreover, the items seized in the garage first requiring a search to reveal them, brought the seizure outside the scope of s. 489(2). Here it should be noted that this case and others cited herein ought not to be necessarily taken as authority that warrantless police searches of common areas of a home in relation to one of its residents that are conducted with the consent of another of the residents are always valid. [2]

[152] Cases reviewing police entry onto private property relying on the implied licence doctrine are therefore particularly helpful. This doctrine was summarized in *R. v. Evans*, [1996] 1 S.C.R. 8, at para. 13:

> I agree with Major J. that the common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock. As the Ontario Court of Appeal recently stated in R. v. Tricker (1995), 21 O.R. (3d) 575, at p. 579:
>
> > The law is clear that the occupier of a dwelling gives implied licence to any member of the public, including a police officer, on legitimate business to come on to the property. The implied licence ends at the door of the dwelling. This proposition was laid down by the English Court of Appeal in Robson v. Hallett, [1967] 2 All E.R. 407, [1967] 2 Q.B. 939.
>
> As a result, the occupier of a residential dwelling is deemed to grant the public permission to approach the door and knock.
>
> Where the police act in accordance with this implied invitation, they cannot be said to intrude upon the privacy of the occupant. The implied invitation, unless rebutted by a clear expression of intent, effectively waives the

[2] See in this regard *R. v. Reeves*, 2018 SCC 56, at para. 23

> privacy interest that an individual might otherwise have in the approach to the door of his or her dwelling.

[153] It is important to recognize the fundamental purpose of the implied licence, described at para. 15:

> In determining the scope of activities that are authorized by the implied invitation to knock, it is important to bear in mind the purpose of the implied invitation. According to the British Columbia Court of Appeal in R. v. Bushman (1968), 4 C.R.N.S. 13, the purpose of the implied invitation is to facilitate communication between the public and the occupant. As the Court in Bushman stated, at p. 19:
>
> > The purpose of the implied leave and licence to proceed from the street to the door of a house possessed by a police officer who has lawful business with the occupant of the house is to enable the police officer to reach a point in relation to the house where he can conveniently and in a normal manner communicate with the occupant.
>
> I agree with this statement of the law. In my view, the implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling. The "waiver" of privacy rights embodied in the implied invitation extends no further than is required to effect this purpose. As a result, only those activities that are reasonably associated with the purpose of communicating with the occupant are authorized by the "implied licence to knock". Where the conduct of the police (or any member of the public) goes beyond that which is permitted by the implied licence to knock, the implied "conditions" of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder.

[154] In assessing reasonable expectations of privacy protected by s. 8 of the *Charter*, police entry onto private property must be examined in relation to the existence of any invitation or implied licence to do so. This examination, as described by the Ontario Court of Appeal in *R. v. Mulligan* (2000), 128 O.A.C. 224 (ONCA), at para. 22, is twofold:

> In the circumstances of this case, to determine whether the conduct of the officer amounted to a search within the meaning of s. 8 of the *Charter*, the matter is to be considered from two perspectives. First is the question of the purpose of the officer when he went onto the property of the appellant. Second is the question of whether, in light of his purpose, the officer's activity invaded the appellant's reasonable expectation of privacy. Related to both inquiries is the issue of implied licence or implied invitation.

[155] In *Evans*, police knocking on the door of a private dwelling, to conduct a warrantless search by trying to smell marijuana from within, could not be said to have acted under an implied licence to do so and were found to have breached s. 8 of the *Charter*. Any implied waiver against trespass and knocking, simply could not be extended for the purpose of police securing evidence from within the residence. In other words, knocking on the door to communicate, which police undoubtedly did, did not somehow cleanse the underlying intention to gather evidence against the occupant.

[156] In *R v. Lotozky,* (2006), 81 O.R. (3d) 335 (ONCA), the police, acting on a tip about an impaired driver, went to his residence and waited for him. They eventually saw him drive to his property and onto his driveway in a manner they found to very odd and suspiciously consistent with impairment. They entered onto the driveway, knocked on his car window to get his attention, queried him about his license, ownership and insurance, and then made a breathalyser demand. Under those circumstances, their entry of a short distance onto that driveway to further their investigation was found lawful under the implied license doctrine.

[157] The Court provided the following rationale for upholding police conduct in this case to be legitimate under the implied licence doctrine:

> 36 The officers in this case had a legitimate basis for entering on the driveway. They had received a report that the driver of the car associated with the address was apparently impaired. The driver drove the vehicle in an unusual fashion as he approached the driveway. The officers would have been entitled to stop the vehicle on the street under s. 48(1) of the Highway Traffic Act. For reasons of safety, they waited until the motorist had brought the vehicle safely to a stop. This was a reasonable decision to make. It makes no sense that because the officers exercised a reasonable degree of caution their actions should be characterized as illegitimate.
>
> 37 There are other reasons for viewing the officers' actions as legitimately within the scope of the implied licence. It would not be good policy to interpret the law as encouraging motorists to avoid the reach of legitimate traffic investigations by heading for home and thus encouraging a high-speed police chase. Further, until the impaired driving complaint was investigated there was a risk that an impaired driver would re-enter the vehicle and drive while impaired. It is not reasonable to expect the police to devote resources to waiting outside the motorist's house until he or she returns to the street.

[158] Police attendance on private property, particularly unannounced or in the absence of a prior authorization, can have unintended outcomes. This, with reference to *R. v. Tricker* (1995), 21 O.R. (3d) 575 (ONCA), was noted in *Lotozky*, at para. 38:

> I acknowledge that there is a countervailing policy. It is always possible that a property owner may engage in an altercation with the police because of a mistaken view of the scope of the common law property rights; Tricker is obviously an extreme example of what can happen. Counsel for the respondent suggests that there is, therefore, value in drawing a bright line around the entire property and prohibiting any police entry where the purpose is to investigate criminal activity by the property owner. On the other hand, the implied licence is easily withdrawn simply by the occupier telling the officer to leave. The officer must then leave, unless he or she acquired grounds to make an arrest before that time. Further, even the rule proposed by the respondent is not as clear as it appears. The lawfulness of the officer's entry on the driveway still would depend upon the officer's purpose, which may or may not be apparent to the occupier. Regrettably, in this area, like so many others involved in constitutional litigation it is not always possible to draw bright lines and the best courts can do is give a reasonable common sense interpretation to the law that is relatively easy to apply.

[159] It bears repeating that warrantless police attendance on the property at 5:30 in the morning in the present case caused significant friction between police and the property's occupants, particularly given the lack of detail provided by police as to why they were seizing the vehicles.

[160] It is clear from the foregoing that *Lotozky* is therefore a case regarding the implied licence by police to enter a short distance onto a residential driveway in public view, to communicate with the driver of a car seen to enter that driveway during an investigation of a driving offence in progress.

[161] *Singer* is a case similar on its facts to *Lotozsky*. In *Singer*, police acting on a call regarding a possible impaired driver, about one hour later went to a private residence and saw his car already there, parked a short distance from the public road, on the home's driveway. From the street, although police could not see if there were any occupants in the car, they did observe that car's lights were on, and its motor was still running.

[162] Approaching the car, they saw Mr. Singer in the driver's seat, lying down with his head in the direction of the passenger's door. Apparently asleep, he did not respond to the officer rapping on the door window. Upon the officers opening both the driver and passenger doors, they immediately smelled a strong odour of alcohol and they shook Mr. Singer awake. Communicating with him, they observed some indicia of impairment.

[163] Complying with a demand for a sample of his breath into an approved screening device, and upon failing that test, he was arrested for care and control of a motor vehicle with blood alcohol content over the legal limit. He was then transported by

police to the detachment for further investigation and processing arising from those events.

[164] Even while acknowledging there to be a lower expectation of privacy in a motor vehicle than a dwelling, the Saskatchewan Court of Appeal Court at para. 61 noted Mr. Singer as not merely being in a vehicle anywhere but rather being in a vehicle parked in the driveway of his residence. Police, not even knowing if the vehicle was occupied, approached it on the driveway and began to collect evidence. Finding that police entered the driveway to investigate the owner by gathering evidence against him, the Court ruled, at para. 66 that:

> Based on this evidence, it is clear that the police intended to investigate by gathering evidence against Mr. Singer from the moment they set foot in the driveway. That being so, they did not have an implied licence to enter at all. To paraphrase *Evans*, Mr. Singer cannot be presumed to have invited the police to enter the driveway for the purpose of collecting evidence to enable them to substantiate a criminal charge against him. Constable Lapointe was a trespasser from the moment she set foot in the driveway. In our view, the fact that she did not know this was Mr. Singer's residence is irrelevant in the circumstances of this case.

[165] In *R. v. Buhay,* 2003 SCC 30, private security guards discovered a duffel bag containing marijuana in a rented locker at a public bus terminal, and informed the police, who attended and removed the bag, later arresting the accused when he attended the locker to retrieve it. The Court found the accused to have a reasonable expectation of privacy in the rented locker, and the discovery of the drugs by private security guards then alerting the police did not extinguish that privacy interest.

[166] In describing the nature of the privacy interest in the locked storage locker, the Court compared it to other types of privacy interests described as equal or greater than those then under its consideration:

> 22 The respondent argues that the appellant had a low expectation of privacy because the bus companies owned the lockers and had a master key so they "could access the lockers at any time". True as this may be, it does not remove the reasonable expectation of privacy. A reasonable expectation of privacy is contextual. The expectation does not have to be of the highest form of privacy to trigger the protection of s. 8. For example, someone who rents a hotel room does not own the room, and very likely understands that hotel management has a master key. A reasonable understanding is that hotel staff will access the room, but for limited purposes. There is therefore a reasonable expectation of some privacy in the room, which can be enhanced by the display of a sign requesting privacy.
>
> 23 The issue was addressed by the Court of Appeal for Ontario in *R. v. Mercer* (1992), 70 C.C.C. (3d) 180, where the court held at p. 186: "... I am not persuaded that hotel guests' awareness that cleaning staff will enter their rooms at least daily removes the reasonable expectation of privacy" and further:
>
> > Privacy would be inadequately protected if the reasonableness of a given expectation of privacy in one's office or hotel room could be displaced by an awareness of the possibility that cleaning staff may rummage through anything that is not locked away.
>
> Although hotel rooms and bus lockers are not entirely analogous, I believe that the existence of a master key does not in itself destroy the expectation of privacy. If such were the case, there would be no expectation of privacy in an apartment building, office complex or university residence, for instance. Unless an emergency or other exigent circumstances arise, locker renters may reasonably expect that their lockers are free from unauthorized search by bus terminal security agents or by the police.
>
> 24 As recently stated in *R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10, this Court has adopted a liberal approach to the protection of privacy. Bastarache J. stressed at para. 16 that this protection extends not only to homes and personal items, but to information which we choose to keep confidential -- particularly that which is kept under lock and key. The same applies to personal items which we choose to keep safe from the

> interference of others by storing and locking them in a space rented for that purpose. While it was not as high as the privacy afforded to one's own body, home, or office, a reasonable expectation of privacy existed in locker 135 sufficient to engage the appellant's s. 8 *Charter* rights.

[167] Rejecting any notion of reliance on the plain view doctrine, the Court at para. 37 stated:

> The Crown also contends that the seizure was justified under the "plain view" doctrine, because the actions of the security guards put the contraband in plain view of the police. This argument must fail. It is not sufficient to argue that the evidence was in plain view at the time of the seizure. Indeed, it will nearly always be the case that police see the object when they seize it (see *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *R. v. Spindloe* (2001), 154 C.C.C. (3d) 8 (Sask. C.A.), at para. 36). It stretches the meaning of "plain view" to argue that an item placed in a duffel bag inside a locked locker is somehow in plain view of the police. The "plain view" doctrine requires, perhaps as a central feature, that the police officers have a prior justification for the intrusion into the place where the "plain view" seizure occurred (see, e.g., *Law, supra*, at para. 27; *Spindloe, supra*; *R. v. Belliveau* (1986), 75 N.B.R. (2d) 18 (C.A.); *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548 (Sask. C.A.); *R. v. Kouyas* (1994), 136 N.S.R. (2d) 195 (C.A.), aff'd [1996] 1 S.C.R. 70; *R. v. Fitt* (1995), 96 C.C.C. (3d) 341 (N.S.C.A.), aff'd [1996] 1 S.C.R. 70; *Texas v. Brown*, 460 U.S. 730 (1983), at p. 741; *Coolidge, supra*). The police did not come upon the marijuana during the course of a routine patrol or by the ordinary use of their senses. The police had no prior authorization to enter into the appellant's locker. While, in the circumstances of this case, they could lawfully enter the bus station, they could not lawfully enter the locker itself without a warrant. It follows the contraband was clearly not in plain view of the police so as to justify the legality of the seizure within the "plain view" doctrine.

[168] Although I do not understand the Crown to be relying on the plain view doctrine in the present case, the foregoing passage is nonetheless noteworthy, in respect of the remarks that police cannot employ circular reasoning, in effect purporting to rely on observations of the car and the motor home being “in plain view” to then justify their seizures under that doctrine.

[169] The Court concluded, at para. 38, that:

> The warrantless search and seizure of the items stored in the rented and locked bus depot locker was an impermissible intrusion of the state on a legitimate and reasonable expectation of privacy and, therefore, constitutes a violation of s. 8 of the *Charter*.

[170] *Buhay* is noteworthy in that there is strong recognition of privacy interests in a rented storage locker, even when others might have a master key for that locker and even when that locker may be accessed without any intrusion onto private property. I find the privacy interests at play in the present case, involving a private motor vehicle, and a motor home actually occupied by the accused at the time of seizure, both located on private lands in the KDFN, to exceed, by a considerable margin, the privacy interest in the rented storage locker as considered in *Buhay*.

[171] In *R. v. Attard*, 2024 ONCA 616, the Court upheld the police seizure of a car involved in a serious motor vehicle accident. Finding the police officer, with 14 years' experience, had reasonable grounds to believe high-speed contributing to the collision supported a belief in the offence of dangerous driving, the seizure was found to have been authorized by s. 489(2)(c) of the *Code*. The main purpose of the seizure, to remove from the car the Endpoint Detection and Response ("EDR") unit from which data could be extracted to prove speed, was not unlawful because that unit was a component of the car itself, rather than something which might be found inside the car. At para. 58:

> In my view, the trial judge further erred in law in finding the respondent's car was a "place", rather than a "thing" within the meaning of s. 489(2)(c). In so finding, the trial judge appears to have confused the EDR (a component of the car) with the contents inside a car. For example, he

> expressed concern that if police can "seize" the EDR, they can seize whatever is in the car. This concern is misguided. Section 489(2) does not purport to give police the power to conduct a warrantless seizure of things within a vehicle. It empowers the police to seize a "thing", which in this case were motor vehicles, including the EDRs as components of those vehicles.

[172] The Court, at paras. 60 and 61, provided a helpful review of the overall framework when examining any kind of privacy interest:

> 60 Three broad categories of privacy interests have emerged over time: territorial, personal, and informational: *R. v. El-Azrak*, 2023 ONCA 440, at para. 30; *R. v. Spencer*, 2014 SCC 43, at para. 38.
>
> 61 At paras. 31-32 of *El-Azrak*, Fairburn A.C.J.O., writing for this court, summarized the legal framework - whatever the form of privacy is at issue - for whether someone has a reasonable expectation of privacy. That determination necessitates both a factual and a normative inquiry. The factual inquiry necessitates a command of all the circumstances in play in the case. The normative inquiry is broader in nature, with an eye to protecting that for which we ought to expect protection from a privacy perspective in a free and democratic society. The test for determining whether someone has a reasonable expectation of privacy asks the following:
>
> 1. What is the subject matter of the search?
> 2. Does the accused have a direct interest in that subject matter?
> 3. Does the accused have a subjective expectation of privacy in the subject matter?
> 4. Would an expectation of privacy be objectively reasonable in the circumstances of the case?

[173] I read *Attard* to mean that the warrantless seizure of the car, had it been done for the purpose of obtaining a thing inside that car, rather than obtaining an informational component of the car itself which contained no personal identifiers relating to the accused, might well have taken the matter outside the ambit of s. 489(2)(c), and instead required a prior authorization to seize it. Furthermore, it must be again noted that

Attard, unlike the present case, has the vehicle situated in a public place rather than on private property.

[174] From all of the foregoing, it is clear that the “lawful place” requirement, along with the other conditions, is a significant protection rendering s. 489(2) constitutionally compliant.

[175] In light of that, there are some important features of the police actions in relation to their attendance at the property that bear on the question of implied licence:

a. It must be noted that the hour was very early. All of the lights were still off in the main house, and it would appear, from the evidence tendered at the hearing of this application, that even the light on in the motor home was not observed until after police had entered upon the property;

b. To the extent that any implied licence might be justified in respect of entry onto the driveway, police attendance was not in respect of any driving offence recently committed or still in progress, but rather in respect of an offence known to have been completed hours ago, entirely unrelated to the operation of motor vehicles parked in a driveway, and focused on evidence believed to be within them;

c. The entry was not limited to the driveway, or to the front door of the residence. Rather, police appeared to have walked freely on the

property, including towards the back of the property mostly in darkness, where the motor home was situated;

d. The purpose of the entry was not to communicate per se; rather it was to execute a decision already made to warrantlessly seize vehicles, and to thereupon demand the applicant's immediate exit from the motor home. Even to the limited extent of that communication, no one told any of the residents as to specifically why the vehicles were being seized despite being repeatedly asked;

e. Police conscripted the assistance of the property occupants, including Mr. Callahan-Smith, to complete the towing of the vehicles and to some degree, they controlled his movements when he was agitatedly vocalizing his concerns, including concerns relating to the tow;

f. While no one explicitly told the police to leave, it is implicit from the conduct of the residents, particularly from an agitated Mr. Callahan-Smith, that police attendance was not welcomed. Moreover, at least some of the officers would not have departed, even if asked to do so;

g. The occupation was not of a brief duration, but rather it extended for a period measured in hours, closely approximating the time it may have taken police to seek an authorization itself, had they chosen to do so.

[176] In *R. v. Hart*, 2002 BCSC 659, police believed they lacked reasonable grounds to arrest the accused or search his car during an investigation of sexual assault. However,

because he matched most of the characteristics described by the victims, and because their description also matched several aspects of the interior of his car as seen by police looking into it, they warrantlessly seized it from the restaurant where it was parked, pending the obtaining of an authorization to search it, in order to preserve evidence that might be contained within it.

[177] The Court upheld this initial seizure of the car, to be a valid exercise of police power to preserve evidence under articulable cause, pending further investigation and obtaining of an authorization. Given this power was described, at para. 58, as "exceedingly rare given the parameters of the *Charter*…", further analysis of the underlying rationale is presently not required, given that Mr. Callahan-Smith's vehicle was seized not from a public place but rather from private property, and where it is questionable whether the grounds to seize met even the lower threshold of articulable cause.

[178] The police common law power to seize evidence, including under the *Waterfield* test (as found in *R. v. Waterfield*, [1963] 3 All E.R. 659 to preserve evidence was canvased in *Kelsy* where the Court, after mentioning that test, concluded at para. 31 that, "the need for this common law power may have largely disappeared in light of the statutory amendments."

[179] The Court, at paras. 51 and 52, noted the importance of keeping the doctrines of exigent circumstances and the *Waterfield* test separate:

> 51 It will be recalled that the trial judge found that the search was reasonable by drawing on both doctrines of exigent circumstances and the *Waterfield* test. While the two doctrines can, in some circumstances,

> be related and may even overlap, in my view, it is preferable to keep them distinct in determining whether police conduct is justified. I say that primarily because of my concern that by combining the two there is a risk that the reasonableness requirement that lies at the heart of the s. 8 analysis may be weakened.
>
> 52 The two doctrines are meant to address different concerns and are context-specific. Reasonableness in the exigent circumstances doctrine rests primarily on the fact that the officer did have grounds to obtain prior judicial authorization. The fact that it is not feasible to obtain a warrant merely sets the scene for possibly engaging the exigent circumstances doctrine, it does not justify the search. While there is a vague and ill-defined basis for search in exigent circumstances involving officer or public safety, even then there must be some reasonable basis for the search. Reasonableness in the *Waterfield* context rests on the reasonable necessity of the police action. Again, the fact that officers were acting generally in the course of their duties merely sets the scene; but is only one half of the test that must be met. By combining the two doctrines and taking only certain elements from each, the core safeguard of reasonableness may be lost.

[180] It would appear that the application of this power to preserve evidence, even hypothetically assuming a sufficient evidentiary foundation for its application, and in the absence of exigent circumstances, would still require an assessment of its lawfulness, as in the present case of police, seeing on a property the very thing they sought, as therefore now being in “plain view”, and relying on *Waterfield* to justify entry onto that property for its seizure. I simply do not see *Waterfield* in any way capable of justifying the police entry and seizure.

[181] The foregoing review of the case authorities and findings demonstrates that the doctrine of implied licence has important limits. Owners and occupies of real property, while impliedly inviting the public and the police onto their property for purposes of communication, cannot be reasonably regarded to have extended that invitation to anyone, much less police, at 5:30 in the morning, when all of the lights in the house are

still off, to enter not only the driveway, but to walk around further back into the yard for the purpose of seizing a car and a motor home thereupon, and conscripting assistance. Knocking on the door of the home, as well as the door of the motor home, to communicate their attendance for this purpose, in light of everything else the police did, does not thereby bring the matter within the licence.

[182] The expectation of privacy attendant to an investigation in relation to a motor vehicle, and for communications in a driveway in that respect, was recognized in *Lotozsky*, to be lower than the privacy expectations attendant to police knocking on the door of a dwelling house to investigate its occupants. In the present case, I note that police did not attend to communicate with anyone to further their investigation about the car or the motor home, in the sense of how they may have been driven, but rather in the sense that they would contain evidence of the commission of an offence entirely unrelated to manner of driving.

[183] Police attendance on the property therefore constituting a trespass, they cannot be said to have been lawfully present, as required by s. 489(2). The attendance on the property being unlawful, the warrantless seizures therein effected are not authorized by law and are therefore in violation of s. 8 of the *Charter*.

Was the manner of the seizure reasonable?

[184] Here, I will focus on one aspect of the actual seizure, in other words while police were at the property.

[185] It will be recalled that the applicant, when told to leave the motor home, had asked Cst. Wideman if he could retrieve his sandals. The particular concern involves the actions of Cst. Wideman then looking inside the motor home. His testimony was that he did not enter it, but rather leaned forward to look inside, and that he did this not for any investigative purpose such as searching it, but to ensure that the applicant did not tamper with any evidence while getting his sandals.

[186] If Cst. Wideman wished to preserve the interior of the motor home from tampering, the safer and more reasonable response would have been to tell the applicant that he could not retrieve anything from the motor home, and that he must exit immediately. This would not only have better protected against tampering, it would also not have required the officer to look inside. Other measures could have been then explored for footwear that would not require anyone re-entering the motor home.

[187] While observing the applicant retrieve his sandals, the officer unavoidably made observations of the motor home's interior, which he could not have otherwise made. Even allowing this was a very brief interval, perhaps a minute or so in duration, and that it was done for a purpose unconnected to searching the motor home, it constituted an unlawful view of the motor home's interior.

Does s. 489(2) require exigent circumstances for Constitutional validity?

[188] The Supreme Court of Canada determined in *Grant* (1993), that s. 10 of the *Narcotic Control Act*, which permitted reasonably grounded but warrantless searches of places other than a dwelling house, applied only under exigent circumstances in order to maintain constitutional compliance with s. 8 of the *Charter*.

[189] Relying principally on *Grant*, defence submits that s. 489(2), unless also read down to require exigent circumstances, renders that section in breach of s. 8 of the *Charter*.

[190] Crown asserts that although Parliament has imposed the requirement of exigent circumstances in a variety of other search, seizure or entry provisions under the *Code*, (eg. ss. 117.02(1), 487.11, 529.3), and s. 11(7) of the *CDSA*, it chose to not impose that requirement for seizures pursuant to s. 489(2) because the conditions that are prescribed in that section provide an appropriate balance between the State's interest in investigating crime, and the individual's *Charter* protected expectation of privacy.

[191] Given my other findings in this ruling, this issue need not be addressed on the circumstances of this case.

Was the Applicant detained on August 9, 2023?

[192] Section 9 of the *Charter* provides as follows:

> [Detention or Imprisonment]
>
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

[193] Section 10 of the *Charter* provides as follows:

> [Arrest or detention]
>
> 10. Everyone has the right on arrest or detention
>
> a. to be informed promptly of the reasons therefor;
>
> b. to retain and instruct counsel without delay and to be informed of that right; and

> c. to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

[194] The onus to prove this breach rests with the applicant, on a balance of probabilities.

[195] For reasons that follow, I conclude the applicant has not established, on a balance of probabilities, that he was detained at the property.

[196] On arrival at the property, Cst. Cook went to the front door of the residence to communicate the seizures. Cst. Wideman knocked on the motor home, where Mr. Callahan-Smith answered the door. He was told the motor home would be seized so the applicant would need to leave it. Whether this was more of a demand than a request would depend on the exact words used. The only evidence of that is from the officers, who described it as a request, one that would flow logically from the fact of the vehicle itself being seized.

[197] Cst. Cook elaborated by saying he did not charter, warn, or caution the accused because he had not been arrested, and was cooperative. He did not consider him to have been detained. He testified he left all such decisions to Cst. Marland, as the lead investigator.

[198] During the seizure, Cst. Rimanelli was later dispatched to the property to preserve the continuity of that evidence at the scene, by relieving two other officers that had already been on scene for some time. He remained on scene for about two hours, or until just after 8:00 a.m. In this regard, he testified that his role was solely to preserve the evidence until it could be removed from the property.

[199] Cst. Rimanelli believed he had reasonable and probable grounds to arrest the accused, but because the accused was cooperative, he did not conduct any arrest, and did not believe him to be thereby even under any form of detention. He left that decision up to the person he said was the lead investigator, Cst. Marland. As such, he did not inform the accused about the nature of the investigation.

[200] Cst. Rimanelli did not touch the accused and testified that the only control that he exercised was to ensure he did not touch or enter the car and motor home. He said that the accused asked to get something out of the car but was denied, to preserve the car's condition.

[201] That said, Cst. Rimanelli did agree that he sought the assistance from the accused in removal of the vehicles. He did so by asking him if had the keys to the motor home, and by asking him to move a car out of the way so that the motor home could be towed out of the back yard. Although he said he did not relay this as a command but simply as a request, he did admit that it was clear to the accused that in the absence of cooperation, a car that was in the way, if not moved voluntarily, would be towed away. He testified that when the accused told him to do it himself, the officer obtained the help of other family members.

[202] Cst. Rimanelli also agreed it was possible that he controlled some of the movements of the accused. He said this happened when he became agitated at the sight of the motor home becoming tangled in some tree branches as it was being removed, telling the accused to calm down. He said the accused eventually went into his mother's home, on the property, unimpeded by any of the officers in attendance.

[203] Cst. Rimanelli then followed the towed vehicle to the detachment.

[204] My first observation is that this is not a case that could be seen as one of investigative detention. Prior to entry onto the property, police had already subjectively concluded that they had reasonable grounds to seize the car and the motor home, as well as to arrest the accused, if they wished. However, grounds to arrest or detain does not necessarily mean necessity to arrest or detain.

[205] That said, just because police chose to not arrest the accused, nor to ask him questions, this does not necessarily mean he was not detained. This question still requires analysis.

[206] Some of the considerations involving any determination of the question of a detention were set out in *R. v. Le*, 2019 SCC 34. There, at para. 25, while referring to *Grant*[3], the Court noted that:

> ...Specifically, in *Grant*, this Court held that a *psychological* detention by the police, such as the one claimed in this case, can arise in two ways: (1) the claimant is "legally required to comply with a direction or demand" (para. 30) by the police (i.e. by due process of law); *or* (2) a claimant is not under a legal obligation to comply with a direction or demand, "but a reasonable person in the subject's position would feel so obligated" (para. 30) and would "conclude that he or she was not free to go" (para. 31).

[207] The Court in *Le* observed further, at para. 27, that other factors must also be considered:

> Having said that, not every police-citizen interaction is a detention within the meaning of s. 9 of the *Charter*. A detention requires "significant physical or psychological restraint" (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 19; *Grant*, at para. 26; *R. v. Suberu*, 2009 SCC

[3] *R. v. Grant*, 2009 SCC 32

> 33, [2009] 2 S.C.R. 460, at para. 3). Even where a person under investigation for criminal activity is questioned, that person is not necessarily detained (*R. v. MacMillan*, 2013 ONCA 109, 114 O.R. (3d) 506, at para. 36; *Suberu*, at para. 23; *Mann*, at para. 19). While "[m]any [police-citizen encounters] are relatively innocuous, ... involving nothing more than passing conversation[,] [s]uch exchanges [may] become more invasive ... when consent and conversation are replaced by coercion and interrogation" (Penney et al., at pp. 84-85). In determining when this line is crossed (i.e. the point of detention, for the purposes of ss. 9 and 10 of the *Charter*), it is essential to consider all of the circumstances of the police encounter. Section 9 requires an assessment of the encounter as a whole and not a frame-by-frame dissection as the encounter unfolds.

[208] In *Le*, police were found to have arbitrarily detained five men in the back yard of a racialized neighbourhood, when officers jumped over a low fence into the back yard to question them on suspicion of criminal wrongdoing. This was despite some of those people not residing there but only in attendance as guests.

[209] In *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 56, a detention was determined when a police officer, upon entry into the home of the accused, touched him and ordered him out of bed. Here I note there is no evidence, one way or the other, enabling any conclusion as to whether the applicant resided in the motor home, or simply happened to be occupying it at the time of the police attendance.

[210] In the present case, although there were a number of police officers in attendance at the property, this alone is not determinative on the issue. It is clear on the testimony that I accept, that none of them touched him, nor questioned him. Their interaction with him was limited to asking that he leave the trailer situated at the back of the property. In the course of doing that, they permitted his request to retrieve his sandals. They also asked him for some assistance in connection with towing of the motor home, such as moving a car that was in the way, but he refused, and this

assistance was provided by a family member in the home located on the property. His request to get something from the car was denied.

[211] Cst. Wideman testified that had the applicant refused to leave the motor home, he would have respected that request and not forced the issue. On the other hand, Cst. Cook testified that any such refusal would have resulted in his arrest and forcible expulsion. Despite this misalignment of potential police response, it makes little difference because there is nothing to indicate that the applicant himself would have any reason to believe his liberty would be affected if he did not comply. A hypothetical possibility of detention or arrest occurring does not make it so (see in this regard *Makhmudov,* at para. 15).

[212] It being clear the applicant was free to go anywhere he pleased (except back in the motor home), and in the absence of any other testimony indicating otherwise, the only reasonable inference is that the reason he remained on site was voluntarily, to observe the seizures as a matter of his own legitimate interests and concerns, including that the motor home not sustain any damage during its removal.

[213] Rather than police asking him questions, he was asking police questions about why they were there. That he stayed there as a matter of his own interests and concerns, is not tantamount to any detention, psychological or otherwise, on these facts as I find them to have occurred.

[214] Having found the applicant has not established a violation of s. 9 of the *Charter*, there is no basis to consider any potential infringement of s. 10.

The Form 5.2 Report and the Continuing Retention of the Seized Items

[215] Section 489.1(1) of the *Code* requires a peace officer, seeking to detain items seized pursuant to a search, to bring those things before a Justice as soon as practicable:

> Restitution of property or report by peace officer
>
> 489.1 (1) Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued under this Act or under section 487.11 or 489 or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,
>
> …
>
> (b) bring the thing seized before a justice referred to in paragraph (a), or report to the Justice that the thing has been seized and is being detained, to be dealt with in accordance with subsection 490(1), if the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii).
>
> …
>
> (3) A report to a justice under this section shall be in Form 5.2, varied to suit the case.

[216] Defence asserts a s. 8 *Charter* breach on three grounds:

a. Because the police did not return the seized items after their first application for a warrant had been denied, this continuing period of unlawful retention aggravated the initial warrantless seizure;

b. Police did not disclose to the Justice that at the time of its completion, the application to obtain a warrant had been denied;

c. Because the Report to a Justice (Form 5.2) was not completed until eight days after the seizure, it was not made as soon as practicable.

[217] Cst. Cook was not the lead investigator and following the towing of the car, he completed his report at the detachment, ended his shift, and appears to have had little or no further involvement in the case. None of the other officers involved in attending at the property were tasked to complete the Form 5.2 report.

[218] Cst. Marland, as lead investigator, testified that she concluded her shift later than normal, so that she could complete writing her report. The reason she did not complete the Form 5.2 report while staying late on August 9, 2023, is because she had other administrative tasks that she considered to be higher priority. She did not describe all of them, or why they were more important to complete than the codified obligation to file the Form 5.2 report as soon as practicable.

[219] She was unsure what role she would play in the case thereafter. On returning to work the next day she learned the file had been taken over by the General Investigation Service (GIS). She was unsure who would be assigning which tasks, but because she no longer considered herself as leading the file, she assumed someone else would complete the Form 5.2. She did not tell anyone that she had not completed the report.

[220] Cst. Marland was later assigned some additional investigative duties on the file. She arranged a time and date for a more detailed interview of the complainant. She viewed other video footage taken from downtown Whitehorse, agreeing this took up a considerable amount of time. She was aware that on August 14, 2023, the applicant's mother asked for the return of the motor home but was refused. She was also aware,

on her periodic review of the PROS database showing work being done on the file, that no Form 5.2 report showed up as having been completed, but she attributed that to delays that sometimes occurred between the report actually having been filed and then appearing on the database.

[221] Then, on August 17, 2023, when she happened to encounter another officer working the file and asking whether there was anything else she could do, she was asked to complete the Form 5.2. She then completed the form.

[222] In completing the Form 5.2, Cst. Marland indicated the items seized, the date and location from where they were seized, the person from whom they were seized, and that the seizures were made without warrant, and their detention was necessary to be dealt with according to law, at the Whitehorse RCMP detachment.

[223] Defence asserts that Cst. Marland ought to have indicated in the Form 5.2 report that the seizure at the time of the report, had still not been validated by an authorization. I am not sure that is required. There is no place in the Form for this information to be included, but more importantly, the heading under which the information was written reads: “COMPLETE SECTION 2 IF NO WARRANT HAS BEEN ISSUED”. No warrant had indeed as yet been issued, and in that sense therefore, there was no misrepresentation. I do not find any breach of s. 8 of the *Charter* based on the representations made in the Form 5.2 report.

[224] Next is the matter of whether the warrantless retention of the seized car and motor home constituted a continuing unlawful seizure and therefore in breach of s. 8 of the *Charter*. I find that clearly it was. The question of how serious this violation is may

be addressed as part of any s. 24(2) submission, if or when that may arise, and may depend on the reasons for the retention in the context of its duration of ten days between the making of the two applications for authorization.

[225] The remaining question under this heading is whether the report was filed as soon as practicable.

[226] Per para. 91 of *R. v. Colarusso*, [1994] 1 S.C.R. 20, a seizure is a continuing thing, the continuation often having greater impact than the original taking:

> In considering this position, it must be understood that the protection against unreasonable seizure is not addressed to the mere fact of taking. Indeed, in many cases, this is the lesser evil. Protection aimed solely at the physical act of taking would undoubtedly protect things, but would play a limited role in protecting the privacy of the individual which is what s. 8 is aimed at, and that provision, Hunter tells us, must be liberally and purposively interpreted to accomplish that end. The matter seized thus remains under the protective mantle of s. 8 so long as the seizure continues.

[227] *R. v. Lambert*, 2023 ONCA 689, at para. 97, leaves no doubt about the importance of filing the Form 5.2 report in a timely fashion:

> I am persuaded that regardless of the precise line of reasoning the trial judge employed, his failure to find a *Charter* breach relating to the delay in filing the first report to a justice was an error. Section 489.1 applies to all seizures, including warrantless seizures: *R. v. Backhouse*, [2005] O.J. No. 754, 194 C.C.C. (3d) 1 (C.A.). Where a peace officer seizes “anything: they must report to a justice “as soon as is practicable”. I have considered the explanations that PC Cunning offered for the delays that occurred, but I can see no basis for holding that it was not practicable to file the first report to a justice before July 28, 2016, a delay of approximately two months after computer 1 was seized on May 14, 2016. The failure to comply with s. 489.1 is a *Charter* breach: *Garcia-Machado*. This is because a seizure is an ongoing event. During the delay that occurred before the report to a justice was filed relating to computer 1, the ongoing retention of the computer, a continuing seizure, was not authorized by law

and was therefore unreasonable, contrary to s. 8 of the *Charter*

[228] There was a great deal of evidence tendered by Crown as to why the report was filed so late. Filed as Exhibit “E” for identification on the *voir dire*, it is not a complicated document. Comprised of only two police exhibits (the car and the motor home), it could not have reasonably taken more than ten minutes to complete.

[229] Much of the evidence going to the delay related to the command structure within the RCMP, and how work is assigned or re-assigned, not all of which was entirely clear to me as applied to this case. Of course, the RCMP may structure its internal workings as it pleases, provided there is lawful compliance with codified obligations. That they failed to do so, and for the reasons provided, I conclude the report was not filed as soon as practicable.

_____

GILL T.C.J.