2010 11 24
Docket: Docket: S-1-CR 2009 000 117

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

CRAIG MACNEARNEY AND KIM MACNEARNEY

Applicants

Restriction on Publication: This matter is subject to a publication ban pursuant to section 648 of the *Criminal Code*

Corrected judgment: A corrigendum was issued on November 25, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

Application challenging the admissibility of evidence under the *Canadian Charter of Rights and Freedoms.*

Heard at Yellowknife, NT, on September 7,8,9,10,14,15 and 22, 2010

Reasons filed: November 24, 2010

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE D.M. COOPER

Counsel for the Crown: Janice Walsh and Danielle Vaillancourt
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Counsel for the Applicant, Kim MacNearney: Nikolaus Homberg

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REASONS FOR JUDGMENT

[1] The two accused, husband and wife, stand charged with possession of cannabis marihuana in an amount exceeding three kilograms for the purpose of trafficking, contrary to s.5(2) of the *Controlled Drugs and Substances Act,* S.C.1996,c.19, as well as producing cannabis marihuana contrary to s.7 of the *Act.*

[2] They filed an application challenging the admissibility of evidence seized at their home on February 19, 2009, under ss. 7, 8 and 10(a) and (b) and 24(2) of the *Canadian Charter of Rights and Freedoms*, being Part 1 of Schedule B to the *Canada Act* 1982, c. 11 (UK), alleging that the original search of their home was unlawful, having been undertaken without a warrant and that the accused Craig MacNearney was unlawfully detained by reason of the failure of police to advise him of the reasons for his detention or of his right to instruct counsel at the earliest opportunity. At the hearing, the accused focused on the issue of the violation of their rights under ss. 7 and 8 and presented no argument related to alleged *Charter* violations under ss. 10(a) and

(b). In any event, having heard the evidence, I see no merit in that branch of the application and do not propose to deal with it further.

Facts

[3] On the morning of February 17, 2009, Marissa Sommerhalder, a child protection worker (CPW) with Yellowknife's Department of Health and Social Services (Social Services), received an anonymous phone call from a male individual who alleged that the two accused were running a grow operation at a named residence in the city (a single-wide mobile home), that a person could smell marihuana from outside the residence through an exterior vent and that there was a lot of traffic with people coming and going from the residence. The caller also advised that there were two small children living there for whom he expressed grave concern. He further indicated that he had a "close group of friends who are in connection with the grow-op", had smelled the odour of marihuana himself and was able to name the two children; boys, aged one and three. He also left the impression that he had been inside the trailer. Ms. Sommerhalder considered the call to be credible and genuine because of the detail given to her, the caller's apparent personal knowledge and the tone and manner in which he spoke.

[4] She consulted with her supervisor and manager and checked internal records but was unable to find any historical information relating to the accused. The supervisor instructed her to contact the RCMP drug section, with a view to having them investigate, and to have them call her back if there were child protection issues. She made the call on the afternoon of the 17th. When no one answered, she left a voice mail message indicating she had information regarding a grow operation and asked that she be contacted. Her call was not returned, so on February 18th she made another attempt to contact the drug section and again left a similar voice mail message. Once more, her call was not returned so she decided to call RCMP general operations. The failure of the RCMP drug section to return or even acknowledge Ms. Sommerhalder's calls was not explained and is rather disquieting.

[5] There were discussions with colleagues at Social Services. There had been a feeling that it would be appropriate to have the drug section inquire into the allegations initially. However, when no interest was expressed or attention paid, the decision was made for the CPWs to conduct their own investigation- that this was something they felt they could not ignore.

[6] At 9:50 a.m. on the 19th of February, 2009, Corporal Landry of the Yellowknife RCMP, received a telephone call from Ms. Sommerhalder. She advised him of the

anonymous phone call and of the information that had been conveyed to her. She requested police assistance to attend the residence to ensure the keeping of the peace during the child protection investigation. He agreed to assist.

[7] There is no evidence to infer, as suggested by defence, that there was an understanding between child protection services and the police that since the RCMP did not have enough evidence to obtain a warrant, the CPWs should conduct an investigation under the *Child and Family Services Act*, S.N.W.T. 1997. C.13 (the *CFSA* or the *Act*) with the RCMP to assist under the guise of keeping the peace but with the primary intention of searching for drugs.

[8] Cpl. Landry was in charge of Watch 4 at the time and he directed that he and four other officers would attend at the MacNearney residence along with the CPWs. He testified that he had been involved in child investigations or apprehensions, almost on a weekly basis since he had been in Yellowknife and that generally there would be a minimum number of two officers involved. He added that more officers would be assigned in cases, such as this, where there were logically other concerns and potential dangers that could not be ignored given the information concerning a grow operation. Some of those potential dangers, in addition to the inherently volatile situations one would expect in child apprehensions, included the presence of firearms, that individuals associated with grow operations would act to defend them, that there could be various chemicals, mold and toxins on site as well as dangerous electrical wiring.

[9] While waiting to hear from Ms. Sommerhalder that Social Services was ready to conduct the investigation, Cpl. Landry checked various RCMP data bases on the MacNearneys and was able to find only one dated conviction on Craig MacNearney for breaking and entering in Nova Scotia in the 1980s. The only fact Cpl. Landry was able to confirm was that the two accused were registered owners of the residence. Therefore, assuming the allegations were true, Cpl. Landry had no way of knowing if the accused were merely running a small, independent grow operation or were part of a larger and more dangerous criminal organization.

[10] He concluded that with an anonymous tip (second hand) and no corroborating evidence, he lacked the reasonable grounds necessary to obtain a search warrant under the *Criminal Code*. He briefed the assigned officers to the effect that their role was to facilitate the child protection investigation, that this was not a search per se; the intrusion was to be minimal and that they were to open closed doors to ensure safety

but were not to open drawers or cupboards or do anything else that would constitute an "invasive" search. He further testified that it was standard procedure when on this type of operation to "clear" the residence to ensure all persons on the premises were accounted for; this being for safety reasons.

[11] Joined by CPWs Sommerhalder and Babin, the five police officers attended at the subject residence at approximately 11:00 a.m. Ms. Sommerhalder was immediately outside the entrance door on a small landing and Ms. Babin was beside her. Cpl. Landry was positioned on the second step and the remaining officers behind him. Ms. Sommerhalder testified she could smell marihuana while walking up the driveway from an exhaust vent near the entrance to the house. None of the other officers or the second CPW, Trina Babin, could smell anything until at the door or inside the house. She knocked on the door which was answered by Craig MacNearney. The older boy joined him. Ms. Sommerhalder informed him that they were there to conduct an investigation with respect to the children and indicated that the RCMP were assisting and asked to come inside. Mr. MacNearney then asked if they had a warrant and Ms. Sommerhalder explained that they were not required to have a warrant and that they had authority to enter the premises under the provisions of the *CFSA*. Initially, both CPWs described Mr. MacNearney as "combative", however, RCMP officers were of the impression that he was subdued and cooperative.

[12] The testimony of Cpl. Landry and Ms. Sommerhalder differed on who entered the premises first. Cpl. Landry said he slipped by the two social workers and was the first to enter while Ms. Sommerhalder said she entered first but Cpl. Landry would have been right beside her. Trina Babin recalled that she and Ms. Sommerhalder entered first followed by the police. Other police officers testified that the social workers went in first. Regardless, although this issue was explored at length by the defence, a finding of fact on who entered the premises first is not critical to the larger issues in this case.

[13] Once inside the home, Cpl. Landry testified that he detected a very strong odour of raw marihuana as did most other witnesses. Ms. Babin said she detected an odour of chemicals. Shortly after entering, Cpl. Landry followed Cst. Kemps into a room more or less directly across from the entrance door. He stated he saw what appeared to be a homemade partition wall which divided the room in half and noted there were two smaller doors, both approximately 3 ½ to 4 feet high, one above the other, leading into the partitioned area. He thought it possible for the space to accommodate as many as 5

or 6 adults. He directed Cst. Kemps to open the top door which was unlatched and Cpl. Landry saw what he considered to be several marihuana plants. He also observed Kemps open the bottom door. He further noted there were several open large jars on the floor of what looked to be chemicals or fertilizer. He was in the room no more than 10 seconds. He had been advised by another officer that there was a large ziplock bag of what was suspected to be marihuana in plain sight in the bathroom on the top of the vanity. He made a visual observation of that himself.

[14] At that point, he went to the kitchen and placed Mr. MacNearney under arrest for possession of marihuana and production. He was placed in hand cuffs. Before leading Mr. MacNearney out the door, he asked Cpl. Landry if he could have his cellular phone. Cpl. Landry retrieved it from a shelf and advised Mr. MacNearney that he would have custody of it but could not give it to him until he was released. He added that he did not consider this a "seizure" and would not have taken possession of it but for the request of Mr. MacNearney.

[15] Almost immediately after the arrest of Mr. MacNearney, Ms. Sommerhalder made the decision to apprehend the two children. She had not gone to the residence with the express intention to apprehend but rather to investigate. It is unclear if she felt an apprehension was appropriate absent the arrest of Mr. MacNearney and the impending arrest of Ms. MacNearney. However, Ms. Babin, who was considerably more experienced in child protection matters, felt an apprehension was required regardless of whether the parents were arrested. In any event, once the arrest process was initiated, apprehension was necessary. Since Ms. Sommerhalder was in charge of writing the report required in these circumstances, she personally viewed the plants, the chemicals and the bag of marihuana.

[16] Cpl. Landry escorted Mr. MacNearney out of the home and placed him in the back of a police cruiser where he immediately "gave him his s. 10(a) and (b) rights". He added that he had entered the home at 11:04 a.m. and exited with Mr. MacNearney at 11:06 a.m. He departed from the scene at 11:13 a.m.

[17] Nothing was seized during this attendance at the home of the accused. Police officers looked in every room and a closet in the main bedroom as well as opening the two doors in the partitioned room but did not otherwise open drawers or kitchen cabinets or look in any areas where drugs or paraphernalia might be hidden. Cpl. Landry reiterated that the purpose of the attendance of the RCMP and their duty in this

situation was to facilitate the investigation of the (CPWs) which meant ensuring their safety and that of the children and themselves once on the premises. The purpose in looking into rooms or "clearing", as it was called, was to ensure there were no other persons on the premises who could pose a threat to safety and was standard operating procedure.

[18] Mr. MacNearney was taken to the police detachment and lodged in cells. Cpl. Landry began working on drafting the warrant of search. Two other officers attended at the work place of Ms. MacNearney and placed her under arrest at approximately 12:30 p.m. The warrant was executed at the home of the accused at 4:00 p.m.

[19] Upon arrival at the RCMP detachment, Mr. MacNearney's personal effects were noted on what was referred to as a Form 13 prior to his being lodged in cells. Sometime after this, it occurred to Cpl. Landry that he still had custody of the cell phone and he placed it in Mr. MacNearney's personal effects without making a notation on the Form 13. He testified that at approximately 9:00 p.m., "an alarm bell went off" when it occurred to him that there might be incriminating evidence on the cell phone. He retrieved it and read a string of text messages between Mr. MacNearney and a third person that led him to believe that both accused were engaged in trafficking marihuana. Because the jeopardy of the accused had changed, he read them their s. 10 rights again.

[20] The accused did not testify on this application.

[21] I find the evidence of the Crown to have been credible and that of Ms. Sommerhalder, Ms. Babin and Cpl. Landry to be particularly reliable. It was my view they gave their evidence dispassionately and, without being defensive, they withstood rigorous cross-examination. When they were not sure of something, they admitted it understanding the admission would not assist the Crown's case. Cpl. Landry had made extensive and meticulous notes which he referred to from time to time. I trust his evidence.

Issues

[22] 1. Was the entry of the residence by Social Services under the *Child and Family Services Act* authorized by law?

2. If the entry was authorized, were the CPWs restricted to merely apprehending the children or were they authorized to examine the premises as part of their investigation for the purpose of confirming the substance of the report that had been received?

3. Were the police acting in accordance with their common law and (or) statutory duty by accompanying the child protection workers to the residence of the accused and by conducting a "clearing operation" or minimal search of the residence?

4. If entry to the residence was unauthorized and if the actions of the police inside the home were illegal then should the evidence seized under warrant be excluded under s. 24(2) of the *Charter*?

5. Was the taking into custody of the cell phone illegal? If so, should the evidence garnered from this "seizure" be excluded under s. 24(2) of the *Charter*?

Position of the Defence

[23] The position of the defence is that here there was a high expectation of privacy and that a warrantless search by Social Services could not be justified. Counsel say that the reasonable grounds necessary to justify the search could not be founded on the basis of an uncorroborated anonymous phone call and that more subtle (yet largely unspecified) methods of investigation ought to have been employed to provide the necessary corroboration prior to undertaking a home visitation or apprehension.

[24] Further, the defence argues that the cell phone was seized from the personal effects of Mr. MacNearney illegally because it was not done under warrant. Nor was it seized incidental to arrest since that was not technically done until 9:00 p.m. on February 19th. Accordingly, they say the seizure was unlawful.

[25] As well, it is argued that the duty on child protection workers to investigate does not include entering a private home without a warrant and that the authority to enter a place under s.33 of the *CFSA* is restricted to situations where a decision to apprehend has already been made. They say because privacy rights are at stake, the *Act* is to be construed narrowly such that the right to enter to investigate cannot be implied.

[26] Finally, counsel submit that there were no exigent circumstances to justify the entry, that the RCMP's intention in accompanying the CPWs was to conduct a search for a grow-op they could not otherwise accomplish under the criminal law and that, having reference to the test enunciated in *R. v. Grant*, [2009] SCC 32, to admit the evidence obtained by warrant under s. 24(2) of the *Charter* would result in the administration of justice being held in disrepute.

[27] Defence counsel filed a *Brief of Law* and I have reviewed the cases submitted, which were not argued to any extent, and note that many of them are from jurisdictions that require a social worker to obtain a warrant of search unless the circumstances are exigent or involve an emergency entry by police to a home in the course of a criminal investigation without a warrant or are otherwise largely distinguishable from the case at bar.

Position of the Crown

[28] The Crown says that once the report from the anonymous caller had been received, under s. 9 of the *Act*, child protection services was under a positive duty to investigate. They say there were reasonable grounds on a subjective and objective basis to investigate in that there was a substantial risk of harm to the children.

[29] Citing *R. v. Sanderson*, [2003] O.J. No. 1481 and *R. v. Waterfield*, [1963] All E.R. 659 (C.C.A.) the Crown argues that the police were acting within the scope of their statutory and common law duties in accompanying the CPWs to prevent a breach of the peace and to fulfill that duty in these circumstances, it was both logical and necessary to effect the "clearing operation"; and that the police meticulously adhered to their limited role of securing the premises, took nothing into their possession other than the cell phone which Mr. MacNearney had requested upon his arrest and in all respects acted professionally and in good faith.

[30] Further, the Crown says there are no limitations in the civil statute, such as provisions for obtaining a warrant, to prevent the entry of the CPWs to a home where they have the requisite belief that a child is in need of protection.

[31] Finally, the Crown argues that, taking a broad and liberal interpretation of the *Act*, the CPWs were not required to decide to apprehend prior to entering the premises

and that they were permitted under the legislation to enter the home in order to investigate prior to concluding that apprehension, as opposed to a less restrictive remedy, was necessary.

Analysis

The *Child and Family Services Act*

[32] The preamble sets out the purpose of the *Act* where, among other things, it reads:

> And whereas children are entitled to protection from abuse, harm and neglect;
>
> And whereas it is desirable in law for timely resolution of matters concerning children.

(Underline is my emphasis throughout this section of the Judgment).

The principles governing the *Act* are set out in section 2 and include:

> (a) the paramount objective of this *Act* is to promote the best interests, protection and well-being of children;
>
> (b) children are entitled to protection from abuse and harm and from the threat of abuse and harm;
>
> (j) there should be no unreasonable delay in making or carrying out a decision affecting a child.

When considering what is in the "best interests of a child" under section 3, all relevant factors include:

> (a) the child's safety
> (f) the risk that the child may suffer harm through being...allowed to remain in the care of the parents;
> (j) the effects on the child of a delay in making a decision.

[33] In other words, the *Act* directs that social workers are to act promptly when they have reasonable grounds to believe a child is in need of protection.

[34] Section 7(3)(b) of the *Act* says that a child is in need of protection where there is a substantial risk that the child will suffer physical harm inflicted by the child's parent

or caused by the parent's inability to care and provide for or supervise and protect the child adequately.

[35] As I read the statute, concerns over false or malicious reporting are made subordinate to the risk of harm to children.

[36] Section 8(1) the *CFSA* imposes a duty on "a person who has information of the need of protection of a child." This duty mandates that a person with such information shall, without delay, report the matter either to a CPW or a peace officer or other authorized individual if a CPW is not available.

[37] Section 9 of the *CFSA* puts a positive duty on "a person" receiving a report made under section 8 to investigate the child's need for protection.

[38] Although with every report, the possibility of exaggeration, erroneous information or a deliberately concocted story is present, concerns over false reporting are subordinate in the *Act* to those of ensuring the safety of children. There is no prescribed duty on a CPW to investigate the veracity of a report or whether it was made maliciously. Nor is there a penalty prescribed within the statute for false or malicious reporting. Those who make reports are immune from civil action unless a report was made falsely and maliciously.

[39] Clearly, the paramount object of the *Act* is to protect children and to provide the legislative framework, not just to allow, but to direct that Social Services act expeditiously when there are reasonable grounds to believe a child is in need of protection.

Apprehension

[40] Section 10 states that where a report is made to a CPW and during or as a result of an investigation, the CPW may do several things, including, "apprehend the child if there are reasonable and probable grounds to believe the child's health or safety is in danger".

[41] In addition, section 11 provides that a CPW, a peace officer or an authorized person may apprehend a child where he or she has "reasonable grounds to believe" that the child needs protection and the child's health or safety is in danger. This section provides the means to apprehend absent the report indicated under section 10. The section goes on to require that following an apprehension pursuant to this section, the CPW shall investigate the child's need for protection.

[42] This section appears to indicate that while reasonable grounds are required to apprehend, an investigation must then be conducted to substantiate the concern. No mention is made within the *Act* about any parameters, latitudes or restrictions placed on these investigations. If after such investigation, it is determined the child is not in need of protection, he or she must be returned to the parents. So, the investigation is to be made after and not necessarily before an apprehension occurs. All that is required are reasonable grounds to believe the child is in need of protection.

[43] Where an apprehension has occurred, under s. 12 an application to the court for an order confirming the apprehension must be filed with the court within four (4) days after the date of apprehension and a hearing must be held within forty-five (45) days of the apprehension.

[44] Section 33 grants the power of child apprehension to an authorized person and provides that they may, without a warrant, enter a place by day or night, using force if necessary to effect entry, to apprehend the child.

[45] This power to enter a "place" in my view would include a residence or dwelling if interpreted generally or specifically. Abuse or neglect of children by parents is most likely to occur in private and behind the closed doors of the home. The purpose of the statute would be defeated and common sense defied if "place" were interpreted so as not to include a dwelling or home.

[46] This section states that entry without a warrant is permitted in order "to apprehend." If this section is interpreted strictly it would suggest that a CPW must already have sufficient information prior to entering the home that would establish reasonable grounds to believe that a child is in need of protection such that an apprehension would be effected immediately upon locating the child within the place.

[47] If the section is read more broadly, entry to apprehend would provide the latitude to conduct an investigation within the place, and to apprehend or not based on the results of the investigation.

Effect of Warrantless Search

[48] A warrantless search is presumptively unreasonable, therefore, in the context of an application to have the evidence excluded, the burden is shifted to the Crown to rebut the presumption on a balance of probabilities and establish that the search was reasonable. *Collins v. The Queen*, [1987] S.C.R. 265; *R. v. Damianakos* (1995), 102 Man. R. (2d) 35 (C. A.) at para. 16; *R. v. Brown* (1996), 47 C. R. (4th) 134 at para. 3. A search is reasonable where:

(1) The search is authorized by law
(2) The law itself is reasonable
(3) The manner in which the search was conducted was reasonable
[See *R.v. Collins*, supra.].

[49] The Crown accepts that it carries the burden of establishing the reasonableness of the search or entry by the state in this case.

[50] The defence relies on *R. v. Feeney*, [1997] 2. S.C. R. 13, in which the Court held that entry into a home by police without a warrant is not permitted under the *Charter*. However, in *R. v. Godoy* [1999] 1 S.C.R. 311, Mr. Justice Lamer specifically found that *Feeney* only applied in situations where police were entering a dwelling without a warrant to effect an arrest.

Interpretation of the CFSA

[51] Among other things, what differentiates the *CFSA* from most other provincial and territorial statutes is there is no provision in the Territorial statute for obtaining a warrant prior to entering a place to apprehend. One might speculate that this was legislative oversight but I would prefer to assume that our legislators considered such a provision but felt it would be impractical given the geographic and demographic make-up of the Territories to require prior judicial authorization and that without warrant provisions the statute still withstood constitutional scrutiny.

[52] Given this important distinction, the litigant in this jurisdiction must be wary of adopting, out-of-hand, jurisprudence from outside the Territories.

[53] The Supreme Court of Canada in *Winnipeg Child Family Services v. K. L. W.*, [2000] 2 S.C.R. 519 (hereinafter *"K.L.W."*) provided valuable guidance on how courts should interpret child protection statutes and whether criminal standards should be adopted when considering this legislation.

[54] There the appellant mother challenged the constitutional right of the child welfare agency to apprehend her newborn baby without a warrant in a situation where there was no imminent danger. She claimed that the apprehension of her child without prior judicial authorization in a non-emergency situation infringed her s. 7 *Charter* rights in a manner that was not in accordance with principles of fundamental justice.

[55] In dismissing the appeal and writing for the majority, Madam Justice L'Heureux-Dubé cited with approval the Judgment of the Alberta Court of Appeal in *T. v. Alberta* (2000), 188 D.L.R. (4th) 603 at para. 14 when it was stated that child protection legislation " is about protecting children from harm; it is a child welfare statute and not a parents' rights statute". She further observed at para. 80 that:

> While parents' and children's rights and responsibilities must be balanced together with children's right to life and health and the state's responsibility to protect children, the underlying philosophy and policy of the legislation must be kept in mind when interpreting it and determining its constitutional validity.

At para. 98 the Court remarked:

> To summarize, the interests at stake in the child protection context dictate a somewhat different balancing analysis from that undertaken with respect to the accused's s. 7 and s. 8 rights in the criminal context. Moreover, the state's protective purpose in apprehending a child is clearly distinguishable from the state's punitive purpose in the ...criminal context, namely that of seeing that justice is done with respect to a criminal act. These distinctions should make courts reluctant to import procedural protections developed in the criminal context into the child protection context.

[56] Again, the Court emphasized the difficulties facing child protection workers, that they must be able to take preventive action to protect children and that immediate apprehension may be appropriate in circumstances where it is unclear whether the danger of harm is "imminent". Further, doing nothing places the risk on the children and a wrongful apprehension does not give rise to the same risk of seriousness as an inability on the part of the state to intervene promptly. The legislation must be read with this in mind.

[57] While the circumstances here could not be classified as an emergency, I consider the facts to fall within what Madam Justice L'Heureux-Dubé described as situations where workers are called upon to make highly-time sensitive decisions in situations in which it is often difficult, if not impossible, to determine whether a child is at risk of imminent harm, or at risk of non-imminent but serious harm, while the child remains in the parents' care. And that given the state's interest to protect and the child's interest to be protected, immediate apprehension, or at least investigation in the home, may be appropriate in such circumstances, even though there might be some dispute as to whether the danger of harm is "imminent".

[58] Finally, I refer to s. 10 of the *Interpretation Act*, R.S.N.W.T. 1988, c. I-8, as follows:

> 10. Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[59] It is clear that the *Act* is to be given a fair, large and liberal construction and that the rigorous evidentiary and procedural standards in place for criminal law will not be strictly applicable to child welfare apprehension matters.

Reasonable Grounds

[60] The first question to answer in the immediate case is whether social services had reasonable grounds to believe the children were in need of protection.

[61] Counsel for the defence argue that acting on an anonymous tip without corroboration is patently unreasonable and, if I understand the argument correctly, cannot constitute reasonable grounds in any set of circumstances. I disagree.

[62] In *Children's Aid Society of the Niagara Region v. C.B.* [2005] O. J. No. 3878, the Court opined at paras 47 and 48:

> It would be the rare case where the tip, by itself, was sufficient to allow the worker to say that he or she 'believes on reasonable and probable grounds' that clause 40(7)(a) and 40(7)(b) have been satisfied.
>
> The level of verification required in respect of a tip may be higher where the informer is one whose credibility cannot be assessed or where few details are given. If there are scanty particulars provided by a tipster and his or her reliability is unknown, a worker must conduct an investigation so as to provide critically important ingredient - corroboration.

[63] I would make some observations here. First, the standard in the *CFSA* is for the social worker to have "reasonable grounds" and not "reasonable and probable grounds". Second, there were several telling particulars given to Ms. Sommerhalder by the anonymous caller. And although she could not see him, she did make a positive assessment of his credibility given the manner and tone of voice in which he spoke. Third, the Court in *Niagara* said it would be the rare case where an anonymous tip alone would suffice and not that it would never suffice.

[64] Naturally, it would have been and always is preferable to have corroborating evidence but Ms. Sommerhalder had checked the files of Social Services and found nothing at all regarding the accused. They were not known within the office. It was suggested by defence that they should have conducted surveillance outside the home. Apart from noting that they had visitors at night, what else could they have concluded from these observations? In my view, very little. If Ms. Sommerhalder had gone onto the property in an attempt to smell marihuana, she would have been trespassing. The accused may have been new to Yellowknife which could account for the lack of history. There simply did not appear to be a way to find corroborating evidence on a timely basis. In the meantime, the children might be in imminent danger of harm.

[65] In *R. v. Loewen*, [2010] A.J. No. 980, Slatter J.A., in the context of a search of a vehicle, subsequent arrest and seizure of a controlled substance, commented on what is meant by "reasonable grounds" in contrast to "reasonable and probable grounds" and said at paragraph 17:

> "Many things can reasonably be anticipated to occur, without it being probable that they will occur. In the summer, it is reasonable to anticipate a thunderstorm, even though thunderstorms are not probable, in the sense that thunderstorms do not happen on more days than not. But if a thunderstorm occurs, one is not surprised, because that circumstance is not unreasonable."

At paragraph 18 he continued:

> " ... a belief in the existence of a set of facts can be 'reasonable' even if the existence of those facts is not 'probable'."

[66] As stated, the test for obtaining a warrant to apprehend in most provincial statutes is for the worker to have "reasonable and probable grounds" to believe a child is in need of protection. In the *CFSA*, the grounds must only be "reasonable". Unless I am misinterpreting the remarks of Slatter J., it would seem he has made it clear that "reasonable grounds" constitute a lower standard than "reasonable and probable grounds".

[67] To apply his reasoning to the case at bar, one could say that from the information and honestly held belief of Ms. Sommerhalder, she could reasonably anticipate that, upon attendance at the subject residence, she could find the children in need of protection due to the existence of a grow operation even though its existence may not have been a probability. I do not rely solely on the Judgment in *Loewen* for my view, but I do find the logic and reasoning of Slatter J.A. compelling.

[68] In this case, Ms. Sommerhalder (and her colleagues and supervisor at child protection services) subjectively believed there were reasonable grounds upon which to conduct an investigation based on detailed information received from a tipster, albeit, anonymous. She decided to act, not on a hunch or mere suspicion, but on what she reasonably believed was particularized and reliable information. Had she acted on nothing more than rumour of a grow-op or if the information she received was "sketchy" or if she had been given no insight into the motive of the caller, then it is doubtful her belief would have been reasonable. But here, the caller purported to be an eyewitness to activities and had apparently been on the property himself. He purported to have friends who were closely associated with the grow-op. His apparent reason for calling was concern for the children. He knew their names and ages. That he reported

to social services and not the police could indicate that he was not acting maliciously and intent on having the parents arrested but more interested in the children's well-being. Could a reasonably informed and objective third person form the same belief? I would suggest so.

[69] I refer again to *K.L.W.*, supra, where the Court opined that procedural protections developed in the criminal law context should not be imported into the child protection context. In all of the circumstances, I find that Ms. Sommerhalder had reasonable grounds to believe that there was a substantial risk the children could suffer physical harm so as to justify a s. 33 intervention.

[70] While not argued by the defence, I feel it necessary to deal with the question of whether the children were at "substantial risk that [they would] suffer physical harm". I will not repeat the many potential dangers associated with a grow operation. I identify with the comments of the Court in *Director of Family and Child Services v. S.C.*, [2000] B.C. J. No. 2717 where the learned trial judge, in dismissing the Director's application for access to a residence based on the limiting wording of the governing statute, nevertheless had this to say at para. 11:

> On the face of it, I found the particulars troubling in that there was a grow operation and clearly, as was apparent by my line of questioning...it would have appeared that it only made common sense that in these circumstances and considering the safety and wellbeing of the child in question as being paramount, that the Director or the designate ought to have the jurisdiction or the authority to enter those premises to ensure the home environment is safe. In fact, exercise of common sense would suggest that that (sic) does not seem unreasonable.

[71] There are no such statutory limitations in the *CFSA*.

[72] Common sense dictates the inference that the welfare of children, especially young children, living in the environment of a marihuana grow operation is inherently at substantial risk and CPWs have not only the right but the responsibility to ensure their safety.

Prior Intention To Apprehend

[73] On the question of whether s. 33 can be read as authorizing the CPWs to enter the premises in situations where they have not made a decision in advance to apprehend I agree with the reasoning of the Court in *R. v. Cunningham*, supra , at paras. 27 and 28:

> Whether the workers intended to apprehend the children is not the issue, nor is it the statutory test under s. 40(7). Children's aid societies are under an obligation to secure the safety of children using the least restrictive alternative available. The workers correctly could not ascertain in advance whether an apprehension would be necessary, or whether the safety of the children could be ensured by some less restrictive means. In the meantime, given the information..., the workers were obliged to see the children in her care as soon as possible. Acting under s. 40(7), with the potential for an apprehension, workers and the police were doing their duty...to protect the safety of the children, and that they had both statutory and common law authority to make a forced entry.

[74] I observe that the wording of s. 40 (11), which encompasses s.40(7), concerning apprehension is very similar to the relevant section contained in the *CFSA*.

[75] In *R. v. Westrageer*, [2005] B.C.J. No. 2392, at para. 23, the Court remarked:

> "...it is my view that under the *Child, Family and Community Services Act*...Ms. Holly not only had the right, but the responsibility to conduct an investigation concerning the safety of the children given the information she had received. She had the right and the obligation to go to the home where the children resided and make inquiries of their parents."

[76] In any event, I find that the wording of s. 33 is to be construed broadly and that it is implied that a child protection worker may enter a place for the purpose of carrying out an investigation into allegations and need not have made a pre-determination of an intention to apprehend.

[77] Accordingly, the first issue is answered in the affirmative. I find that the entry into the household of the accused was authorized by law.

Social Workers' Right to Search

[78] In the case of *In Re: T.L.W.* 1982 CanLII 1050 (ONCJ), the court found that even though there may not have been specific statutory authority to conduct a search of the residence, it was still reasonable to confirm the initial allegations and to confirm whether or not an apprehension should be carried out. The court also found that it would, in fact, have been unreasonable for the social workers not to have searched to confirm the allegations made.

[79] Other courts have found that as long as the search was limited to confirming the concern that led to the apprehension and not expanded so as to look in "every nook and cranny", then it will likely be reasonable [see *R. v. Chatham-Kent Children's v. J.K.*, [2009] O.J. No. 5423, *Re: T.L.W.*, supra, and *R. v. Ringler* 2004 ONCJ 104, para. 40].

[80] Ms. Sommerhalder testified that she limited her inspection to identifying what she believed to be were illicit drugs. The bag of suspected marihuana was in plain sight on top of the vanity in the bathroom. She saw several plants behind the top door in the partitioned room which she believed to be marihuana. She stated that if a complaint is that there is no food in a home, she would search the cupboards and refrigerator to confirm if it was true. That is, her search is always and was here limited to confirming the allegations.

[81] In the circumstances, I find that the CPWs had a duty to examine the premises to confirm the report of a grow operation and that their limited search was authorized by law.

Charter Considerations

[82] Again in *K.L.W.* the Court opined that non-emergency apprehensions did not, per se, offend the principles of fundamental justice and was conditional on there being provision for a prompt post-apprehension hearing [see para 122]. As noted above, such a provision is contained in section 12 of the *Act* and along with s.10 which mandates a post-apprehension investigation, I find that minimal, yet adequate, constitutional protection of parental rights is provided for.

[83] In any event, the issue of whether s. 33 violated ss. 7 or 8 of the *Charter* was not raised before me and I would answer the second part of the test in *Collins* in the affirmative; viz., that the law is reasonable.

[84] The defence has argued that the enabling sections ought be interpreted narrowly given parental rights against unreasonable search and seizure, and especially in the home of the accused where there is a very high expectation of privacy. This to me would have the effect of reversing the adage from "better safe than sorry" to "better sorry than safe". I am mindful that the *Act* is a civil statute, not criminal. The interpretation I have placed on apprehension is consistent with a broad and liberal reading of the *Act* and the attainment of its paramount objects and principles as well as the philosophical approach to child protection legislation enunciated in K.L.W. Given the purposive nature of the *Act*, the ability to enter without a warrant for the purpose of ensuring child safety when there is reason to believe a child is in need of protection is necessary for a CPW to effectively perform her or his duty. If it were otherwise, child safety investigations would not be conducted as often as they should and many children would be at risk.

[85] From a review of the relevant sections of the *Act* and the authorities referred to, I am of the view that it would defeat the purpose of the *Act* if it were to be interpreted as requiring child protection workers to have irrefutable evidence of harm to children or even a *prima facie* case before they could enter premises to investigate. The power of apprehension thus includes the power to investigate with a view to a potential apprehension. One can only imagine the outrage and furore if child protection workers had been alerted to a potentially dangerous situation involving children and failed to act and the children subsequently suffered grievous harm.

[86] Therefore, in conclusion, Ms. Sommerhalder had reasonable grounds to believe the children were in need of protection, had the right to gain entry to the home to investigate without forming the prior intention to apprehend and had the right to conduct a examination of the premises limited to confirming the report she had received.

Conduct of the Police

[87] The thrust of the defence throughout has been that what transpired was an illegal search- a "drug raid"- by the police. It seems to me that, since entry was gained to the premises by virtue of the statutory powers contained in the *CFSA*, this is an erroneous characterization. I would note that pursuant to ss. 11 and 33 of the *Act*, the police are provided with the same powers as CPWs to apprehend a child believed to be in need of

protection. Since I have found that the entry and limited search by the CPWs was lawful, the fact they were accompanied by the police would also be lawful.

[88] However, in the event I am wrong, I feel it important to review some of the relevant evidence and to examine the statutory and common law duties and powers of the police as they relate to this set of circumstances.

[89] Both the CPWs and police testified that it was commonplace- a protocol of sorts- for police officers to be asked to and to accompany CPWs on child apprehension matters for safety reasons. What was different here is that instead of the usual complement of two police officers, there were five (including Cpl. Landry) who attended the scene.

[90] When Cpl. Landry agreed to assist the social workers he had some decisions to make. His information was that this action might carry with it dangers over and above those inherent with most apprehensions. He did a threat assessment. The evidence was that drugs and weapons go together and that firearms could be on the premises, that a lot of people came and went from the home, that someone might choose to defend the grow operation, that there could be mold, chemicals and fertilizers on the premises stored in unsafe conditions as well as dangerous electrical wiring. This is in addition to the volatile and potentially violent situations the CPWs said were present at every apprehension.

[91] Cpl. Landry's decision was to assign five officers including himself. One would have to have been living in a dreamworld not to acknowledge that violence goes hand in hand with the drug trade. It is not appropriate to examine the officer's decision in hindsight and from an ivory tower based on what did occur at the home and understate the potential threats to safety.

[92] That the police had the same powers of apprehension under the *Act* did not occur to Cpl. Landry or Social Services [see *R. v. Gulbranson*, [2000] S.J. No. 756]. He viewed his job (not incorrectly) as being a police officer with powers of arrest. He knew that he did not have sufficient grounds to obtain a search warrant under the *Criminal Code*. He conducted a short briefing where the officers accompanying him were apprised of their immediate duty which was to assist the CPWs in the apprehension exercise in order to ensure their safety and that of the children and themselves. They were meticulously instructed not to go into drawers, kitchen cabinets

or any place that could be considered intrusive but only to "clear" the premises. This meant they were to enter every room in the home and ensure there were no other persons on the premises who could pose a threat to safety.

[93] At the threshold to the mobile home, the officers smelled marihuana or, in the case of Cpl. Landry, he explicitly stated "raw" marihuana. Once inside, some officers accompanied Mr. MacNearney and the CPWs to the living area to the right while other officers checked the bedrooms and bathroom to the left. They opened closet doors in the master bedroom. One "bedroom" was found to have been altered in that a homemade floor-to-ceiling partition had been installed which divided the room in half. At the far end of the partition wall were two half doors, one atop the other, and each approximately 3 ½ to 4 feet high with simple latches. It was not apparent that the areas behind the doors would turn out to be "cubby holes" or " cubicles" until after they were opened. Cpl. Landry testified there could have been ample space behind which an adult or adults could stand. Each "cubby hole" was large enough to accommodate an adult; albeit uncomfortably. One officer said he climbed into the upper cubby hole.

[94] No seizures were conducted. There were no invasive searches such as looking in drawers, cupboards, ceiling tiles, bedding and mattresses, heating ducts, and boxes. In cross-examination, Cpl. Landry was asked why, when the RCMP smelled marihuana upon entry to the premises, they did not stop what they were doing and obtain a search warrant. In response, he said they were under a duty to keep the CPWs safe to allow them to perform their duties.

[95] I would observe that given the strong smell of raw marihuana, the police arguably would have had reasonable grounds upon which to arrest Mr. MacNearney on a charge of illegal possession of a controlled substance and discovered the grow-op on a search incidental to arrest [See *R. v. Harding* [2010] ABCA 180]. Alternately, they could have detained him on suspicion of same and obtained a warrant. Either way, once the police were at the threshold of the home and smelled the raw marihuana, if they were there legally, the outcome would have been the same.

[96] I now turn to the question of whether the police were acting within the scope of their duties in accompanying the CPWs to the home.

[97] The statutory mandate of the RCMP, which codified to a large extent common law duties is found in s. 18 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10.

> 18. It is the duty of members who are peace officers, subject to the orders of the Commissioner, (a) to perform all duties that are assigned to peace offices in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;

[98] In *R. v. Godoy*, supra, at para. 12, Lamer J. considered the issue of police powers and duties as follows:

> The accepted test for evaluating the common law powers and duties of the police was set out in *R. v. Waterfield*, [1963] All E.R. 659 (C.C.A) (followed by this court in *R. v. Stenning*, [1970] 3 C.C. C. 145; *Knowlton v. The Queen* (1974), 10 C. C. C. (2d) 377; and *Dedman v. The Queen* (1985), 20 C.C.C. (3d) 97). If police conduct constitutes a *prima facie* interference with a person's liberty or property, the court must consider two questions: first, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and second, does the conduct, albeit within the general scope of such duty, involve an unjustifiable use of powers associated with the duty.

[99] In *R. v. Dedman*, [1985] 2. S.C. R. 2 the Court characterized the general duty of a police officer as being to preserve the peace as it relates to the protection of life and property [see para. 65]. At para. 69 Mr. Justice LeDain stated that in order for a police power to be justifiable in a given context:

> "[t]he interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference".

[100] Given the facts in this case, I have no difficulty in concluding that by accompanying the CPWs to the home of the accused, the police were acting within the scope of their common law and statutory duties; namely, to preserve the peace and protect life. Should they have waited outside the premises when the CPWs entered?

Once inside the home, should they have remained just inside the door? In my mind, the answer to both questions is "no".

[101] In order to prevent a breach of the peace or to guard the safety of the CPWs it was necessary for the police to be in close proximity to them and Mr. MacNearney and to ensure that there were no other adults or persons who could pose a threat on the premises. While Mr. MacNearney came to the door, Ms. MacNearney did not and, at that point, her whereabouts were unknown. Had the police remained outside the home or merely stood in the hallway and had a violent incident occurred involving the CPWs or the children, they would rightly stand accused of having been negligent or incompetent.

[102] The fact that the police had reason to suspect that drugs might be found on the premises does not render their "clearing" operation illegal. In the case of *R. v. Nolet*, [2010] S.C.J. No. 24, the police continued a search from the cab of a transport truck to the trailer where they found illicit drugs. The search was instituted pursuant to a provincial regulatory power after a random traffic stop. The accused sought to exclude the evidence as being inadmissible under ss. 8 or 9 of the *Charter* arguing, among other things, that the police were required to obtain a warrant to enter the trailer and had used powers of inspection under provincial legislation as a ruse, pretext or subterfuge when the real purpose of the search was criminal in nature.

[103] The Judgment of the Court was delivered by Binnie, J. who cited with approval at para. 37 the decision of *R. v. Annett* (1984), 17 C. C. C. (3d) 332 (Ont C. A.) as follows:

> ...[t]he lawful search was not converted into an unlawful search because the officers, in addition, had the expectation that the search might also uncover drugs.

[See also *R. v. Yague*, 2005 ABCA 140 (Can LII) at paras. 7-9]

[104] As well, I refer to *R. v. Westegeer*, supra, where the police accompanied a child protection worker to the home of the accused who consented to their entry but not to a search of the entire household. In addition to an inspection of the main floor of the household, the police asked to gain access to a locked room in the basement. The accused did not consent and when the police kicked the door open, they discovered a methamphetamine lab. This entry was found to be a breach of s. 8 of the *Charter* and the resulting evidence declared inadmissible. However, in finding that the child

protection worker had acted appropriately in accordance with her duty, the Court had this to say about the police at para. 23:

> I am also satisfied that the police initially offered to accompany Ms. Holly in order to provide security. They realized they might find evidence of a methamphetamine lab, I accept their evidence that their primary concern at the initial stage was to ensure her safety. Their initial attendance at the house was not in my view of the evidence part of a ruse concocted to advance a criminal investigation into the presence of a suspected methamphetamine lab.

[105] Here the police conducted a lawful and minimally invasive search for the purpose of preserving the peace during the exercise of the valid territorial power to enter the premises for the purpose of investigating and apprehending under the *CFSA*.

[106] Accordingly, I find that the police "clearing operation" or limited search was reasonable and the conduct of the police in these circumstances was justifiable, that the Crown has rebutted the presumption of unreasonableness which arises on a warrantless search on a balance of probabilities and that there was no violation of the rights of the accused under ss. 7 or 8 of the *Charter*.

S. 24(2) of the Charter

[107] While not strictly necessary, I feel it appropriate to indicate that even had I found the entry of the CPWs with the police to be illegal, I would have been inclined to find that it was not unreasonable for the purposes of s. 24(2) of the *Charter* and therefore I would not exclude the evidence obtained by search warrant.

[108] Applying the test laid down in *R. v. Grant*, supra, I would not exclude the evidence in that, in my view, the workers and police acted in good faith, competently and professionally throughout the investigation and the failure to admit the evidence would bring the administration of justice into disrepute. The conduct of the representatives of the state, if it infringed the *Charter*, was on the less serious end of the scale. The issue here is equally as critical to the Crown's case as that of the accused. There is no doubt that the privacy interests of the accused are on the higher end of the scale, this being their home. However, while a home may be a sanctuary or "castle" for parents, it can also be a place of potential danger to children who are vulnerable and in

jeopardy. I am of the view that the public interest in and desirability of having this case tried on its merits, outweigh the privacy considerations.

Cell Phone

[109] The cell phone was taken into the possession of the RCMP either as personal effects of accused Mr. MacNearney at his request or was a seizure incidental to arrest. It matters not that interest in the item was not aroused until later on the evening of February 19th. I find that the taking into custody of the cell phone was lawful in the circumstances and if I am wrong, I would not exclude the evidence obtained from it under 2. 24(2). [see *R. v. Otchere-Badu* [2010] O.J. No. 901]

[110] In the result, the application of the accused, Craig and Kim MacNearney is dismissed.

"D.M. Cooper"
D.M.Cooper,
J.S.C.

Dated this 24 day of November 2010.

Counsel for the Respondent: Janice Walsh
and Danielle Vaillancourt
Counsel for the Applicant
Craig MacNearney: Jay Bran
Counsel for the Applicant
Kim MacNearney: E. Nikolaus Homberg

Corrigendum of the Reasons for Judgment

of

The Honourable Justice D.M. Cooper

On page 3 number 3 the first line reads:

[3] On the morning of September 17, 2009 ...

The month should be “February” and has been corrected to read:

[3] On the morning of February 17, 2009 ...

On page 3 number 4 on the seventh line reads:

[4] ... Her call was not returned, so on September 18th ...

The month should be “February” and has been corrected to read:

[4] ... Her call was not returned, so on February 18th ...

On page 14 number 55 on the first line reads:

[55] ... Madam Justice Heureux-Dubé

Madam Justice L'Heureux-Dubé's name as been corrected to read:

[55] ... what Madam Justice L'Heureux-Dubé ...

On page 15 number 57 on the second line reads:

[57] ... what Madam Justice Heureux-Dubé ...

Madam Justice L'Heureux-Dubé's name as been corrected to read:

[57] ... what Madam Justice L'Heureux-Dubé ...

S-1-CR 2009 000117

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN
Respondent

- and -

CRAIG MACNEARNEY
AND KIM MACNEARNEY
Applicants

Restriction on Publication: This matter is subject to a publication ban pursuant to section 648 of the *Criminal Code*

Corrected judgment: A corrigendum was issued on November 25, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE D. M. COOPER
