

CANADA / JUDGMENT

R. v. Cluett

2025 BCSC 2392

COURT

Supreme Court of British Columbia

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2025 BCSC 2392 R. v. Cluett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cluett,

2025 BCSC 2392

Date: 20251127

Docket: 37735

Registry: Vancouver

Rex

v.

Daniel Jacob Cluett

Before: The Honourable Justice Majawa

Oral Reasons for Judgment re Voir Dire #1 - S. 8-10 Challenge

Counsel for the Crown:

P. Nahal

Counsel for the Accused:

W. Solmon

Place and Dates of Trial:

Vancouver, B.C.

November 24-26, 2025

Place and Date of Judgment:

Vancouver, B.C.

November 27, 2025

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INTRODUCTION

- [1] Mr. Cluett is charged with three counts of importing drugs controlled under the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]. The charges are based on events that occurred on or about June 9, 2023, at the Vancouver International Airport when Mr. Cluett was returning to Canada from a trip to Mexico. After arriving in Vancouver, Mr. Cluett attended at primary inspection and was referred for a secondary examination.
- [2] During the secondary examination, a Canada Border Services Agency ("CBSA") officer located and seized 8.6 grams of cocaine, 0.50 grams of methamphetamine and 13.50 grams of MDMA. The CBSA officer arrested Mr. Cluett for smuggling substances into Canada

contrary to the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), twice - once after locating the first baggie which contained the methamphetamine, and a second time after locating the cocaine and MDMA. Following the conclusion of the search, Mr. Cluett was strip-searched. Nothing further was found pursuant to the strip-search.

- [3] Following the strip-search, an RCMP officer took control of Mr. Cluett. Eventually, Mr. Cluett was charged with importation of the three controlled substances that the CBSA officer seized at the airport.
- [4] In this voir dire, Mr. Cluett applies for declarations that his ss. 8, 9, and 10 Charter rights were violated during his interactions with the CBSA officers at the airport. If those rights were violated, then Mr. Cluett seeks exclusion of the evidence seized, which would require a further hearing.

THE EVIDENCE

- [5] The court heard from three CBSA witnesses on this voir dire: Border Services Officer ("BSO") Harleen Sekhon, Superintendent Sanjit Dhillon, and BSO Matthew Tuck. Formal admissions with respect to date, jurisdiction, identification, and the nature and weight of the drugs seized from Mr. Cluett were also made and filed. Mr. Cluett did not testify.
- [6] Mr. Cluett returned from a trip to Mexico on June 9, 2023. He arrived at the Vancouver International Airport in the late evening and had his first interactions with a CBSA officer at approximately 11:00 p.m.
- [7] The first CBSA officer that Mr. Cluett interacted with was BSO Sekhon at primary inspection. CBSA officers working at primary inspection facilitate the free flow of international travellers. Primary inspection officers ask travellers questions, make risk assessments, and make referrals for further examination. Primary inspection officers can release a traveller to exit, or they can refer them for random, mandatory, or selective secondary customs examination or refer them to immigration for further paperwork and/or processing. Everyone either returning to Canada or entering Canada for the first time must interact with a CBSA officer at primary inspection.
- [8] BSO Sekhon interacted with Mr. Cluett at approximately 11:00 p.m. on June 9 and asked him routine questions about his trip abroad. This interaction lasted approximately five minutes. During the interaction, Mr. Cluett told BSO Sekhon that he was returning to Canada from a six-day trip to Mexico. He said he had gone to Mexico with a friend but Mr. Cluett did not know where his friend was at that time. Mr. Cluett told her that he was unemployed. He also told her that he went to Mexico to gamble at a casino because he was banned from casinos in Canada. He further stated that he had spent five years in prison, that he was a danger to the public and that was why he was banned from casinos in Canada. Some of the information that Mr. Cluett provided was directly responsive to questions asked by BSO Sekhon, and some information was volunteered by Mr. Cluett.

- [9] Based on the information that Mr. Cluett provided, BSO Sekhon decided to refer Mr. Cluett for a selective secondary examination. The information that Mr. Cluett provided contained what the CBSA describes as "indicators" that, when considered together, warrant a secondary examination. The indicators that formed the basis of BSO Sekhon's decision to refer Mr. Cluett for secondary examination included that he was returning from Mexico which is a source country for contraband, because he was unemployed, because he gave some vague answers particularly in respect of his travelling partner, and because he told her that he was a danger to the public. This was the first and only time a traveller had ever told BSO Sekhon that they were a danger to the public. This raised concerns for her in respect of the safety of other officers and members of the public present in the customs hall. BSO Sekhon also noticed that Mr. Cluett had what appeared to be a teardrop tattoo which she understood to mean that he had either been to prison, there was some sort of gang affiliation, or that he had been involved in some sort of criminal activity in the past. She did not ask him any questions about that tattoo.
- [10] When BSO Sekhon referred Mr. Cluett for secondary examination, she made digital notes of the indicators in the CBSA's Integrated Customs Enforcement System ("ICES"). In accordance with CBSA's policy, she did not make any notes, nor did she advise anyone to do any particular type of search, ask any specific questions, nor look for any particular items with respect to Mr. Cluett.
- [11] Given the unusual nature of the information provided by Mr. Cluett, BSO Sekhon spoke with Superintendent Chahal who was on duty at the primary inspection area that evening about her interaction with Mr. Cluett. In particular, she told Superintendent Chahal about Mr. Cluett's comment that he was a danger to the public. Superintendent Chahal advised BSO Sekhon that Mr. Cluett would be escorted to secondary examination.
- [12] At secondary examination, a traveller is subjected to further examination of goods in their possession such as the contents of their luggage and their pockets. The purpose of secondary examination is to verify the declaration made by the traveller upon entry into Canada and to ensure that the traveller is not bringing any prohibited goods into Canada. Officers conducting secondary examinations are not restricted to confirming the veracity of the information the traveller entered on their declaration form. For example, child sexual abuse material, hate propaganda, and narcotics are not the subject of the declaration form yet are subject to being looked for in a secondary examination because they are prohibited from being brought into Canada.
- [13] A secondary examination is a progressive examination. The extent of the examination is at the discretion of the CBSA officer conducting the examination. While a traveller's baggage is routinely searched in a secondary examination, there is no requirement to do so, nor is there a requirement to examine all of the traveller's bags.

- [14] In general, a person who is referred for a secondary examination receives some sort of notation on the declaration card they completed when they returned to Canada and presented it to the primary inspection officer. Often, travellers will present that declaration card at the exit of the customs hall at which time they would be directed to secondary examination.
- [15] In Mr. Cluett's case, Superintendent Dhillon, who was a supervising officer in secondary examination that evening, "roved" Mr. Cluett at the baggage carousel before the exit of the customs hall. CBSA officers may rove individuals present in the customs hall and ask them further questions and may select them for secondary examination. When Superintendent Dhillon roved Mr. Cluett, he had not looked at BSO Sekhon's notes in ICES. He roved Mr. Cluett because he had been told that Mr. Cluett was acting erratically.
- [16] Superintendent Dhillon brought Mr. Cluett to the secondary examination area at around 11:15 p.m. Superintendent Dhillon began to conduct the secondary examination because there were not any BSOs available to do so at that time. Mr. Cluett had four bags with him. Mr. Dhillon asked Mr. Cluett the standard questions about his baggage which are: 1) whether the bags were his; (2) whether he packed the bags himself; and (3) whether he was aware of the contents of the bags (the "Baggage Questions"). Mr. Cluett answered 'yes' to all three of the Baggage Questions. Shortly thereafter, BSO Tuck became available to conduct the secondary examination, and the examination was transferred to him to complete.
- [17] Superintendent Dhillon told BSO Tuck that Mr. Cluett had said yes to the Baggage Questions. BSO Tuck testified that Superintendent Dhillon also told him that Mr. Cluett had said he was a fentanyl addict and was going through withdrawal. Superintendent Dhillon did not direct BSO Tuck to look for anything specific nor did he tell him to ask Mr. Cluett any specific questions.
- [18] BSO Tuck took over the secondary examination. BSO Tuck reviewed BSO Sekhon's entries in ICES before he commenced his secondary examination. He did not speak with BSO Sekhon, nor was he instructed by anyone to look for anything in particular, nor to ask Mr. Cluett any specific questions.
- [19] BSO Tuck described Mr. Cluett as being somewhat unpredictable during the course of the secondary examination. At times, Mr. Cluett raised his voice and yelled and stomped his feet, and at other times he would be calm.
- [20] BSO Tuck commenced a search of Mr. Cluett's baggage. Fairly quickly, BSO Tuck located a small plastic bag with the crystal-like substance in it that he believed was consistent with methamphetamine. This bag was found in the coin pocket of a pair of pants in Mr. Cluett's beach bag. Upon finding this suspected controlled substance, BSO Tuck arrested Mr. Cluett for smuggling pursuant to s. 159 of the Customs Act. BSO Tuck advised Mr. Cluett what he was arrested for, advised him of his right to retain and instruct counsel, and cautioned him that he had a right to silence and that anything he said could be used against him. BSO Tuck conveyed this information to Mr. Cluett verbatim from his officer handbook. Mr. Cluett

indicated that he understood what BSO Tuck was advising him of, and he indicated that he wanted to speak to his lawyer. BSO Tuck also conducted a pat down search at the time of Mr. Cluett's arrest.

- [21] Mr. Cluett provided BSO Tuck with his lawyer's phone number. BSO Tuck tried the number twice but was unable to connect with Mr. Cluett's counsel. BSO Tuck then contacted the firm at which Mr. Cluett's counsel was a partner. He spoke to an individual of the firm who said that they would try to get a hold of Mr. Cluett's counsel. After a few minutes, the individual advised BSO Tuck that counsel was not available but that an articling student was available. BSO Tuck advised Mr. Cluett of this and Mr. Cluett declined to speak to the articling student.
- [22] BSO Tuck then asked Mr. Cluett if he wanted to speak to a legal aid lawyer to which Mr. Cluett said he did not. BSO Tuck asked Mr. Cluett if he was waiving his right to counsel and Mr. Cluett said yes. BSO Tuck then continued with the examination of Mr. Cluett's baggage.
- [23] Shortly thereafter, in Mr. Cluett's large suitcase, BSO Tuck discovered a plastic bag containing two baggies, one with the purple powder and one with the white powder. This bag was loosely wrapped in a pair of shorts within Mr. Cluett's suitcase and fell out when BSO Tuck lifted the shorts. Upon discovery of this baggie, Mr. Cluett told BSO Tuck that it contained cocaine and MDMA. BSO Tuck did not ask any questions about the contents of that Ziploc bag; rather, Mr. Cluett volunteered that information once the bag was located. At some point during the interaction, Mr. Cluett told BSO Tuck that he did not know the drugs were in his bag and that he thought he had lost them.
- [24] When BSO Tuck found the second bag, he again arrested Mr. Cluett and advised him that he was under arrest for smuggling under s. 159 of the Customs Act. The grounds for the arrest were that BSO Tuck found what he believed to be a controlled substance as well as the accused's statement admitting that it was a controlled substance. BSO Tuck again advised Mr. Cluett of his right to speak to counsel and again provided him with his caution, also reading verbatim from his officer handbook.
- [25] Mr. Cluett indicated that he understood and that he wished to contact his counsel. BSO Tuck contacted the firm again and was told that no partners were available but that there were articling students available. This time, Mr. Cluett said he would like to speak to an articling student and he was provided with the opportunity to do so in private. After he completed the call, he was placed in a holding cell.
- [26] At this time, BSO Tuck believed he had the grounds to conduct a personal search of Mr. Cluett. A personal search is a strip-search and is authorized under s. 98 of the Customs Act. Before a traveller is subjected to a strip-search, the BSO must present the grounds for such a search to the superintendent who must agree and sign off on those grounds. The superintendent who reviews the grounds for a strip-search must not have had any involvement in the examination of the traveller's baggage.

- [27] BSO Tuck presented his grounds for a strip-search and Superintendent Dhami approved BSO Tuck's request to conduct a strip-search. Prior to conducting the strip-search, BSO Tuck advised Mr. Cluett that he would be subjected to a strip-search and he was provided with another opportunity to speak to legal counsel. Mr. Cluett declined to do so. BSO Tuck again cautioned Mr. Cluett and proceeded to conduct the strip-search.
- [28] BSO Tuck conducted the strip-search in a room specifically for that purpose in the presence of an assisting CBSA officer who took notes. No further contraband was found on Mr. Cluett pursuant to the strip-search.
- [29] After the strip-search was over, Mr. Cluett was returned to the holding cell. At approximately 3:00 a.m., Mr. Cluett was transferred to the custody of an RCMP officer. At some point later, Mr. Cluett was charged with importation of controlled substances under the CDSA. As far as I'm aware, he was not charged with smuggling under the Customs Act, which was what he was originally arrested for by the CBSA officer.

ISSUES

[30] The issues to be decided are as follows:

1. Was Mr. Cluett arbitrarily or constitutionally detained at any point during the time he was in the customs hall before he was arrested on the first occasion? The answer to this question turns on whether or not CBSA's questions and/or interaction with Mr. Cluett went beyond the routine.
2. Were Mr. Cluett's s. 10(a) and (b) Charter rights violated? This turns on the answer to the following questions:
 - i. Did the CBSA officer breach Mr. Cluett's s. 10(a) Charter rights when he was arrested for smuggling on the first and second occasions? The answer to this question turns on whether the CBSA officer provided information about the reasons for his arrest such that Mr. Cluett could understand generally the sort or extent of jeopardy which he faced.
 - ii. Did the CBSA officer breach the implementational component of Mr. Cluett's s. 10(b) Charter rights on two occasions: (1) at the time of his first arrest; and (2) after the strip-search was approved but before it was conducted? The answer to this question depends on whether Mr. Cluett invoked his right to speak to counsel on those occasions such that the duty to provide an opportunity to speak to counsel of choice arose.
3. Did the CBSA violate Mr. Cluett's s. 8 Charter rights when they:
 - i. conducted the search of his luggage;
 - ii. conducted the pat-down search incident to his first arrest; and
 - iii. conducted the strip-search.

- [31] I will consider the alleged breaches in turn. But first, I will outline the law that applies to border crossings. I will address the law that applies to each specific issue when those are considered.

THE LAW APPLICABLE TO BORDER CROSSINGS

- [32] The law relevant to these Charter applications is informed by the context in which the events occurred, in this case, at a border crossing. Of particular importance is that in the border crossing context, what is or is not a detention and what is or is not an unreasonable search is different than in other public and private places. At the border, a person's liberty may be restricted, and their privacy intruded upon, without engaging constitutional protections. While the liberty interest and expectation of privacy is reduced at border crossings, they are not eliminated, and each case remains to be determined on its particular facts and circumstances.
- [33] Section 9 of the Charter protects individuals from arbitrary detention by the state. However, the context of a border crossing, which includes the customs hall at the Vancouver International Airport, is different than other contexts. At border crossings, an individual has a reduced expectation of privacy and understands that they may be searched. As our Court of Appeal said in *R v. Nagle*, 2012 BCCA 373 at para. 32, "interference with their independence and privacy is expected." Routine questioning of travellers, the search of their luggage and pat-down searches of a person do not engage s. 10(b) and s. 8 Charter rights. A person will not be constitutionally detained if the CBSA inquiries do not go beyond the normal screening process. In *Nagle*, the Court of Appeal put it this way at paras. 34-35:
- [34] In the context of border crossings, routine questioning, the search of baggage and pat-down searches are standard practices, applicable to every ordinary traveller, and is expected and tolerated by anyone wishing to travel internationally. This conduct by border agents does not engage constitutional rights, including detention, the right to counsel or a reasonable expectation of privacy. Again, as aptly said by Doherty J.A. in *Jones* at para. 37:
- [37] The conclusion, firmly rooted in the jurisprudence, that routine questioning and inspection of luggage at the border does not result in a detention, give rise to any right to counsel, or interfere with a traveller's reasonable expectation of privacy compels the conclusion that personal autonomy and privacy - the values animating the protection against self-incrimination - were not implicated when the appellant was compelled to answer routine questions about his residence and his marital and employment status. The exclusion from evidence at his subsequent trial of these statements, therefore, could not vindicate or protect those values. Exclusion of the answers, however, could diminish the state's ability to effectively enforce its legitimate border interests while at the same time impairing the search for the truth in the criminal proceeding by excluding relevant evidence. The balancing of competing principles of fundamental justice does not favour extending the principle against self-incrimination to statements made in the circumstances in which the appellant made his statements to the Customs authorities.

- [35] A person's liberty and freedom of movement will often be restricted during the period of routine inquiries, sometimes for lengthy periods of time. If the inquiries do not go beyond the normal screening process, then the person will not be said to be detained. As Ryan J.A. said in *R. v. Sekhon*, 2009 BCCA 187 at para. 74, 270 B.C.A.C. 81:

These cases illustrate the point that travellers can expect to encounter a screening process when they cross the border. That process will include the requirement that documentation be produced and may involve searches. As part of the normal course of the screening process the searches (the first type discussed in *Simmons*) may be random and do not require grounds to search. Throughout the immigration and customs procedures a person is under the restraint that he or she will not be allowed to enter Canada unless there is satisfactory compliance with the questioning and the searches provided for by the relevant statutes such as the Customs Act. It follows that while this process is carried out the traveller will not be free to leave. His or her movements are thus restricted, but as Dickson C.J.C. said in *Simmons*, as long as these activities remain a part of the normal course of the screening process it cannot be said that the person, while in the screening process, is detained for purposes of the Charter.

- [34] Determining whether someone is constitutionally detained when at a border crossing does not begin and end with an analysis of whether the individual's liberty interest has been overcome. The liberty of every person at a border crossing is restricted to an extent, and this is a consequence of international travel that is expected by all. The question of whether an individual is constitutionally detained at a border crossing depends on whether the actions of the CBSA officers have gone beyond the permissible routine inquiry: *Nagle* at para. 49. In *R v. Jones*, 2006 CanLII 28086 (ONCA) at para. 42, Justice Doherty provides some useful guidance on when a routine customs investigation becomes something more such that a traveller is constitutionally detained:
- [42] [T]he extent to which the border authorities suspect an individual of having committed a particular offence will impact on whether that individual is or is not detained when subject to routine questioning. For example, if the border authorities have decided, because of some sufficiently strong particularized suspicion, to go beyond routine questioning of a person and to engage in a more intrusive form of inquiry, it may well be that the individual is detained when subject to that routine questioning see *R. v. Jacoy*, 1988 CanLII 13 (SCC), [1988] 2 S.C.R. 548, [1988] S.C.J. No. 83, 45 C.C.C. (3d) 46 . [Emphasis added.]
- [35] A useful summary of the jurisprudence regarding the law at border crossings is found in the Ontario Superior Court of Justice's decision in *R v. Darlington*, 2011 ONSC 2776 at para. 75. Of particular relevance to whether the individual is constitutionally detained is at subparagraph 75(6) where Justice Hill describes the circumstances where constitutional rights become engaged in the border context:
- [75] On behalf of the defence, Ms. Goldlist acknowledged that a traveller arriving at Canada's border is subject to unique restraints. She was right to do so. Prevailing "border crossing jurisprudence" provides that:

- (6) However, constitutional interests of self-incrimination and right to counsel become engaged where the generality and routineness of the screening exercise give way to more specific and intrusive measures, for example:
 - (a) the individual becomes the target of a focused criminal investigation as in circumstances where there exists "a sufficiently strong particularized suspicion" of contravention of the law: Jones, at paras. 24, 42; R. v. Kwok (1986), 31 C.C.C. (3d) 196 (Ont. C.A.), at pp. 207-8
 - (b) when particularized indicia of contraband are discovered: Sahota, at para. 48; R. v. Baptiste, 2010 ONSC 4465, at paras. 87-8, 92
 - (c) where there is "an interrogation ... relating to the possibility of customs' violations or other offences": Kwok, at p. 210
 - (d) when the person is detained for execution of a s. 98 Customs Act search: Simmons, at pp. 315, 322; R. v. Jacoy, [1988] 2 S.C.R. 548, at p. 558 or a "bedpan vigil" or dry loo collection.

[Emphasis added.]

ISSUE 1: Was Mr. Cluett constitutionally detained before he was arrested the first time?

- [36] As I understand his argument, Mr. Cluett says that he was constitutionally detained such that his Charter rights were engaged before he was arrested for the first time for two reasons. I will address each reason in turn.
- [37] First, Mr. Cluett argues that the primary inspection officer's referral for a secondary examination was arbitrary, and thus, his detention in secondary examination was arbitrary and unconstitutional. In another words, Mr. Cluett says that the indicators identified by BSO Sekhon as the reason for the selective referral to secondary examination did not objectively warrant such a selective referral. While Mr. Cluett acknowledges that travellers may be referred to secondary examination randomly and such a random referral would not amount to a constitutional detention, he argues that when a selective referral is made for a secondary examination, that referral must be based on reasons and those reasons must objectively warrant such a referral. If they do not, the traveller is arbitrarily detained and their constitutional rights are engaged.
- [38] I disagree. There are no grounds required to conduct a secondary examination search in the border context. Referrals for secondary examination and the associated search may be mandatory, random, or selective. Indeed, as Superintendent Dhillon testified, there are times when the entirety of an airplane's passengers is sent for secondary examination. Such searches are permitted under s. 99(1)(a) of the Customs Act. In R. v. Sekhon, 2009 BCCA 187 at para. 74, Justice Ryan put it this way:
- [74] These cases illustrate the point that travellers can expect to encounter a screening process when they cross the border. That process will include the requirement that documentation be produced and may involve searches. As part of the normal course of the screening process the searches (the first type discussed in Simmons) may be random and do not

require grounds to search. Throughout the immigration and customs procedures a person is under the restraint that he or she will not be allowed to enter Canada unless there is satisfactory compliance with the questioning and the searches provided for by the relevant statutes such as the Customs Act. It follows that while this process is carried out the traveller will not be free to leave. His or her movements are thus restricted, but as Dickson C.J.C. said in *Simmons*, as long as these activities remain a part of the normal course of the screening process it cannot be said that the person, while in the screening process, is detained for purposes of the Charter.

[Emphasis added.]

- [39] The fact that a CBSA officers make selective referrals on the basis of a multiplicity of indicators does not mean that those indicators need to objectively warrant such a referral. Section 99(1)(a) contains no language which would limit a search of a traveller to such circumstances. In support of his argument, counsel for Mr. Cluett pointed out that an international traveller may reasonably expect not to be subjected to secondary examination for an improper purpose, such as their race or ethnicity; however, there is no evidence of such an improper purpose here and that issue is not before me. In any event, the indicators identified by BSO Sekhon as detailed above, would in my view, objectively warrant a referral for a secondary examination.
- [40] Second, Mr. Cluett argues that he was constitutionally detained when Superintendent Dhillon "roved" him at the baggage carousel after he left primary inspection but before he had been directed to secondary examination at the exit to the customs hall. He argues that this went beyond the routine permissible inquiries and procedures that do not engage a traveller's Charter rights. Furthermore, he submits that the CBSA officers formed a sufficiently strong particularized suspicion that Mr. Cluett was in possession of controlled substances after he told Superintendent Dhillon that he was a fentanyl addict and was going through withdrawal. Being the target of a focussed criminal investigation goes beyond the routineness of the screening exercise, and thus, Mr. Cluett argues that he was constitutionally detained at that time and his Charter rights under s. 8 and 10 crystalized.
- [41] I disagree. In my view, the CBSA officers' interaction with Mr. Cluett did not exceed the normal screening process until BSO Tuck located the suspected drugs in Mr. Cluett's luggage. It was not until BSO Tuck discovered the drugs in his luggage that a sufficiently particularized suspicion arose that Mr. Cluett was smuggling a controlled substance into Canada. Consequently, Mr. Cluett was not detained in the "constitutional sense" until the drugs were located, and it was not until then that Mr. Cluett's Charter rights crystalized.
- [42] The Ontario Superior Court of Justice's decision in *R v. Macmillan* 2021 ONSC 7498, is instructive on this point. In that case, Mr. Macmillan had been referred for a mandatory secondary examination because through his declaration card, Mr. MacMillan had been identified by the CBSA's National Targeting Centre as a suspected high-risk person who could be smuggling narcotics into Canada. Prior to beginning the secondary examination,

the CBSA officer queried Mr. MacMillan's name in the ICES database and reviewed the target synopsis. This provided several indicators that Mr. MacMillan might be smuggling narcotics, in addition to Mr. MacMillan's behaviour that day.

- [43] Nonetheless, the court held that this was not sufficient to find that Mr. MacMillan was the target of a particularized investigation or that he was the subject of a focussed inquiry relating to a specific offence at that time. While the CBSA officer might have had a generalized suspicion that he would find drugs if he searched Mr. MacMillan's luggage, he did not have any specific information that would link Mr. MacMillan to a particular offence. Thus, he was not found to be constitutionally detained while being asked the standard baggage questions and other exploratory questions when he first attended at secondary examination: MacMillan at paras. 84, 86-88.
- [44] In the case at hand, the facts known to the CBSA officers prior to conducting the secondary examination are far less detailed and specific than those in MacMillan. BSO Sekhon testified that she made a selective referral to send Mr. Cluett for a secondary examination. She testified that the main reasons for the referral was that Mr. Cluett said he was a danger to the public, Mexico is a source country for drugs, the vague answers provided by Mr. Cluett about his travelling partner, and his unemployment. This falls well short of a sufficiently strong particularized suspicion that would give rise to Charter protections.
- [45] A sufficiently strong particularized suspicion also did not arise when Mr. Cluett told Superintendent Dhillon at the baggage carousel that he was a fentanyl addict and that he was experiencing withdrawal. The examination remained routine even though Superintendent Dhillon escorted Mr. Cluett to secondary examination. It was reasonable to do so in light of the comments Mr. Cluett made to BSO Sekhon about being a danger to the public. However, the interception of Mr. Cluett does not take it out of the routine such that Mr. Cluett's Charter rights were engaged at that time.
- [46] Similarly, BSO Tuck's questioning of Mr. Cluett after he took over the secondary examination was in the nature of a routine examination - BSO Tuck was clear that at no point was he directed to look for any specific items or ask Mr. Cluett any questions. It remained as such until BSO Tuck found the methamphetamine in Mr. Cluett's beach bag. Despite a thorough cross-examination, at no time did BSO Tuck agree with defence counsel that he was specifically looking for drugs during the examination, before he found the first bag.
- [47] For the foregoing reasons, Mr. Cluett was not constitutionally detained until he was arrested by BSO Tuck on the first occasion. Thus, his Charter rights did not arise until then.

ISSUE 2: Were Mr. Cluett's s. 10(a) and (b) rights violated?

Did the CBSA officer breach Mr. Cluett's s. 10(a) rights when he was arrested for smuggling on the first and second occasions?

- [48] Under s. 10(a) of the Charter, a person who is detained or arrested has the right to be advised of the reason for the arrest or detention. The purpose of s. 10(a) is twofold. The first purpose is so the arrestee can know the basis in law for the arrest in order to decide whether to submit to it. The second purpose is to allow the arrestee to make a meaningful and informed choice about whether to exercise his or her right to counsel: *R. v. Evans*, 1991 CanLII 98 (SCC), [1991] 1 S.C.R. 869 [Evans] at para. 31; *R. v. Goodkey*, 2015 BCCA 64 [Goodkey] at para. 114
- [49] Mr. Cluett argues that his s. 10(a) Charter rights were breached when BSO Tuck arrested him for smuggling on both occasions while undergoing secondary examination. Mr. Cluett submits that when BSO Tuck informed him that he was under arrest for smuggling goods into Canada that are prohibited, controlled, or regulated under the Customs Act, he could not generally understand the jeopardy he faced. He says this is because, to someone like Mr. Cluett who used to be a drug dealer, who has been to prison, and had just had a law enforcement official find drugs in his luggage, it would seem like he was "getting off easy" by being arrested for an offence under the Customs Act. Mr. Cluett says that the information given to him by BSO Tuck did not lead him to understand that he was being arrested for smuggling items that are controlled by the CDSA. Thus, he says he did not understand the jeopardy he faced and was not able to seek fully informed advice from legal counsel.
- [50] I agree with the Crown that compliance with s. 10(a) requires the police to inform the arrestee of the substance of the reason for arrest. Whether the state actor has complied with this obligation requires a focus on the substance of what the arrestee can reasonably be taken to have understood from the reasons provided, as opposed to the formalism of the precise words used: *Evans* at para. 35; *Goodkey* at paras. 115-116. Whether the information provided is sufficient depends upon the surrounding circumstances with reference to whether it would permit a reasonable person, standing in the shoes of the arrestee, to make an informed decision about the whether to submit to the arrest, and whether to consult with counsel: *Evans* at para. 31; *R. v. Fan*, 2013 BCSC 1406 at paras. 143-147, *aff'd* 2017 BCCA 99. The nature of the charges and the factual context in which the person was arrested matters and influences the extent of detail that the state actor must provide to comply with s. 10(a): *R. v. White*, 2022 BCSC 1016 at para. 30.
- [51] In my view, Mr. Cluett's s. 10(a) rights were not breached. Mr. Cluett was provided with enough information at the time of his arrest to make an informed decision about whether to submit to his arrest and whether to consult with counsel. In the context of the circumstances, Mr. Cluett was aware of the jeopardy he faced.
- [52] BSO Tuck advised Mr. Cluett twice that he was under arrest for smuggling contrary to s. 159(1) of the Customs Act. When he was arrested, BSO Tuck had just located bags containing methamphetamine, cocaine, and MDMA. A reasonable person in Mr. Cluett's position would have known that he was under arrest for smuggling a substance into Canada. Indeed, Mr. Cluett would have known that he was under arrest for bringing illegal drugs into Canada given the way in which the arrest unfolded. This situation is different than that faced by the

accused in *R v. Carpenter*, 2001 BCCA 31. Unlike Mr. Carpenter, Mr. Cluett was not under the impression that he was being arrested for a small amount of cannabis. It was clear what he was being arrested for. Mr. Cluett had the information he needed to know to understand the jeopardy he was in and to seek meaningful legal advice.

- [53] While BSO Tuck did not arrest Mr. Cluett for importation of those drugs contrary to the CDSA, the offence for which Mr. Cluett was ultimately charged, this does not necessarily mean that Mr. Cluett's s. 10(a) rights were infringed. Mr. Cluett was not entitled to be advised of the precise charge that would eventually be laid: *Goodkey* at para. 115, citing *R. v. Wong*, 1998 CanLII 4217 (BCCA) at para. 24. BSO Tuck was not required to articulate to Mr. Cluett every charge that he could potentially face in the future. It is not unusual for an individual to initially be arrested for a lesser offence to later be charged with a more serious offence when an information is laid.
- [54] The information provided to Mr. Cluett upon each of his arrests was sufficient to allow Mr. Cluett to make an informed choice as to whether to submit to the arrest and whether to contact counsel. Indeed, Mr. Cluett did submit to the arrest and did contact counsel. Mr. Cluett's s. 10(a) rights were not infringed.

Were Mr. Cluett's s. 10(b) rights infringed when he was arrested the first time and at the time immediately before he was subjected to the strip-search?

- [55] Mr. Cluett argues that the implementational component of his section 10(b) Charter rights were breached when he was arrested by BSO Tuck the first time and at the time immediately before he was subjected to the strip-search. He argues that he did not clearly waive his right to speak to counsel of his choice on these occasions. Rather, he only indicated that he did not want to speak to legal aid counsel. Mr. Cluett did speak with an articling student at his lawyer's firm after the second arrest and he does not allege that his s. 10(b) rights were violated on this occasion.
- [56] The Crown argues that the issue is not whether Mr. Cluett waived his right to counsel. Rather, the Crown says that the issue is whether Mr. Cluett was diligent in invoking or whether he invoked his right to speak to counsel of his choice. The Crown submits that he was not diligent in doing so when he was arrested on the first occasion and this suspended the implementation obligation on the CBSA officer for the first arrest. With respect to the s. 10(b) rights arising before the s. 98 strip-search was conducted, the Crown says that, in the circumstances, Mr. Cluett did not invoke his right to speak to counsel and thus the implementational duties were not triggered.
- [57] In *R. v. Bartle*, [1994] S.C.J. No. 74 at para. 17, the Supreme Court of Canada set out the duties imposed by s. 10(b) on state actors who arrest or detain a person:
- [17] This Court has said on numerous previous occasions that s. 10(b) of the Charter imposes the following duties on state authorities who arrest or detain a person:

- (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
- (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[Emphasis added.]

[58] In *R v. Dill*, 2025 BCSC 996 at paras. 55-60, Justice Laurie aptly summarized the legal principles with respect to s. 10(b) of the Charter including that the burden is on the accused person claiming the breach to prove it on a balance of probabilities. Of particular relevance to this case are Laurie J.'s comments at paras. 58 and 64 where she summarizes the extent of the state actor's obligations under s. 10(b):

[58] The police obligations flowing from s. 10 (b) are not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duties on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended: *R. v. Tremblay*, 1987 CanLII 28 (SCC), [1987] 2 S.C.R. 435, at p. 439, and *R. v. Black*, 1989 CanLII 75 (SCC), [1989] 2 S.C.R. 138, at pp. 154-55. See also *R v. Sinclair*, 2010 SCC 35 at para. 27.

[64] As the Supreme Court made clear in *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173, the implementational duties under section 10(b) are not triggered until a detainee indicates a desire to exercise his or her right to counsel. In other words, the obligation on the police to give an accused a reasonable opportunity to consult with counsel arises only when the accused indicates to the police their desire to exercise that right: *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429, at para. 30; *R. v. Fuller*, 2012 ONCA 565 at para. 17.

[Emphasis added.]

[59] Like the Crown in *Dill*, the Crown in the case at hand does not assert that there was a waiver. As in *Dill*, the CBSA officer complied with the informational component of the s. 10(b) right. In these circumstances, the next question to be determined was not whether the Crown had proven Mr. Cluett had waived his right, but rather, whether he had invoked, or was diligent in invoking, his right to counsel such that the implementational duties were triggered: *Dill* at para. 74 citing *R. v. Owens*, 2015 ONCA 652, at para. 27.

[60] In the particular circumstances of this case, I find that Mr. Cluett's s. 10(b) rights were not breached because he did not invoke his right to consult counsel when he was arrested the first time and when he was read his rights before he was strip-searched.

- [61] Following the first arrest, BSO Tuck complied with Mr. Cluett's request to call his lawyer of choice. He did this twice before making a call to the law firm where he spoke to an operator. The operator informed BSO Tuck that there were no lawyers available and that only articling students of the firm were available. Mr. Cluett was advised of this and he did not indicate a desire to speak to an articling student. At this time BSO Tuck also offered Mr. Cluett provincial legal aid, which he declined. BSO Tuck also asked Mr. Cluett if he was waiving his right to legal aid to which he said yes.
- [62] The context is important. June 9, 2023, was a Sunday. Mr. Cluett was first arrested at 11:35 p.m. As confirmed by the operator at the firm, it was unlikely that a lawyer would be available. Mr. Cluett should reasonably have known this. He likely did know this as he did not insist on speaking to his counsel. There is no evidence that when advised that his counsel of choice was not available that he insisted on waiting until he could speak to him. There is no evidence that he requested to speak to an articling student. While he could have asserted his right to speak to duty counsel, he declined to do so. In the circumstances, I find that Mr. Cluett did not assert his right to speak to counsel of choice such that the implementational component of his s. 10(b) rights were not engaged any further.
- [63] While Mr. Cluett does not assert a Charter breach with respect to the second arrest, the circumstances of that arrest and the exercise of Mr. Cluett's s. 10(b) rights at that time are important to the context of Mr. Cluett's allegation that his s. 10(b) rights were infringed when he was advised that he would be strip-searched. Following Mr. Cluett's second arrest, after discovery of the second bag of suspected drugs, BSO Tuck again made efforts to contact Mr. Cluett's counsel of choice as requested by Mr. Cluett. BSO Tuck again called the operator of the firm who stated that there were no lawyers available but that articling students were available. This time, Mr. Cluett stated that he would speak to an articling student, and he was provided with the opportunity to do so, and he did so.
- [64] Before BSO Tuck conducted the strip-search, he once again advised Mr. Cluett of his right to retain and instruct counsel, and like the other two occasions, he did so by reading him his rights verbatim from his officer handbook. Mr. Cluett indicated that he understood his right and stated that he did not wish to contact legal aid. Again, the context is important. Mr. Cluett was fully aware that his counsel of choice was not available but that an articling student was. This was the third time in approximately an hour that he was advised of his s. 10 (b) rights. At no time before the strip-search was conducted did Mr. Cluett tell BSO Tuck, or anyone else, that he wished to speak to an articling student at his lawyer's firm or that he again wanted to speak to his lawyer (whom he knew was not available).
- [65] Mr. Cluett has not met the burden upon him of establishing that he invoked his right to counsel before the strip-search was conducted. Again, this was the third time he had been read his rights to counsel verbatim from the officer handbook. I agree with the Crown that given the warning that had been read to him three times, and the way in which the evening had unfolded, Mr. Cluett would have known that he had the right to speak to his own lawyer or legal aid, and at this point he understood that his preferred counsel was not available.

There is no evidence that Mr. Cluett told BSO Tuck that he did not wish to speak to legal aid but that he did wish to speak to his personal lawyer or to an articling student at the firm. In these particular circumstances, Mr. Cluett did not invoke his right to consult counsel, and therefore, BSO Tuck was not obliged to provide Mr. Cluett with an opportunity to speak to counsel and his s. 10(b) rights were not infringed.

ISSUE 3: Were Mr. Cluett's s. 8 rights violated when his luggage was searched, he was subjected to a pat-down search incident to arrest, and/or when he was strip-searched?

[66] Section 8 of the Charter provides that "[e]veryone has the right to be secure against unreasonable search or seizure." Absent prior judicial authorization, a search or seizure will be unreasonable unless: (i) it is authorized by law; (ii) the authorizing law itself is reasonable; and, (iii) it is carried out in a reasonable manner: *R v. Borden*, [1994] 3 S.C.R. 145 at 165.

The Search of Mr. Cluett's Luggage

[67] Section 99(1)(a) of the Customs Act provides CBSA officers with a wide-ranging power to search items brought into Canada by a traveller without the need for any particular grounds or suspicion. Subsection 99(1)(e), on the other hand, provides the power to examine or open goods where there is a reasonable suspicion that the traveller has contravened the Customs Act or another act of parliament:

99 (1) An officer may

- (a) at any time up to the time of release, examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts;
- (e) where the officer suspects on reasonable grounds that this Act or the regulations or any other Act of Parliament administered or enforced by him or any regulations thereunder have been or might be contravened in respect of any goods, examine the goods and open or cause to be opened any package or container thereof

[68] As I understand his argument, Mr. Cluett submits that the search of his baggage was conducted under s. 99(1)(e) which has a reasonable suspicion grounds requirement for a search to be authorized. He says that BSO Tuck testified that he conducted his search under s. 99 without turning his mind to whether it was conducted under s. 99(1)(a) or (e). Relying on the Court of Appeal's decision in *R. v. Whitaker*, 2008 BCCA 174 at para. 65, he submits that BSO Tuck's actions must be assessed on what he actually did and not on what he could have done. As he did not turn his mind to the particular subsection of s. 99 when he conducted the search of the luggage, Mr. Cluett argues that it is appropriate that this court assess the legality of the search with reference to the subsection that has the higher standard - i.e. s. 99(1)(e). When assessed under this standard, Mr. Cluett says that there was not sufficient evidence to form a reasonable suspicion to justify the search.

- [69] I do not agree that the search of Mr. Cluett's luggage was undertaken pursuant to s. 99(1)(e). While BSO Tuck referred generally to s. 99 as the basis of his authority to search Mr. Cluett's luggage and not to s. 99(1)(a) specifically, it is clear from his testimony that the search was conducted pursuant to the general ability to do so provided for in s. 99(1)(a). It is this section that addresses the examination of goods and among the many listed options includes that an officer may at any time up to the time of release, examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts. It is this section that is used in routine customs searches and investigations at the border. It is this section that gives rise to the expectation of all international travellers that their belongings are subject to routine searches at border crossings.
- [70] Given that the search was conducted under s. 99(1)(a), BSO Tuck did not need to have developed a reasonable suspicion that a contravention had occurred before he performed the routine search of Mr. Cluett's belongings. His s. 8 Charter rights were not infringed by the search.

The Search Incident to Arrest

- [71] Warrantless searches are presumptively unreasonable, and the onus is on the Crown to establish the reasonableness of a warrantless search on a balance of probabilities. One instance in which warrantless searches may be permissible is when the search is conducted incidental to arrest. State actors are permitted to search an individual who has been lawfully arrested so long as the state actor is able to articulate that they searched the arrestee for a valid purpose. The three main purposes of a search incidental to arrest are to ensure the safety of the police and the public, to protect evidence, and to discover evidence: *R. v. Majedi*, 2009 BCCA 276 at paras. 18-19.
- [72] Mr. Cluett argues that BSO Tuck's pat-down search of Mr. Cluett immediately following his first arrest was a breach of his s. 8 Charter rights. He says that in order for this search to have been legal, BSO Tuck must have had reasonable grounds to suspect that there was a safety risk to him or the public and that the risk could be addressed by conducting the search.
- [73] Mr. Cluett's argument mistakes the law in respect to searches incidental to arrest with the law of searches that are incidental to an investigatory detention. Had Mr. Cluett been detained instead of having been arrested, then BSO Tuck would have been required to articulate reasonable grounds to suspect that there was a risk to his safety, or the safety of the public, based on "objectively discernable facts": *R. v. Dhillon*, 2023 BCCA 38 at para. 101.

- [74] The pat-down search of Mr. Cluett took place incidental to his lawful arrest. In these circumstances, there must simply be a valid purpose to the pat-down search as discussed above and as set out in *Majedi*. BSO Tuck need not have developed any reasonable grounds to suspect that his safety was in jeopardy before conducting the search incident to Mr. Cluett's arrest.
- [75] In my view, BSO Tuck articulated a valid purpose for conducting the pat-down search incident to arrest. That valid purpose was officer safety. BSO Tuck testified that he was concerned about officer safety because he did not know Mr. Cluett, he had received information that Mr. Cluett had told the primary inspection officer that he was a danger to the public, and that he believed he had access to his checked baggage between the time he left primary inspection and was brought to secondary examination. These articulated concerns support the subjective validity of the purpose for which BSO Tuck conducted the pat-down search and they are objectively reasonable in the circumstances - that being officer safety. Since the pat down search was conducted pursuant to a lawful arrest, that arrest itself provides lawful authority for BSO Tuck to conduct an officer safety search: *Majedi* at para. 19. Consequently, Mr. Cluett's s. 8 Charter rights were not infringed.

The Strip-Search

- [76] Pursuant to s. 98 of the Customs Act, a person who has arrived in Canada may be strip-searched if:
- 98(1) the officer suspects on reasonable grounds that the person has secreted on or about his person anything in respect of which this Act has been or might be contravened, anything that would afford evidence with respect to a contravention of this Act or any goods the importation or exportation of which is prohibited, controlled or regulated under this or any other Act of Parliament.
- [77] The grounds required for a strip-search under s. 98 are often referred to as "reasonable suspicion." In *R. v. Kang-Brown*, 2008 SCC 18, Justice Binnie defined reasonable suspicion as follows:
- [75] "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds [Emphasis added.]
- [78] Pursuant to s. 98(2) and (3), an individual who is about to be subjected to strip-search can request to be taken to a senior officer immediately for a review of the grounds for the search before it is conducted:

Search of the person

98

Person taken before senior officer

- (2) An officer who is about to search a person under this section shall, on the request of that person, forthwith take him before the senior officer at the place where the search is to take place.

Idem

- (3) A senior officer before whom a person is taken pursuant to subsection (2) shall, if he sees no reasonable grounds for the search, discharge the person or, if he believes otherwise, direct that the person be searched.
- [79] The Crown bears the burden of demonstrating on a balance of probabilities that a warrantless search is authorized by a reasonable law and was carried out in a reasonable manner: Dill at para. 97, citing *R. v. Mann*, 2004 SCC 52 at para. 36.
- [80] Mr. Cluett does not take issue with the reasonableness of s. 98 of the Customs Act which authorizes the strip-search that Mr. Cluett was subjected to at the Vancouver International Airport.
- [81] In his notice of Charter application, Mr. Cluett alleges that regarding the strip-search, his s. 8 rights were breached because it was conducted on the basis of insufficient and unlawfully obtained grounds. During oral argument, it became clear that Mr. Cluett was also alleging a breach on the basis that the strip-search was conducted in an unreasonable manner. As pointed out by the Crown, the notice of Charter application makes absolutely no reference to the reasonableness of the strip-search as being an alleged breach that would be the subject matter of this voir dire. Had the Crown been properly provided with notice of this argument, it might very well have called different witnesses or elicited different evidence from BSO Tuck.
- [82] Despite the failure of the defence to properly give notice of the basis for this alleged Charter breach, I can consider the issue on the evidence before me. This is because defence counsel was unfettered in his ability to ask questions of BSO Tuck about the manner in which the search was conducted during his thorough cross-examination. Crown counsel also agreed that it could make submissions on the merits of the reasonableness of the search on the evidentiary record before the Court. With that in mind, I turn to consider Mr. Cluett's s. 8 argument with respect to the strip-search.
- [83] Mr. Cluett argues that the factors identified by BSO Tuck were insufficient to form a reasonable suspicion that he had secreted items on or about his person, the importation of which would be prohibited. Mr. Cluett also argues that the search itself was conducted unreasonably. While not entirely clear, it appears that he argues this on the basis that he was entirely disrobed at some point during the search.

The Grounds of the Strip-Search were Lawful

- [84] In my view, the strip-search was properly grounded in a reasonable suspicion as required by s. 98 of the Customs Act.
- [85] CBSA officers are required to obtain approval to conduct a strip-search from a supervising officer by presenting the grounds for the search to that officer. BSO Tuck presented his grounds for a strip-search to Superintendent Dhami. The grounds that BSO Tuck provided to Superintendent Dhami for approval of the strip-search were that:
1. Mr. Cluett was entering Canada from a drug source country;
 2. Mr. Cluett had stated that he was unemployed but that he made \$10,000 Canadian from gambling;
 3. Mr. Cluett stated that he is a fentanyl addict and was suffering from withdrawal;
 4. after the suspected MDMA and cocaine were located, Mr. Cluett stated that he uses MDMA and cocaine;
 5. during the course of the secondary examination, Mr. Cluett stated that he used to be a drug dealer and that if he had wanted to smuggle drugs into the country he could have "shoved them up my ass";
 6. BSO Tuck had discovered what he believed to be controlled substances on two occasions in Mr. Cluett's baggage and had arrested him twice in respect of this; and
 7. Mr. Cluett was aggressive and displaying abnormal behaviour during the course of the secondary examination.
- [86] In my view, these factors clearly support a reasonable suspicion that Mr. Cluett had secreted drugs or other contraband on his person. The grounds relied upon by BSO Tuck are significantly more than a hunch, intuition or a mere suspicion.
- [87] Mr. Cluett argues that the way in which the drugs were found in his luggage, and the words he said when they were found, do not form the basis of a valid reasonable suspicion that he had secreted drugs on his person. When BSO Tuck located the drugs, Mr. Cluett said something to the effect that he thought he had lost them. He argues that the drugs were readily discoverable in a pants pocket and loosely wrapped in a pair of shorts. Presumably he highlights this in contrast to situations where drugs are better concealed and are found in more elaborate secret compartments, for example.
- [88] In the circumstances of this case, he says that there is no reason for BSO Tuck to think that Mr. Cluett was lying and to suspect that he would have further drugs on his person. I disagree. The manner in which the drugs were found and the words that Mr. Cluett said to BSO Tuck do not mean that Mr. Cluett was telling the truth about having thought he lost the drugs. The manner in which the drugs were found could indicate a number of things including carelessness, inadvertence, or intentionality. Any and all of these form the basis of a reasonable suspicion that he has secreted drugs on his person.

- [89] I also disagree with Mr. Cluett that the fact that BSO Tuck did not locate drugs on him when he conducted a pat-down search for officer safety incident to arrest leads to the conclusion that Mr. Cluett had not secreted anything else further on his person. BSO Tuck described the pat-down search as being focussed on officer safety - he was not searching for drugs. And in any event, the purpose of a strip-search is to locate items that would not be readily found in a pat-down search.
- [90] When the seven grounds identified by BSO Tuck are looked at holistically, they, in my view, more than adequately support a reasonable suspicion that Mr. Cluett had secreted drugs on his person. As discussed earlier, Mr. Cluett was provided with the opportunity to consult counsel before the strip-search occurred. The Crown has met its burden of proving that there was a reasonable suspicion for the strip-search, and thus, the strip-search was lawfully initiated.

The Search was Conducted Reasonably

- [91] I agree with counsel for Mr. Cluett that strip-searches engage a very strong-privacy interest and that as discussed in *R v. Golden*, 2001 SCC 83 all strip-searches are highly intrusive and inherently humiliating, even when they are conducted in accordance with proper procedure. I also agree with counsel for Mr. Cluett that the Crown bears the burden of proving that the strip-search was conducted reasonably, as has been stated on numerous occasions throughout the jurisprudence of this country.
- [92] Regardless of who bears the burden of proving reasonableness of the search, the facts giving rise to the basis for the accused's allegation that the search was conducted in an unreasonable manner must be established on the evidence in the *voir dire*. As will be discussed, that is where Mr. Cluett's allegation of a Charter breach on this ground fails.
- [93] Because Mr. Cluett's Charter notice did not raise any issue with the manner in which the strip-search was conducted, the Crown asked very little about it in BSO Tuck's examination in chief. BSO Tuck was asked if the strip-search was conducted and if anything was found as a result. BSO Tuck responded that it was conducted and that nothing was found.
- [94] BSO Tuck was asked further questions about the manner in which the strip-search was conducted during his cross-examination by defence counsel. BSO Tuck testified that Mr. Cluett's strip-search occurred in a private room in the presence of another officer who took notes and I find that the officers were of the same gender as Mr. Cluett. BSO Tuck testified that typically, when conducting a strip-search the traveller is not entirely unclothed at any given time. Rather, a strip-search is generally conducted sequentially such that a traveller's upper half is disrobed and searched while the traveller's lower half remains clothed and then vice versa. BSO Tuck testified that during a strip-search, a traveller could be asked to squat or bend over or to defecate into a receptacle.

- [95] When BSO Tuck was asked if Mr. Cluett was entirely disrobed at any one point during the examination, BSO Tuck responded that he may have been but that he did not fully recall. He also did not recall if Mr. Cluett had been asked to squat or bend over during the examination. BSO Tuck explained that because he conducted the strip-search, he was not the officer who took notes. BSO Tuck testified that he always attempts to conduct a strip-search in as quick and unobtrusive manner as possible.
- [96] That is the extent of the evidence led on the manner in which the strip-search was conducted. No evidence was led about whether Mr. Cluett was touched by BSO Tuck or the other CBSA officer, or how his clothes were removed. Mr. Cluett did not testify. The evidence before me is insufficient to find that Mr. Cluett was fully disrobed at any given time.
- [97] While Mr. Cluett alleges that the strip-search was conducted unreasonably because he says that he was fully disrobed at a point in time, it is not clear as to what other reasons he says that the search was conducted unreasonably.
- [98] In *Golden* at para. 101, the Supreme Court of Canada sets out an eleven-point framework for state actors to use in deciding how to best conduct a strip-search:
1. Can the strip search be conducted at the police station and, if not, why not?
 2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
 3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
 4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
 5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
 6. What is the minimum of force necessary to conduct the strip search?
 7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
 8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
 9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
 10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?

11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[99] In *R v. Johal*, 2015 BCCA 246 at para. 29, our Court of Appeal has held that the Golden factors are useful indicators of the reasonableness of a strip-search. However, the Golden factors are not a checklist. In certain circumstances, a failure to adhere to a single factor will result in a Charter breach, while in some cases the failure to adhere to multiple factors will not result in a Charter breach: *R v. Black*, 2022 ONCA 628 at para. 40.

[100] What little evidence there is as to how the search was conducted supports a conclusion that the strip-search was conducted in a reasonable manner. For example, the strip-search was conducted in a private room in a controlled area of the airport; it was authorized by a CBSA officer acting in a supervisory capacity; the officers conducting the search were of the same gender as the accused, and no more officers were present than necessary - one to conduct the search and one to take notes. As stated above, on the record before me, there is insufficient evidence to conclude that Mr. Cluett was completely undressed at any one time. And in any event, being completely undressed at a given time would not necessarily mean the search was conducted in an unreasonable manner. There is simply no evidence that Mr. Cluett's privacy and dignity were not maintained during the course of the search.

[101] Furthermore, and in any event, no further evidence was located during the strip-search such that there would be nothing to exclude had there been a breach.

[102] For the foregoing reasons, I find that it is more likely than not that the strip-search was conducted reasonably, and therefore, Mr. Cluett's s. 8 rights were not violated.

CONCLUSION

[103] I find no breaches of Mr. Cluett's ss. 8, 9 and 10 Charter rights. His application is dismissed.

"Majawa J."

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