
CANADA / JUDGMENT

R. v. Crocker

2008 BCSC 1877

COURT

Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Crocker

2008 BCSC 1877

Date: 20080505

Docket: 24469

Registry: Vancouver

Regina

v.

Larry Crocker

Before: The Honourable Mr. Justice Leask

Oral Ruling on Voir Dire #1

Counsel for the Crown

B. McKinley

Counsel for the Accused

R. Vachon

D. Gaffar

Place and Dates of Trial:

Vancouver, B.C.

April 21-25, 28-30;

May 1, 5-8, 2008

Place and Date of Judgment:

Vancouver, B.C.

May 5, 2008

- [1] THE COURT: This is my first voir dire ruling in this case.
- [2] Larry Crocker is charged on a 21-count indictment with a number of criminal offences and violations of the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19 ("CDSA"). These charges arose from an investigation conducted by the Crime Reduction Unit of the North Vancouver detachment of the RCMP. The Crime Reduction Unit's mandate is to approach crime and criminals from a pro-active, rather than a reactive, position.
- [3] On February 6, 2007, members of the CRU attended at the residence of Arleigh Ross, well known to them as a drug user. While there, they talked with her and two of her male acquaintances, also known to the police as drug users. Upon leaving her residence, some members of the team followed Ms. Ross. They observed Ms. Ross and at least one of her male friends talking with the occupants of a green Chevy Cavalier, B.C. licence number 128 ALK, parked on Lonsdale Avenue. No criminal activity was observed.
- [4] Constable Johnson and Corporal Tupper were in plainclothes in an unmarked police car. Their initial plan was to have a uniformed officer conduct a "traffic stop" of the Chevy Cavalier to learn the identity of the occupants. No uniformed officer driving a marked police vehicle was available. The Cavalier left its parking spot on Lonsdale near 18th, drove down Lonsdale, turned onto 16th, and parked several car lengths from Lonsdale. Corporal Tupper and Constable Johnson parked their vehicle. They had already observed that the driver of the Cavalier was a male approximately 50 years of age and the passenger was a young female estimated to be approximately 16 years of age.
- [5] Using the computer in their vehicle, they ascertained that the registered owner was a much older woman named Mabel Crocker. They also learned from the police database that in early January two men and a woman had attempted to cash a fraudulent cheque at the Vancouver branch of Costco. One of the men and the woman left Costco in a green Chevy Cavalier with licence 128 ALK.
- [6] Their second plan was to approach the vehicle in an effort to learn the identity of its occupants and to question them concerning their knowledge of the Costco incident. They approached the vehicle - Corporal Tupper on the passenger side and Constable Johnson on the driver's side. Neither occupant seemed to be paying any attention to them. The passenger was reading a newspaper. The driver was observed by Corporal Tupper to be fiddling with something in his lap. Constable Johnson saw him shoving what appeared to be a manila folder under his seat with his right hand. His left hand was a closed fist in which

Constable Johnson noticed what appeared to be "rolling papers."

- [7] Constable Johnson instructed the driver to roll down his window. Constable Johnson had to repeat this instruction at least three times, but the driver did comply. Once the window was down, Constable Johnson instructed the driver to open his hand. The driver complied - revealing rolling papers and a very small quantity of marihuana. Constable Johnson reached into the vehicle and seized the marihuana. At the same time, he informed both occupants of the vehicle they were under arrest for possession of a controlled drug. The driver put the transmission into drive, floored the gas pedal, and sped away. Another car with CRU members attempted to follow the Cavalier, but lost sight of it after a few blocks.
- [8] On February 7, by following up the Vancouver file dealing with the attempted fraudulent transaction at Costco, Constable Johnson learned that Mabel Crocker had told a police officer that her Chevy Cavalier was usually driven by her son, Larry. Constable Johnson obtained what he described as "a picture of Larry Crocker" and believed that Larry Crocker was the driver of the Cavalier on February 6. The Vancouver investigation also provided an address for Larry Crocker, a Burnaby apartment building in which he was believed to occupy penthouse number 1.
- [9] On February 9, 2007, six members of the North Vancouver CRU set out for Burnaby with the intention of arresting Larry Crocker. All of the team on that day were constables. Constable Johnson, with just over two years of police experience, was the team leader. Upon arriving at the Burnaby apartment building, all six members of the CRU went up the 22nd floor entrance to the penthouse level where Constable Johnson knocked several times on the door of penthouse number 1. There was no answer. Two officers were posted to maintain surveillance on the apartment. Somewhat later, one of them discovered a second entrance door one floor higher. Constable Johnson returned and knocked on that door; again, with no response.
- [10] During the course of February 9, the team discovered two vehicles in the underground parking lot in parking stalls associated with penthouse number 1. One was the green Chevy Cavalier with licence number 128 ALK, the other was a red Chevy Silverado pickup truck. At approximately 10:40 a.m., the police had a tow truck driver open the Silverado in order to read the vehicle identification number. At about 12:08 p.m., Mr. Crocker was arrested in the underground parking lot by Constables Fry and Scott of the CRU. Following his arrest, his person was searched, the Cavalier was searched, and a backpack he was observed to place in the Cavalier was searched.
- [11] After his arrest, Constable Johnson took keys found in Mr. Crocker's possession and entered penthouse number 1 in company with Constable Smith of the CRU and Constable Baldinger (in uniform) from the Burnaby detachment. In the apartment, they found a female identified by Constable Johnson as the female passenger in the Cavalier on February 6. She was arrested for escaping lawful custody.

- [12] In examining the penthouse to check for other occupants, Constable Johnson found a locked room. When he opened the padlock and looked inside, he believed he was seeing a clandestine laboratory. He called for a Hazmat team who came and determined that it was not a clandestine laboratory. Later in the afternoon, Mr. Crocker was strip searched at the North Vancouver detachment by Constable Scott. Later still, the Cavalier and the Silverado were towed to the North Vancouver detachment, where they were searched.
- [13] In the evening of February 9, Constable Johnson presented an Information to Obtain a Search Warrant to a Judicial Justice of the Peace and successfully obtained a search warrant. The officers then searched penthouse number 1 under the authority of the warrant and seized many exhibits. Crown and defence agreed that the admissibility of much of the Crown evidence should be tested in a voir dire which I have been conducting. The Crown and the defence in this case also agreed that the issues to be canvassed in this first ruling should be limited to any breaches of the Canadian Charter of Rights and Freedoms by the RCMP beginning on February 6, 2007, and continuing until just prior to the presentation of the Information to Obtain to the JJP on February 9. It is contemplated that there will be a need for further rulings on the validity of the Information to Obtain, exclusion of evidence under s. 24(2), if necessary, and possibly a voir dire on a statement allegedly given by the accused.

FEBRUARY 6

- [14] I will begin by analysing the initial events of February 6. The crux of the issue here is whether asking Mr. Crocker to open his hand was an unreasonable search under s. 8 of the Charter? Section 8 states:

Everyone has the right to be secure against unreasonable search or seizure.

- [15] There was no dispute before me on the law of a search incidental to an investigative detention. A search incidental to an investigative detention is a warrantless search, presumed to be unreasonable unless the Crown can prove it reasonable. The law on this matter was stated by Mr. Justice Iacobucci for the majority of the Supreme Court of Canada in *R. v. Mann*, 2004 SCC 52, at para. 36:

Any search incidental to the limited police power of investigative detention described above is necessarily a warrantless search. Such searches are presumed to be unreasonable unless they can be justified, and hence found reasonable, pursuant to the test established in *R. v. Collins*, [1987] 1 S.C.R. 265. Under *Collins*, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable (p. 278). The Crown bears the burden of demonstrating, on the balance of probabilities, that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner. *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, at para 32.

- [16] Mr. Justice Iacobucci went on in the case to discuss the limits of the power to search:

The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; in the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances: see S. Coughlan, "Search Based on Articulate Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.

[emphasis added]

[17] The Crown concedes that Mr. Crocker was subject to an investigative detention which started at the latest when Constable Johnson demanded that the window be rolled down. The Crown also concedes that Constable Johnson's request that Mr. Crocker open his hand was a search within the meaning of s. 8 of the Charter. For authority on this point, reference can be had to the B.C. Provincial Court case of R. v. Duong, 2007 BCPC 0388.

[18] Constable Johnson first stated:

He appeared to be clutching something in his left hand.

And then just slightly later, he said this:

I then, still observing that the driver had something clutched tightly in his left hand, ordered the driver to open his left hand to show me what was in it, as my first train of thought was simply safety issues, Your Honour. I'm not sure what -- (a) who they are or (b) what he has in his hand at the time so I wanted to ensure the safety of myself, my partner, and ensure that he didn't have any type of weapon clutched in his hand or hidden.

[19] Those two comments were made during direct examination. On cross-examination, he said this:

I'd observed that something was clutched in the driver's left hand and, simply acting on officer safety to ensure the safety of myself and my partner, I wished first and foremost to have the driver show me what was in his hand.

And somewhat later in the cross-examination:

In my training and experience as a police officer when conducting any interaction with the public, safety for both police and public is paramount and that means that if somebody has a clenched fist and is obviously concealing something from me, I have a safety concern at that point.

Particularly in this case, obviously, I believed that the occupants of that vehicle are either involved in criminal activity or have been and, obviously, that will affect a risk assessment that is ongoing and can be adjusted by myself depending on the situation. At that point in time, I felt that it was necessary for, again, police and public safety that I order the occupant of the vehicle to unclench his hand in order to display what may be in there.

[emphasis added]

[20] If Constable Johnson believed on reasonable grounds that his own safety or the safety of others was at risk, then it was reasonable for him to have asked Mr. Crocker to open his hand. The test has both a subjective and objective element. Did Constable Johnson believe that safety was at risk and was his belief based on reasonable grounds?

[21] I do not believe Constable Johnson's evidence that he was concerned for his own safety. In Mr. Justice Iacobucci's words, I find that he has expressed a "vague" concern for safety.

[22] Furthermore, I have doubts generally as to the reliability of Constable Johnson's evidence. When questioned, Constable Johnson said that he did not consider the requirements of s. 495(2) of the Criminal Code, R.S.C. 1985, c. C-46, before arresting Mr. Crocker. He also said that he did not think of attempting to obtain a warrant before going to arrest Mr. Crocker on February 9. His answers to questions about the picture of Mr. Crocker were vague and unclear. His notes about the time of departing from penthouse number 1 contrast with his "corrected" response and conflicted with the evidence of Constable Baldinger. His evidence of the volume of his voice as he asked Mr. Crocker to roll down his window on February 6 contradicted the evidence of the other officers in attendance.

[23] In summary, I do not believe that Constable Johnson had the subjective belief that his safety or the safety of others was at risk when he demanded that Mr. Crocker open his clenched fist.

[24] In addition, I will deal with the objective situation. Constable Johnson's subjective belief must be based on objectively reasonable grounds. As noted by Crown counsel, the test is not whether he was right, but whether he had reasons for his belief. See paragraph 34 of *Berntt v. The City of Vancouver et al*, 1999 BCCA 345, where Southin J.A. wrote:

The question in this case is not whether the appellant Hancock was wrong, but whether he lacked reason for his belief if, in fact, he held the belief the section requires as a foundation for his defence of justification.

[25] The objective grounds that could have supported Constable Johnson's subjective belief were:

- Constable Johnson had seen the occupants of the car talking with Ms. Ross, a known habitual drug user.
- Constable Johnson saw the occupants of the car moving around.
- Constable Johnson saw the driver putting something under his seat with his right hand.

· Constable Johnson saw Mr. Crocker's left hand was closed into a fist, potentially concealing something.

[26] It is also notable what factors were not present:

- There was no evidence that the officers thought that Ms. Ross and her friends were violent.
- There was no evidence that the attending officers thought that the occupants of the car were drug dealers.
- The officers were performing their investigative detention to investigate the occupants and the vehicle for connection to the cheque fraud case and to identify the occupants to assist the fraud investigation.
- There was no evidence that the cheque fraud case involved violence of any kind.

[27] I note the factors that were not present to show that there was a total absence of indicia of violence. There was no reasonable foundation for any fear that the people in the car could be violent, dangerous, or in possession of weapons. There was no evidence that the incident being investigated had a connection to violence. Furthermore, I do not think that a person sitting in a car with a closed fist with the palm facing upward causes the concern for safety to rise past the level of vagueness. Constable Johnson noted that he would be concerned about safety if any member of the public had a clenched fist. This does not seem to me to be consistent with the language of Mr. Justice Iacobucci in *Mann* where he said that a search must be reasonably necessary in the totality of the circumstances with more than a "vague or non-existent concern for safety."

[28] My conclusion is that the search of Mr. Crocker violated s. 8 of the Charter because there was no real concern for safety either subjectively or objectively. I do not find it necessary to rule on the lawfulness of the February 6 arrest until after I hear submissions on this voir dire with respect to s. 24(2) of the Charter.

SEARCH OF THE CHEVY SILVERADO TRUCK

[29] I next turn to the search of the Chevy Silverado truck. At the Burnaby apartment building where the CRU team attended on the morning of February 9, 2007, the building superintendent informed Constable Johnson that there were two parking stalls in the underground parking lot associated with penthouse number 1. One contained the Chevy Cavalier with B.C. licence 128 ALK. The other contained a Chevy Silverado pickup truck.

[30] At Constable Johnson's request, Constable Scott checked the licence number of the pickup. The plate number was inactive. On the plate, there was a current insurance decal whose number was scratched and illegible. On the dash of the Silverado were some papers which made it impossible to read the VIN. Constable Scott had a telephone conversation with a corporal at the North Vancouver RCMP detachment who told him that the British Columbia Motor Vehicle Act, R.S.B.C. 1996, c. 318, gave peace officers authority to enter vehicles

without a warrant. On this basis, Constable Scott called a tow truck whose driver opened the Silverado.

[31] Upon checking the VIN, Constable Scott learned that the vehicle was stolen. The current registered owner was the Special Investigation Unit of ICBC. At Constable Scott's direction, the tow truck driver disconnected the positive terminal of the battery so that the vehicle would not start. Constable Scott and Fry also placed so-called "rat traps" in front of the rear wheels of the Silverado so that if it were driven forward, the rear tires would be punctured.

[32] During submissions, both defence and Crown counsel produced various sections of the Motor Vehicle Act and made submissions about their effect. In the end, I was satisfied that no section of the Motor Vehicle Act provided to me authorized the entry into the vehicle by the police. As it was a warrantless search, the Crown has the burden of satisfying the Collins ([1996] 1 S.C.R. 265) test. That is:

1. Was the search authorized by law?
2. Was the law itself reasonable? and
3. Was the search conducted in a reasonable manner?

[33] Crown counsel also submitted that the accused had no standing to challenge the search of the Silverado. Both counsel agree that in determining whether the accused had a reasonable expectation of privacy in respect to the Silverado, I must look to the totality of the circumstances as outlined by the Supreme Court of Canada in *R. v. Edwards*, [1996] 1 S.C.R. 128 at 145-146:

The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:

- (i) presence at the time of the search;
- (ii) possession or control of the property or place searched;
- (iii) ownership of the property or place;
- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.

[34] Dealing with those factors, Mr. Crocker was not present at the time of the search. He certainly had control of the parking stall in which the Silverado was parked and, thus, de facto possession of the truck. He had a tenant's right of possession of the parking stall. The evidence before me is not particularly clear, but the officers believed that the building superintendent had observed Mr. Crocker driving the truck. The parking stall and the

Silverado parked in it were in a locked underground parking garage in a residential apartment building where Mr. Crocker had the right, as the tenant of penthouse number 1, to admit or exclude others from use of the parking stall or a vehicle parked in it. I have heard no evidence concerning Mr. Crocker's expectation of privacy with respect to this vehicle, but in my view, an expectation of privacy in these circumstances would be reasonable.

[35] Having reviewed the Edwards factors, I am satisfied that Mr. Crocker had a reasonable expectation of privacy in the Silverado pickup parked in one of the parking stalls associated to his penthouse in the locked underground parking level of his building. In light of the other facts I have found, (a) there was an unwarranted search and (b) there was no lawful basis for the search, I conclude that the accused's s. 8 rights were violated by the police entry into the Silverado at approximately 10:40 a.m. on February 9, 2007.

ARREST ON FEBRUARY 9, 2007

[36] I will now turn to deal with Mr. Crocker's arrest. The law on when an officer can arrest without warrant is set out in s. 495(1) of the Criminal Code. In this case, the relevant subsection reads as follows:

A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed an indictable offence

The test contained within this section has both subjective and objective grounds. The officer must subjectively believe that the person has committed an offence and those grounds must be objectively reasonable.

[37] Dealing first with subjective grounds, in direct examination, Constable Fry discussed the circumstances that led him to arrest Mr. Crocker:

Q When was your next involvement with the matter that brings you to court?

A That would be February the 9th, 2007.

Q What happened on that day?

A On that day, the CRU attended 2041 Bellwood Avenue. The purpose was to search for Larry Crocker and the female that was involved in the same offence on February 6th.

Q Okay, who made the decision to go to Burnaby to search for those two?

A I believe the decision was made by Constable Matt Johnson.

Q Why were you looking for those two?

A I was advised by Constable Johnson that the driver of that vehicle was arrested for possession of a controlled substance. When they were advised -- when the driver was advised that they were under arrest, they fled lawful custody. They started up the vehicle and left the area. There was a female occupant in the passenger seat.

Q And why was it that you were looking for Larry Crocker?

A Larry Crocker was determined to be the driver as mentioned by Constable Johnson. He had obtained a photograph at the scene prior to attending the Bellwood address.

Q You looked at that photograph?

A I did.

[38] And then subsequently in his direct examination, this is an answer without the question:

A Constable Scott and I were in a position to see Larry. He actually turned and looked at our vehicle where we were positioned and, to me, it looked like the same male that was in the picture that Constable Johnson had showed me earlier. Constable Smith, at one point, advised that she didn't think it was the same male.

And then in his evidence just prior to describing the arrest, he was asked:

Q Why did you do that?

This was Crown counsel's reference to a code 5 takedown.

A The reason I did it was I believed this to be the same person that had escaped lawful custody prior to this on February 6th and I didn't know if this person would attempt to do so again. They could potentially use the vehicle as a weapon.

[emphasis added]

[39] It is difficult to discern whether Constable Fry had sufficient subjective grounds to arrest the man in the underground parking lot. For one thing, he readily accepted Constable Smith's observations concerning a backpack, but appears to have completely ignored her opinion that the man was not Crocker. Constable Smith had just travelled 22 floors in an elevator with the male. Constable Fry had observed his face from a distance of 20 meters briefly in the underground parking lot. Rather than resolving the difficult issue of Constable Fry's subjective belief, I turn to the easier question of objective reasonability.

[40] The Crown has a burden to satisfy me on a balance of probabilities that Constable Fry's arrest of Mr. Crocker was objectively reasonable. This they have failed to do. All the frailties of Constable Johnson's actions, the very limited description of the information given to Constable Fry, the complete absence of any objective facts concerning the photograph of Larry Crocker, the conflict between the observation of Constable Smith and Constable Fry leave me unsatisfied. The "reasonable person" would not have arrested the man Constable Fry arrested in the underground parking lot. On this basis, I find that the arrest was

unlawful and a breach of Mr. Crocker's s. 9 Charter rights.

SEARCHES INCIDENT TO THE FEBRUARY 9 ARREST

[41] I now turn to the searches incident to the February 9th arrest. In *R. v. Stillman*, [1997] 1 S.C.R. 607, Mr. Justice Cory reviewed the conditions that must be met before a search pursuant to the common-law power of searching incidental to arrest may be valid (at 634):

First, the arrest must be lawful. No search, no matter how reasonable, may be upheld under this common law power where the arrest which gave rise to it was arbitrary or otherwise unlawful. Second, the search must have been conducted as an "incident" to the lawful arrest. To these almost self-evident conditions must be added a third, which applies to all searches undertaken by police: the manner in which the search is carried out must be reasonable.

[42] In *R. v. Caslake*, [1998] 1 S.C.R. 51, at paragraph 13, the Supreme Court of Canada reiterated that the common-law power of search incident to arrest is an exception to the ordinary requirements for a search in that it requires neither a warrant nor independent, reasonable and probable grounds. The right to search arises from the fact of the arrest because the arrest itself requires reasonable and probable grounds. If the arrest is found to be invalid, the search will also be invalid. Having found Mr. Crocker's arrest to be unlawful, the search of his person, the vehicle, and the backpack are also unlawful violations of his s. 8 Charter rights.

THE FIRST POLICE ENTRY INTO THE PENTHOUSE

[43] I next turn to deal with the entry into penthouse number 1 at approximately 12:35 p.m. on February 9, 2007. After the arrest of Mr. Crocker in the underground parking lot, Constable Johnson was concerned about the possibility that there might be one or more occupants of penthouse number 1 who would have the opportunity to conceal or destroy evidence while an Information to Obtain was being prepared in order to obtain a warrant to search the apartment. Even before the arrest, he had discussed this possibility in a telephone conversation with Staff Sergeant Cumming. In his testimony on the voir dire, Constable Johnson said that he had asked either Constable Fry or Constable Scott to ask Mr. Crocker if there was anyone in the apartment. He testified that Mr. Crocker had told the arresting officers that his girlfriend was in the apartment. Both Constable Fry and Constable Scott have testified that they were the one who asked the question and received the answer from Mr. Crocker. None of the officers have an entry in their notebooks recording the alleged conversation.

[44] In any event, Constable Johnson accompanied by Constable Baldinger, a uniformed member from the Burnaby detachment, and Constable Smith, a CRU member from North Van in plainclothes, entered penthouse number 1 at approximately 12:35 p.m. on February 9 using keys found on Mr. Crocker during the search of his person. They neither knocked nor announced their presence before entering the apartment. After their entry, Constable

Baldinger testified that he announced "Police" several times. A female emerged from the bedroom on the main floor of the penthouse, was recognized by Constable Johnson as the female he had arrested on February 6, and was arrested by Constable Smith for escaping lawful custody. Constable Smith remained with the female as Constables Johnson and Baldinger searched the penthouse.

- [45] On the upper floor, they found a door padlocked on the outside. Constable Johnson was able to open the padlock with one of the keys on the key ring that had been seized from the accused. After opening the padlock, Constable Johnson opened the door. After a brief look inside, he concluded that the room might be a clandestine methamphetamine lab. He closed the door, returned to the main floor, and the three police officers and the arrested female left the penthouse. Later that afternoon, two members of the Burnaby drug section returned to penthouse number 1 wearing Hazmat suits to investigate the suspected clandestine lab. In short order, they concluded that the room was not a clandestine lab. In their opinion, the padlocked room had formerly been a marihuana grow operation.
- [46] Constable Johnson sought to justify the entry into penthouse number 1 by relying on s. 11(7) of the CDSA. In support of that proposition, Crown counsel referred to *R. v. McCormack*, 2000 BCCA 57. In that case, officers had arrested the male occupant of an apartment in the underground parking lot of an apartment building. During the arrest, a female drove by who the officers thought knew the arrested man. They judged that by, I think, an exchange of glances between the female driver and the male prisoner. In the circumstances, the officers felt there were "exigent" circumstances to enter the apartment to secure it so that evidence would not be destroyed by the female before a search warrant could be obtained. The B.C. Court of Appeal agreed with the officers' assessment that these were indeed exigent circumstances.
- [47] I am unable to find similar "exigent" circumstances in the case at bar. The arrest of Mr. Crocker by Constable Fry and Constable Scott was carried out at gunpoint. From the time the officers ordered him to exit his vehicle and lie on the parking garage floor, there was no opportunity for him to communicate with anyone. No civilians were present to observe the arrest. For this reason, although the officers were correct that there was an occupant in the penthouse, there was no objective basis for their concern that the occupant might begin destroying relevant evidence. In terms of the time before a warrant could be obtained, Constable Johnson made no mention of the telewarrant provisions in his evidence. I am satisfied that a telewarrant could have been obtained before there was any reasonable likelihood that the occupant of the apartment would have had any reason to be alarmed about Mr. Crocker's whereabouts. Consequently, as the entry to the penthouse was a search of residence without a warrant and I have found that exigent circumstances as mentioned in s. 11(7) of the CDSA did not exist. The entry into Mr. Crocker's apartment violated his s. 8 rights.

STRIP SEARCH

[48] I turn now to the strip search. Mr. Justice Iacobucci and Madam Justice Arbour, writing for the majority of the Supreme Court of Canada, commented on the nature of strip searches in *R. v. Golden*, 2001 SCC 83, at para 83:

While the respondent and the interveners for the Crown sought to downplay the intrusiveness of strip searches, in our view it is unquestionable that they represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them.

They went on to outline the law on when strip searches are allowed (at paras. 98 and 99):

The fact that the police have reasonable and probable grounds to carry out an arrest does not confer upon them the automatic authority to carry out a strip search. Rather, additional grounds pertaining to the purpose of the strip search are required.

In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the Charter.

[49] The facts in *Golden* involved a strip search at the scene of the arrest, not at a police station. Mr. Justice Iacobucci and Madam Justice Arbour noted that there is a greater need to ensure that an accused is not concealing weapons or illegal drugs on their persons prior to their entry into a prison environment. Regarding short-term detainees, they wrote (at para. 97):

While we recognize that police officers have legitimate concerns that short term detainees may conceal weapons that they could use to harm themselves or police officers, these concerns must be addressed on a case-by-case basis and cannot justify routine strip searches of all arrestees.

[50] In *R. v. Vixaysongkham*, 2007 BCSC 183, Mr. Justice Tysoe dealt with a search related to booking at the police station. He wrote (at para. 33):

I agree with the comment of Bruce P.C.J., [as she then was] that a mere suspicion is not sufficient to justify a strip search in the sense that a hunch or a suspicion without any foundation is not adequate as a basis for conducting a strip search. If, however, a suspicion that the detainee has contraband on their body does have some foundation, then a strip search may be reasonable.

[51] There was no such foundation for a strip search in this case. At most, Constable Fry had a mere suspicion that Mr. Crocker had drugs or weapons on his person. Staff Sergeant Cumming, who supervised the booking of Mr. Crocker at the North Vancouver detachment, specifically stated that he conducted a search of Mr. Crocker, but not a strip search. His

evidence was that the North Vancouver detachment had a policy regarding when strip searches were appropriate and that Mr. Crocker's arrest did not fall within the policy. The evidence before me is that Constable Fry, while engaged in his duties as exhibits officer, decided that Mr. Crocker should be strip searched. He instructed Constable Scott to conduct such a search. Constable Scott, without independent consideration of the wisdom of the strip search, followed Constable Fry's direction and conducted a strip search.

- [52] On the evidence before me, I accept that Staff Sergeant Cumming correctly understood the law and policy relating to strip searches. Constables Fry and Scott did not. I find that the strip search of Mr. Crocker conducted by Constable Scott was a violation of Mr. Crocker's rights under s. 8 of the Charter because it was unreasonable in the circumstances.

SECOND VEHICLE SEARCHES

- [53] Lastly, I turn to the second searches of the two vehicles. The Silverado and the Cavalier were searched for a second time at the North Vancouver detachment after Mr. Crocker had been strip searched. I find that the second search of the Silverado breached Mr. Crocker's Charter rights under s. 8 for the same reason as the initial search did. It was an unwarranted search and there was no lawful basis for that search demonstrated to me.
- [54] The second search of the Cavalier was justified by the Crown as a search incidental to Mr. Crocker's arrest. Since I have found that Mr. Crocker's arrest in the underground parking lot was unlawful, then any searches premised on that arrest are also unlawful. Therefore, I find the second search of the Cavalier was a breach of Mr. Crocker's rights under s. 8 of the Charter.

"P. LEASK, J"

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