
CANADA / JUDGMENT

R. v. Dhami

2016 BCSC 2341

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 2341 R. v. Dhami

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dhami,

2016 BCSC 2341

Date: 20161213

Docket: 78405

Registry: Kelowna

Regina

v.

Ronjot Dhami

Before: The Honourable Mr. Justice Rogers

Oral Ruling on Voir Dire

Counsel for the Crown:

A. Baylis

Counsel for the Accused:

J.R. Ray

Place and Dates of Trial/Hearing:

Kelowna, B.C.

December 5, 6, 8 and 9, 2016

Place and Date of Result Given:

Kelowna, BC

December 12, 2016

Place and Date of Judgment:

Kelowna, B.C.

December 13, 2016

Introduction

- [1] Mr. Dhami is charged on a three-count indictment for possession for the purpose of trafficking heroin, cocaine, and fentanyl. Mr. Dhami seeks orders that evidence of the drugs that he excreted from his body while in police custody be excluded from the trial of the charges against him. Mr. Dhami's argument is based upon allegations that he was arbitrarily detained, was subject to unreasonable search and seizure, was not advised of the reason for his detention, and was denied his right to counsel, contrary to, respectively, s. 9, s. 8, and s. 10 of the Charter of Rights and Freedoms.
- [2] In a nutshell, Mr. Dhami says he was arbitrarily detained at a police traffic stop, that the police did not facilitate his wish for his lawyer to attend a bail hearing before a judicial justice of the peace the day of his arrest, and when the bail hearing was put over to the next day that he was not taken to Provincial Court at the hour specified by the J.J.P.

The Facts

- [3] On the morning of June 10, 2014, RCMP Cst. Diachok set up surveillance on an apartment building on Leon Avenue in Kelowna, B.C. Cst. Diachok's purpose was to observe the movement of people and vehicles associated with a group of persons said to be engaged in trafficking, among other things, heroin and cocaine. Information concerning this group came to the police from confidential human source or sources. The "leader" of the group was suspected to be one Lawrence Wust.
- [4] Cst. Diachok was at that time assigned to the Kelowna drug enforcement unit. The unit consisted of Cst. Diachok, Cst. Chetwynd, Cst. Minkle, and their supervisor Cpl. Albrecht. On the morning of June 10, Cst. Diachok was not certain where the other three members of his team were. It turned out that Cst. Minkle was in the Leon Avenue area while Cst. Chetwynd and Cpl. Albrecht were some distance away.
- [5] Cst. Diachok had, previously, been assigned to an RCMP detachment in Surrey, B.C. There he learned of confidential source intelligence that Mr. Ronjot Dhami went by the nickname Kane and was involved in drug trafficking. Cst. Diachok had never met Mr. Dhami, but he knew what Mr. Dhami looked like because he had seen photographs of him. Cst. Diachok knew Mr. Dhami to be an east indian male, about 6-feet tall, and skinny. After his transfer to

the Kelowna drug section, Cst. Diachok learned of additional confidential source information. That information was that Mr. Wust's operation received drugs from an east indian male who went by the nickname Kane. This Kane fellow was said to drive a brown van.

- [6] Sometime earlier in the year, Cst. Diachok saw Mr. Wust sitting in the passenger seat of a brown van. Cst. Diachok could not make out who the driver was.
- [7] As he sat outside the apartment building on Leon Avenue on the morning of June 10, Cst. Diachok saw the brown van parked in what he took to be an area for visitors. Nothing much happened with the brown van, but at 10:50 a.m. a silver Mercedes SUV pulled out of the apartment building and drove past Cst. Diachok's surveillance point. Cst. Diachok had a clear view of the occupants of the Mercedes. He did not recognize the driver but he knew who the passenger was, it was Mr. Dhami.
- [8] The Mercedes was not a vehicle known to the Kelowna drug team as being involved in the drug trade. The driver was a stranger to Cst. Diachok. Cst. Diachok's purpose that morning was to gather intelligence on Mr. Wust's operation. Cst. Diachok decided to follow the Mercedes. His purpose was to observe what the unknown driver and Mr. Dhami were up to.
- [9] The Mercedes went along Leon to Gordon Drive where it made a proper right turn. Cst. Diachok followed in his unmarked police car. On Gordon the Mercedes went into the lane closest to the centerline and then made an unsignalled lane change into the lane closest to the curb. The Mercedes made an unsignalled right turn from Gordon onto Lawrence Avenue. The Mercedes then turned left from Lawrence onto Kelglen Crescent.
- [10] At that point, Cst. Diachok assumed that the people he was following had "made" him for the police officer that he was. Cst. Diachok decided to initiate a traffic stop. His purpose was to bring the unsignalled lane change and right turn to the driver's attention. At the same time, he intended to engage the people in the Mercedes in some conversation. Whether those fellows responded to him or not, Cst. Diachok figured that he would gain some information that could be useful in later investigations.
- [11] Cst. Diachok turned on the emergency lights mounted in his car. He sounded his police siren. The Mercedes did not pull over right away. Instead, it slowed and carried along the road for 10 to 15 seconds.
- [12] When the Mercedes finally pulled over Cst. Diachok stopped behind it. He got out of his police car and walked up the driver's side of the Mercedes. He advised the driver, who turned out to be Mr. Julian Armstrong, that he had been stopped for failing to signal the lane change and right turn. At that moment Cst. Diachok did not have a booklet of traffic tickets. He was not in a position to actually issue a ticket for a Motor Vehicle Act offence.
- [13] Cst. Diachok engaged Mr. Armstrong and Mr. Dhami in conversation. He asked them what they were doing in Kelowna and where they were going. One or both replied that they were in Kelowna to go to the beach and that they wanted to look at girls. At the same time, Cst.

Diachok saw that Mr. Dhami was vigorously rubbing his hands together. Then he saw Mr. Dhami reach into the glove box. Mr. Dhami said that he was looking for the car's registration but that seemed odd to Cst. Diachok because he could see from where he was that there were no registration papers in the glove box.

- [14] Shortly after that, Cst. Diachok noticed a hand-rolled cigarette on the front passenger seat. He recognized it as a marihuana joint. The joint was in plain sight, lying between Mr. Dhami's left thigh and the seat bolster. Cst. Diachok advised Mr. Armstrong and Mr. Dhami that they were both under arrest for possession of marihuana. He ordered them out of the Mercedes.
- [15] As he was dealing with Mr. Dhami outside of the Mercedes, Cst. Diachok noticed a pea-sized glob of white cream-like lotion on Mr. Dhami's jaw. While the hand rubbing and glove box fidgeting that Cst. Diachok saw earlier struck him as unusual, the glob of lotion on Mr. Dhami's chin appeared to be downright out-of-place.
- [16] Cst. Diachok secured Mr. Armstrong and Mr. Dhami in handcuffs. Then he did a perfunctory officer safety search of the Mercedes' interior. Cst. Diachok found a jar of white creamy lotion in the footwell behind the driver's seat. What appeared to be a finger scoop of lotion had been recently taken out of the jar. In the glove box Cst. Diachok found that the CD cases and interior fabric bore globs of white creamy lotion. Again, those globs looked to him to have been freshly made - they had not settled and still had pointy tips.
- [17] At this point it is useful to note that in May 2014, Cst. Diachok was involved in a different drug bust. On that occasion, a fellow named Mr. Buttar was seen in a car that was engaging in behaviour consistent with a "dial-a-dope" operation. Mr. Buttar was known to be associated with Mr. Wust's group. Mr. Buttar's car took an unusually long time to stop in response to police intervention. When he did stop, Mr. Buttar was seen to have large smears of Vaseline on the front and rear of his trousers. A jar of Vaseline was found in his car. A large freshly drawn finger scoop of Vaseline had been taken from the jar. While he was in police detention, Mr. Buttar admitted that he had swallowed some packages of drugs and that he had put some additional packages of drugs up his rectum. Mr. Buttar subsequently voluntarily extracted the drug packages from his rectum. The drugs turned out to be heroin and cocaine.
- [18] The jar of lotion, the fresh extraction of some of its contents, the hand rubbing, the globs of lotion in the glove box, the dot on Mr. Dhami's chin, and the Mercedes' languor in responding to police lights and siren, together with police intelligence linking Mr. Dhami as Kane to Mr. Wust's heroin and cocaine operation plus his past experience with Mr. Wust's associate Mr. Buttar and the latter's use of his rectum to conceal drugs, coalesced into Cst. Diachok's formation of a subjective belief that Mr. Dhami had secreted heroin or cocaine or both in his rectum.
- [19] Cst. Diachok seized the marihuana joint and jar of lotion.

- [20] Cst. Diachok advised Mr. Dhami of his right to consult legal counsel and of his right to silence. He told Mr. Dhami that his plan was to take Mr. Dhami back to the RCMP detachment in order to secure the evidence of the drugs that Cst. Diachok believed Mr. Dhami had hidden up his bottom. Mr. Dhami indicated that he understood his right to counsel and silence. He said first that he wanted to talk to a lawyer; then said that he did not. Mr. Dhami changed his mind at the detachment. After he was searched and booked into cells, Mr. Dhami had several consultations with his lawyer Mr. Tessmer. Mr. Tessmer is a very experienced criminal defence lawyer. He is very familiar with the way that remand and bail hearings are conducted in Kelowna.
- [21] Mr. Dhami was placed in a regular detention cell. The cell was monitored by a video camera. The police had turned off the cell's water supply and had emptied the toilet bowl. This made it a "dry cell". The idea was that when Mr. Dhami had a bowel movement he would not be able to flush away the evidence that came out with the movement.
- [22] The members of the drug unit were all aware of their responsibility to get Mr. Dhami before a justice without unreasonable delay and within 24 hours. With the arrest and detention happening around the noon hour, they anticipated that they would not be able to get Mr. Dhami to a Provincial Court judge before that court closed for the day. They began to prepare the materials necessary to convene a bail hearing by telephone before a judicial justice of the peace.
- [23] At approximately 12:12 hours that day, Mr. Tessmer and Cst. Diachok had a telephone conversation. Cst. Diachok testified that he advised Mr. Tessmer that Mr. Dhami had originally been arrested for possession of marihuana but that he was being held on suspicion of having concealed drugs in his rectum. Cst. Diachok does not recall saying anything to Mr. Tessmer about the plan to ask for a three-day remand or about having a bail hearing before a J.J.P. Cst. Diachok does not recall Mr. Tessmer asking him to be sure to alert Mr. Tessmer of the bail hearing. Cst. Diachok testified that he was sure that Mr. Tessmer did not leave a contact number so that Mr. Tessmer could be present for the bail hearing. Cst. Diachok said that in his experience it is unusual for detainees to have counsel present at hearings before a J.J.P. and that he would likely remember it had Mr. Tessmer made that request.
- [24] Mr. Tessmer testified that he spoke to Cst. Diachok at around noon on June 10. Mr. Tessmer said that in that conversation Cst. Diachok refused to tell him on what grounds Mr. Dhami had been arrested. He recalled that Cst. Diachok told him that Mr. Dhami was being held for possession or trafficking of drugs and that the police were going to ask for a three-day remand. Mr. Tessmer testified that he told Cst. Diachok that he wanted to attend the J.J.P. hearing, that he left his phone number with Cst. Diachok, and that he intended to oppose the application for a three-day remand order.

- [25] Mr. Tessmer went on to testify that around 16:30 hours on the 10th he gave instructions to his assistant Ben to call the guard station at the RCMP detachment and leave his mobile number there. The purpose of that instruction was, according to Mr. Tessmer, to ensure that he would be alerted to the start of the bail hearing and that he could attend by phone and make submissions on his client's behalf.
- [26] Cst. Chetwynd was charged with arranging for and conducting the hearing before the J.J.P. At approximately 15:00 hours he sent the necessary materials to the Justice Center in Burnaby. After waiting for a reply for about an hour, Cst. Chetwynd telephoned the Justice Center to find out what was going on. Someone there told him to resend some of his materials. He complied. The charge specified on the bail materials was possession of heroin.
- [27] The J.J.P. convened Mr. Dhami's bail hearing within a few minutes of 17:30 hours on the afternoon of June 10th. Cst. Chetwynd was not aware of any desire by Mr. Tessmer to attend that hearing. He therefore made no arrangements to have Mr. Tessmer be there in person or by telephone. When the hearing was convened Mr. Dhami attended in person. Cst. Chetwynd acted as Crown. Mr. Dhami advised the J.J.P. that he did not want the bail hearing to go ahead without Mr. Tessmer being present. The exact exchange between the J.J.P., Mr. Dhami and Cst. Chetwynd was:

THE COURT: Thank you. Mr. Dhami, have you been given a chance to talk to a lawyer?

THE ACCUSED: Yes, I have.

THE COURT: Did you talk to one?

THE ACCUSED: Yes, ma'am.

THE COURT: Your lawyer or legal aid?

THE ACCUSED: A lawyer.

THE COURT: Okay, what is your lawyer's name, sir?

THE ACCUSED: Tissmer [phonetic]. Tessmer.

THE COURT: Sorry, I didn't catch that?

THE ACCUSED: Tessmer.

THE COURT: Estmere [phonetic].

CONSTABLE CHETWYND: It's Stan Tessmer.

THE COURT: Tessmer, I got it, okay. All right, and does Mr. Tessmer have instructions for the court because once the lawyers are involved, they often want the matter put over so that they can help you out. Is that the case here?

CONSTABLE CHETWYND: Do you wish to have your lawyer present?

THE ACCUSED: Yes, ma'am. I talked to him and he said that he was going to figure it out or talk to -- I -- I don't know.

THE COURT: He wants to talk to the Crown? All right, Constable Chetwynd, what is the Crown asking?

- [28] Cst. Chetwynd went on to describe the grounds on which the police relied in their application for an order that Mr. Dhami be remanded in custody for three days. Those grounds were substantially the grounds noted above and on which Cst. Diachok formulated his belief that Mr. Dhami had drugs secreted in his rectum.
- [29] The J.J.P. declined to consider the matter. She held that because Mr. Dhami wanted to have his lawyer present and because his lawyer was not there, the appropriate thing to do was to adjourn the matter over to Provincial Court the next morning. Neither Cst. Chetwynd nor Mr. Dhami voiced any objection to that decision, although Cst. Chetwynd did indicate that the police were concerned to maintain control over Mr. Dhami so as to minimize the risk of losing the evidence they believed he was hiding in his body.
- [30] Cst. Chetwynd testified that had he known that Mr. Tessmer wanted to attend the J.J.P. hearing he would have facilitated it happening. Cpl. Albrecht endorsed that evidence. Cpl. Albrecht testified that it is not uncommon for counsel to attend J.J.P. hearings. He said that if the police know that a lawyer wants to appear for a client at a hearing the police will do what is necessary to make that happen. It is not police policy to exclude lawyers from those hearings.
- [31] Mr. Dhami returned to his dry cell. Cst. Chetwynd received the J.J.P.'s order that Mr. Dhami have a bail hearing at 9:30 a.m. on June 11. He placed that order along with a tag indicating that Mr. Dhami had court the next morning in the appropriate place in the guard's station in the cell block.
- [32] Around 20:00 hours on the night of June 10, Mr. Dhami stood up in his cell, put his right hand down the rear of his pants and fumbled around in the area of his buttocks. He then sat on the cell's toilet while concealing his right hand from view. Then he stood up and once again put his hand down the rear of his pants and fished around with it in the area of his buttocks. He called the guards and told them that he had had a bowel movement. No drugs were found in the feces he left in the dry toilet bowl. However, the police reviewed the video recording of Mr. Dhami's antics in the cell leading up to and following his sitting on the toilet. What they saw there, i.e.: the movements described above, convinced them that Mr. Dhami had removed drugs from his rectum, held the drugs hidden in his hand while he sat on the toilet, and had then re-inserted the drugs in his rectum.

- [33] Cst. Diachok was still on duty when this happened. Mr. Dhami asserted to Cst. Diachok that he ought to be released because there were no drugs in his feces. He was probably quite disappointed when the police decided to not let him go.
- [34] Cpl. Albrecht learned of Mr. Dhami's antics when he arrived at the detachment early on the morning of the 11th. Cpl. Albrecht ensured that those details were communicated to Mr. Burnett ahead of the opening of court that morning. Mr. Burnett was retained by the federal Crown to prosecute drug offences. When Mr. Burnett arrived at the Kelowna Provincial Court that morning he was fully briefed and able to speak to the application for an order that Mr. Dhami be held on a three-day investigational remand.
- [35] For his part, Mr. Tessmer attended the RCMP detachment at approximately 9:40 a.m. that morning. He waited for about 15 minutes and then was shown into a room where he had a private consultation with Mr. Dhami. What Mr. Tessmer did after that meeting was not put into evidence. I infer that Mr. Tessmer had gone to the courthouse and there he learned that there was very limited judge time available that morning. I make that inference because just before noon that day Mr. Tessmer went back to the RCMP detachment (the courthouse and the detachment are separated by a laneway and a parking lot - it is a matter of a few minutes' walk between the two) and met with Mr. Dhami again. At this meeting Mr. Tessmer had Mr. Dhami sign a counsel designation form.
- [36] Mr. Dhami never was transported from the RCMP cells to the courthouse for a bail hearing. The evidence clearly established that Cst. Chetwynd took the steps conventionally performed by the police after a bail hearing to ensure that a prisoner is taken to court the next day. The evidence also clearly established that the arrangement for and actual transportation of a prisoner from the cells to the courthouse is done by the cell guards and the provincial sheriffs service. The RCMP do not have a role in that process. There was no evidence at all as to why it was that Mr. Dhami was not taken over to the courthouse in the morning of the 11th.
- [37] Mr. Tessmer acknowledged that while he knew that Mr. Dhami could have been taken over to the courthouse for his bail hearing, he did not insist that that happen. Mr. Tessmer acknowledged that his reason for having Mr. Dhami sign the counsel designation form was probably so that he could appear at the bail hearing in Mr. Dhami's absence.
- [38] Mr. Tessmer also acknowledged that it was not unusual for a prisoner to not be brought to the courthouse at exactly 9:30 a.m. on the morning of his hearing. Many factors influence whether the prisoner will be brought over at that time. Those factors include the availability of court time, staffing levels at the courthouse, and the limited capacity of the courthouse to accommodate a large number of prisoners at any one time.
- [39] The learned Provincial Court judge that morning was His Honour Judge Chapman. Again, the evidence is not very clear on this but it is likely that at Mr. Tessmer's insistence Mr. Dhami's bail hearing was expedited. Judge Chapman interrupted the trial that was before him so that Mr. Burnett and Mr. Tessmer could make their positions known. Mr. Dhami's

bail hearing started at approximately noon on the 11th. Mr. Dhami was still in cells. Mr. Tessmer was not insisting that his client be present for the hearing. In fact, he persuaded the learned judge that it would be okay to proceed on the strength of the counsel designation form alone.

[40] Mr. Burnett outlined the Crown's case for a three-day remand. He finished just at the start of the lunch break. Mr. Tessmer was anxious to proceed, but Judge Chapman decided that it would not be fair to hold staff over the lunch break. He adjourned the bail hearing until after lunch.

[41] Unfortunately for Mr. Dhami, the court lunch break was a little too soon. At approximately 1 p.m. on the 11th Mr. Dhami was seen to be crouched on the floor of his cell. He was using a plastic utensil, a fork or a spoon, to poke little packages down through the holes of the floor drain. The police interrupted this activity. Mr. Dhami was found to have feces and little plastic wrapped packages smeared on his feet. There were feces and more little feces-smeared plastic wrapped packages in and around the toilet and floor of the cell. Several more such packages were found in the water below the floor drain. The police collected and seized all of them. When analyzed, they were found to comprise:

- 7 bags containing a total of 1.24 grams of heroin;
- 23 bags containing a total of 5.86 grams of crack cocaine; and
- 23 bags containing a total of 4.59 grams of fentanyl.

[42] There is no doubt that Mr. Dhami expelled these packages from his rectum sometime shortly before 13:00 hours on June 11, 2014. The Crown wishes to adduce those drugs into evidence at the trial of the charges against Mr. Dhami.

The Applications

[43] Mr. Dhami has filed two applications for relief pursuant to the Charter of Rights and Freedoms. He seeks orders excluding from trial the evidence of the drugs that the police seized on June 11, 2014.

[44] In the first application, Mr. Dhami asserts abrogation of his rights to be: free from unreasonable search and seizure under s. 8; free from arbitrary detention under s. 9; and to be advised of the reasons for his detention and right to counsel under s. 10.

[45] The foundation for these allegations is Mr. Dhami's assertions that:

- Cst. Diachok detained Mr. Dhami when he was a passenger in the Mercedes, but failed to inform Mr. Dhami that the detention was pursuant to an investigation under the Controlled Drugs and Substances Act;
- throughout his dealings with Mr. Dhami, Cst. Diachok failed to inform him that the true reason for his detention was investigation under the Controlled Drugs and Substances Act;

- Cst. Diachok failed to inform him of his right to counsel; and
- having consideration of s. 495(2) of the Criminal Code, Cst. Diachok's observation of a single joint of marihuana on Mr. Dhami's seat was not sufficient to justify arresting Mr. Dhami, thus making the arrest unlawful and therefore an arbitrary detention.

[46] It has to be said that in his submissions, Mr. Dhami's counsel Mr. Ray did not address the first two of the factual allegations in support of the first notice of application.

[47] In the course of his submissions, Mr. Ray articulated two additional allegations of breach of Mr. Dhami's Charter rights. Mr. Ray argued that Cst. Diachok's search of the Mercedes following Mr. Dhami's arrest was incidental to an unlawful arrest and was, therefore, an unlawful and unreasonable search in breach of Mr. Dhami's s. 8 rights. Further, Mr. Ray argued that the grounds cited by Cst. Diachok for detaining Mr. Dhami for possession of heroin hidden in his rectum were not sufficient to meet the objective criteria for a warrantless arrest, thus rendering Mr. Dhami's arrest for that offence unlawful and arbitrary contrary to his s. 9 rights.

[48] In the other application, Mr. Dhami asserts a breach of his right to be free from arbitrary detention under s. 9 and a breach of his right to fundamental justice under s. 7 of the Charter.

[49] The foundation for these allegations is Mr. Dhami's assertions that:

- the police deliberately failed to alert Mr. Tessmer of the convening of the hearing before the J.J.P., thus depriving him of the benefit of counsel at that hearing; and
- the failure of the police to produce Mr. Dhami at Provincial Court at 9:30 a.m. June 11, 2014 as ordered by the J.J.P.

Parties' Positions

Arrest for Possession of Marihuana

[50] Mr. Ray argued that the mere observation by a police officer of a rolled-up cigarette-shaped object with twisted ends is not sufficient grounds to underwrite an objective belief that the object is, in fact, a marihuana joint. Further, Mr. Ray argued that the evidence did not go so far as to establish an objective basis on which one could form a reasonable belief that Mr. Dhami had possession and control of that cigarette-shaped object. If one or both of those arguments are true, then, according to Mr. Ray, the circumstances were not such that Cst. Diachok could have exercised his power of arrest pursuant to s. 495(1)(b) of the Criminal Code. In that case, the arrest for possession of marihuana was contrary to law, was unlawful, and was therefore arbitrary and in breach of Mr. Dhami's s. 9 rights. Mr. Ray's argument continued: everything that followed the marihuana arrest, including the search of the Mercedes, was likewise unlawful and, being unlawful, was contrary to Mr. Dhami's s. 8 rights.

- [51] Ms. Bayliss for the Crown argued that the circumstances did provide an objective basis on which an officer of Cst. Diachok's training and experience would reasonably come to the belief that the rolled-up cigarette was marihuana. Similarly, the proximity of the cigarette to Mr. Dhami - they occupied the same seat in the car - was sufficient to underwrite a reasonable belief that Mr. Dhami exercised the necessary degree of possession and control over the cigarette.
- [52] Even if the marihuana arrest was not lawful, Ms. Bayliss argued that Mr. Dhami cannot complain about Cst. Diachok's search of the interior of the Mercedes. That is because Mr. Dhami did not establish that he had a reasonable expectation of privacy with respect to that vehicle.

Arrest for Possession of Heroin

- [53] Mr. Ray's argument with respect to the possession of heroin arrest echoed his arguments on the marihuana arrest. He submitted that the grounds on which Cst. Diachok relied to detain Mr. Dhami for possession of heroin were not sufficient to support an objectively reasonable belief that Mr. Dhami had secreted drugs in his rectum. Mr. Ray pointed to the fact that Cst. Diachok's information that Mr. Dhami's nickname was Kane was two years old and was sourced in the Lower Mainland, while the information connecting a person with the same nickname to Mr. Wust's group was current and did not suggest that Kane came from the Lower Mainland.
- [54] Mr. Ray went on to submit that Cst. Diachok relied heavily on his experience with Mr. Buttar in coming to the belief that Mr. Dhami had hidden drugs in his rectum. But, said Mr. Ray, there was little evidence to connect Mr. Buttar with Mr. Dhami and there were significant factual differences between what happened with Mr. Buttar and what Cst. Diachok saw with Mr. Dhami.
- [55] Ms. Bayliss agreed that while there are some differences between the Buttar matter and the present case, the similarities are sufficient to ground an objective reasonable belief that Mr. Dhami had put drugs in his rectum. And, said Ms. Bayliss, it is important to note that the police intelligence about Mr. Wust's group included information that Kane the reloader drove a brown van, that Mr. Wust had been seen in a brown van, and that same brown van was parked outside the apartment building that the police believed Mr. Wust was using for his drug activities. Then, who should appear coming out of that same building but Mr. Dhami, known to Cst. Diachok as Kane. The totality of the circumstances known to Cst. Diachok at the time were, in Ms. Bayliss' submission, sufficient to ground both a subjective and objective belief that Mr. Dhami had secreted drugs inside his body.

J.J.P. Hearing

- [56] Mr. Ray urges the court to find that during their phone conversation around noon on the 10th Mr. Tessmer made it clear to Cst. Diachok that Mr. Tessmer wished to appear with Mr. Dhami when the J.J.P. hearing was convened later that day. He says that Mr. Tessmer left his contact number with Cst. Diachok. He says that the court should find that Cst. Diachok knew from that conversation that if Mr. Tessmer did appear at the J.J.P. hearing, he would oppose an order for a three-day investigational remand. Mr. Ray argues that Cst. Diachok deliberately withheld that information from his colleagues. He says that Cst. Diachok did this so as to minimize the risk that Mr. Dhami would be released from custody before passing the drugs out of his body.
- [57] If that is what happened, Mr. Ray argues that Cst. Diachok perpetrated an egregious breach of Mr. Dhami's right to fundamental justice. That breach consisted of preventing Mr. Dhami from having the benefit of counsel of his choice at a judicial hearing, the subject of which was Mr. Dhami's personal liberty. The appropriate remedy for a breach of that magnitude is, in Mr. Ray's estimation, a judicial stay of proceedings.
- [58] Mr. Ray noted that he could not show a causal link between the alleged breach of fundamental justice and the discovery of the drugs. That is because no one can know what would have happened had Mr. Tessmer attended the J.J.P.'s hearing. Perhaps he would have been released, perhaps he would have been remanded for three days, or perhaps the J.J.P. would have adjourned the case to the following morning in any event. Mr. Ray argued that it was not necessary for his client to establish a causal link between the breach and the production of evidence. He said that this situation is similar to the case where a s. 10(b) right to counsel breach automatically results in exclusion of the accused's statement. In such a case it cannot be said that the breach caused the accused to give the statement - it is enough that the breach occurred.
- [59] Ms. Bayliss argued otherwise. She submitted that Mr. Tessmer may be mistaken about what he said to Cst. Diachok or that he may be mixing his memory of this file with one of the many other matters on which Mr. Tessmer has acted. She argued that there was no evidence that Cst. Diachok deliberately failed to tell his colleagues that Mr. Tessmer wished to attend the J.J.P. hearing. That fact could easily have slipped Cst. Diachok's mind as he carried out his duties that afternoon and evening.
- [60] Ms. Bayliss says that in any event no harm was done by Mr. Tessmer's absence; the J.J.P. properly adjourned the matter over to Provincial Court the following morning and, until events in cells overtook it, the bail hearing actually convened as it was supposed to in Provincial Court. Ms. Bayliss argued that Mr. Dhami cannot point to a fundamental unfairness in the process that led to his suffering an irreversible and irremediable legal setback.

Provincial Court Hearing

- [61] Mr. Ray simply points out that the J.J.P. made an order that Mr. Dhami be presented to the Provincial Court at 9:30 a.m. on June 11, 2014, and that the authorities did not comply with that order. He argued that the Crown provided no explanation for the system's failure to comply with the J.J.P.'s order. That, again, comprises a fundamental breach of Mr. Dhami's right to be dealt with according to law and justifies a judicial stay of proceedings.
- [62] Ms. Bayliss argued that Mr. Dhami's bail hearing began when he appeared before the J.J.P. and pursuant to her order the hearing continued on the morning of the 11th. He was, she said, dealt with according to law throughout. He cannot complain about that.
- [63] Ms. Bayliss argued that the real issue in this leg of the application is whether a failure by the authorities prolonged Mr. Dhami's detention such that his detention became arbitrary and a breach of his s. 9 rights. Ms. Bayliss argued that Mr. Dhami was fated to remain in detention until his hearing before the Provincial Court judge was complete. His detention was lawful until the court ordered either his release or that he remain in custody. Ms. Bayliss said that whether he was in custody in the police cells or in the holding cells in the provincial courthouse is of no importance and could not be the ground for a complaint of a breach of his s. 9 rights.

Applicable Law

Arbitrary Detention

Charter Provisions

- [64] Section 9 of the Charter of Rights and Freedoms protects citizens from arbitrary detention. The section reads:

9 Everyone has the right not to be arbitrarily detained or imprisoned.

- [65] A peace officer may make a legal warrantless arrest provided that the requirements of s. 495(1) or (2) of the Criminal Code are met. Section 495(1) and (2) read:

Arrest without warrant by peace officer

495 (1) 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 or is about to commit an indictable offence;
- (b) a person whom he finds committing a criminal offence;

- [66] In *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-251, the court set out a two-part test to justify a warrantless arrest:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds, must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a *prima facie* case for conviction before making the arrest.

[67] The person in the place of the officer is entitled to employ that officer's training and experience in the detection of crime.

Search and Seizure

[68] Section 8 of the Charter protects citizens from unreasonable searches. Section 8 reads:

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

[69] A police officer is entitled to make a search incidental to arrest. However, if the arrest turns out to be unlawful, the incidental search may also be unlawful. If unlawful, the incidental search will be seen as unreasonable and as a breach of the person's s. 8 right.

[70] To have standing to assert a breach of his s. 8 rights, an accused must satisfy the court that he had a reasonable expectation of privacy over the thing searched and that the search of that thing was unlawful. In the context of a passenger in a vehicle, circumstances such as relationship with the driver, ownership of the vehicle, the authority to permit or deny others to use the vehicle, long-term occupation of the vehicle will inform the court as to whether the passenger had a reasonable expectation of privacy with respect to the contents of the vehicle, see: *R. v. Belnavis*, [1997] 3 S.C.R. 341 at paras. 22 and 23.

Right to Counsel

[71] Section 10(a) and (b) of the Charter provides:

Arrest or Detention

10 Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right;

Fundamental Justice

[72] Citizens of Canada are entitled to have the authorities deal with them fairly. That right is guaranteed by S. 7 of the Charter:

Life, Liberty and Security of Person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[73] The most familiar practical instance engaging s. 7 is an accused's fundamental right to make full answer and defence to the charges against him. Behaviour by the authorities abrogating that right is behavior contrary to s. 7. So, for example, failure by the prosecution to disclose information relevant to the charges may negatively affect the accused's right to make full answer and defence: see *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

Remedies

[74] A person whose rights have been infringed may apply to the court for a remedy. Section 24 of the Charter provides as follows:

Enforcement of Guaranteed Rights and Freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of Evidence Bringing Administration of Justice into Disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[75] In the present case, Mr. Dhami seeks the remedy of a judicial stay of proceedings consequent to Cst. Diachok's failure to facilitate Mr. Tessmer's appearance at the J.J.P. hearing.

[76] An order for a judicial stay is limited to circumstances where the infringement renders the trial of the accused unfair or upsets the integrity of the judicial system. A stay is appropriate only where the prejudice to the accused will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome and no other remedy is reasonably capable of removing the prejudice: *R. v. Regan*, 2002 SCC 12.

Discussion

Arrest for Possession of Marihuana

- [77] I am satisfied that Cst. Diachok stopped the Mercedes for a legitimate purpose: its driver had committed two violations of the Motor Vehicle Act. Having observed those infractions, Cst. Diachok was entitled to stop the car. Having stopped the car, Cst. Diachok had a discretion to simply draw the driver's attention to his transgressions. It was not necessary for Cst. Diachok to write out a violation ticket to legitimize his decision to stop the car. This was not a random or arbitrary detention.
- [78] It was also open to Cst. Diachok to try to engage the occupants of the car in conversation. Other than being required to provide his name and driver's license, Mr. Armstrong was under no obligation to converse with Cst. Diachok. The same is true of Mr. Dhami. That Cst. Diachok wanted to learn something about the doings of those two fellows does not make his attempt to have conversation with them untoward or illegal. It does not convert a legitimate traffic stop into something else.
- [79] It is also important to note that until Cst. Diachok put Mr. Dhami under arrest for possession of marihuana, Mr. Dhami was free to leave Mr. Armstrong and the car. Had he wanted to, he could have wandered off down the street and Cst. Diachok would have had no grounds to detain him.
- [80] However, Mr. Dhami lost his right to liberty when Cst. Diachok observed the rolled-up cigarette lying between the passenger seat bolster and Mr. Dhami's left thigh. That cigarette was in plain sight - to see it, Cst. Diachok did not have to do anything other than simply look inside the car. While it is true that Cst. Diachok could not have known with certainty that there was marihuana inside that cigarette, it is also true that the appearance of the cigarette met all of the standard and generally understood characteristics of a marihuana joint. It was made of thin tissue paper - Cst. Diachok said it may have been the Zig Zag paper that is commonly used to make joints. It was obviously hand rolled; it was not a product of a commercial operation. Both ends were twisted so as to prevent its contents from falling out; it did not have the kind of filter associated with tobacco cigarettes.
- [81] In other words, the rolled-up cigarette looked like what marihuana joints usually look like. Cst. Diachok knew this by virtue of his experience in drug enforcement. In my view, any reasonable person who does not live in a cave or has been raised by wolves would also immediately associate that rolled-up cigarette with a marihuana joint.
- [82] I find that Cst. Diachok subjectively believed that the rolled-up cigarette was a marihuana joint. I also find that circumstances were such that an officer, and indeed a typical citizen of this country, would reasonably believe that it was a marihuana joint.
- [83] It was not, in my opinion, necessary for Cst. Diachok to have seen or heard anything more in order to come to the conclusion that he did. A joint of marihuana looks like what it is. One does not need a DNA test to reasonably believe that an animal that looks like a horse is, in fact, a horse. Appearance alone will suffice, as it does in this case.

- [84] The cigarette was lying on the seat beside Mr. Dhami's left thigh. If it was not touching his body, the cigarette was in extremely close to it. Mr. Dhami may not have actually handled the cigarette, but there can be no doubt that it was within his control. That fact was apparent to Cst. Diachok as it would have been to any reasonable observer in Cst. Diachok's position.
- [85] On the evidence here, I have no difficulty concluding that grounds existed on which Cst. Diachok and any reasonable objective observer in his position would have formed a belief that Mr. Dhami had possession of marihuana. I find that Cst. Diachok's decision to arrest Mr. Dhami for possession of marihuana was lawful.

Arrest for Possession of Heroin

- [86] The same criteria apply for the heroin arrest as for the marihuana arrest: for the arrest to be lawful, Cst. Diachok must have subjectively believed that Mr. Dhami was in possession of heroin or, as he said, cocaine, and the circumstances of the arrest must be such that an objective officer in Cst. Diachok's position would reasonably have come to the same belief.
- [87] No issue was raised with respect to Cst. Diachok's subjective belief. I am satisfied that that ground has been made out. The real question is whether an objective officer in his position would reasonably have come to the same conclusion.
- [88] The grounds on which the crown relies to satisfy the objective element of the test are:
- Two years earlier, while he was stationed in the Lower Mainland, Cst. Diachok learned that an east indian male named Ronjot Dhami was using the nickname Kane. Cst. Diachok looked at photographs of Mr. Dhami and became familiar with his appearance.
 - Sometime prior to June 10, Cst. Diachok learned from another officer that a confidential source in Kelowna said that a tall skinny east indian male named Kane was reloading drugs for Mr. Lance Wust and that Kane was driving a brown van.
 - Cst. Diachok suspected that Mr. Wust was operating a group of individuals who sold drugs in Kelowna.
 - In May 2014, Cst. Diachok observed a car in which a Mr. Buttar was a passenger. The car was engaged in activity consistent with "dial-a-dope" drug trafficking. The car took an unusually long time to stop in response to police instruction. Mr. Buttar was found to have smears of Vaseline on the front and rear of his trousers. A jar of Vaseline was in the car and a fresh finger scoop of Vaseline appeared to have been taken out of the jar. Mr. Buttar subsequently admitted to having swallowed packages of drugs and of putting other packages of drugs into his rectum. When recovered, the drugs turned out to be heroin and cocaine.
 - Confidential source information indicated to the police that Mr. Buttar was associated with Mr. Wust's group.
 - Mr. Wust was thought to be associated with an apartment building on Leon Avenue in Kelowna.

- Cst. Diachok had observed a brown van in Kelowna and Mr. Wust was riding as a passenger in that brown van.
 - On the morning of June 10, 2014 Cst. Diachok saw that same van parked in the visitor area of the apartment building on Leon Avenue.
 - Cst. Diachok saw Mr. Dhami riding as a passenger in a Mercedes car leaving the apartment building.
 - When he activated his police equipment, the Mercedes responded by slowing but it continued to roll for 10 to 15 seconds before it came to a stop.
 - When Cst. Diachok first saw Mr. Dhami he was vigorously rubbing his hands together. There appeared to be no reason for Mr. Dhami having then reached into the car's glove box.
 - When Mr. Dhami was out of the car, Cst. Diachok saw a pea-sized glob of white cream on Mr. Dhami's jaw.
 - In the footwell behind the Mercedes' driver's seat Cst. Diachok found a jar of white creamy lotion with a finger scoop recently taken out of it.
 - In the glove box Cst. Diachok saw globs of white lotion on the CD cases and fabric of the box itself. The lotion had not soaked into the fabric and the globs had pointy tops. This indicated to Cst. Diachok that the globs had been recently deposited there.
- [89] I find that absent Cst. Diachok's experience with Mr. Buttar, the remaining facts of the present case could not have supported a reasonable belief that Mr. Dhami had done something so unusual - not to say so profoundly stupid and potentially self-destructive - as putting heroin or cocaine up his rectum.
- [90] It is critical, then, to consider the elements of similarity or disparity in the Buttar situation and the present case. In both incidents the car carrying the suspect took an unusually long time to stop in response to police direction. In both cases the car contained a jar of lubricant and a scoop of lubricant had been recently taken out of the jar.
- [91] There are, however, significant differences between the two matters. Mr. Buttar had smears of lubricant in and around the clothing that covered, among other things, his rectum. Those smears would be consistent with Mr. Buttar having put Vaseline on one or more of his fingers to aid in inserting the drugs in his rectum and then using those same digits to rearrange his trousers. There were no such smears on Mr. Dhami's pants. The only indication that Mr. Dhami had actually touched the lotion was the dot on his face. It does not take an anatomist to appreciate that a person's face is a long way away from his rectum.
- [92] Another significant difference is that before he was stopped, Mr. Buttar was seen to engage in activity consistent with drug trafficking. A person engaged in drug trafficking is likely to have a supply of drugs on hand.

- [93] The Mercedes, on the other hand, did nothing more suspicious than fail to signal a lane change and a right turn. Cst. Diachok saw nothing about the behaviour of the Mercedes that would suggest to a reasonable and objective observer in his position that its occupants were in possession of heroin or cocaine.
- [94] Without some evidence that the people in the Mercedes were trafficking in drugs, the mere presence of lotion in the car and of Mr. Dhami rubbing his hands together and having a dot of lotion on his chin and rather dated source information that Mr. Dhami used the nickname Kane are not enough, I think, to ground a reasonable belief that he had secreted heroine in his rectum.
- [95] For that reason I have come, reluctantly, to the conclusion that the evidence here does not satisfy the objective element necessary to make lawful Mr. Dhami's arrest for possession of heroin. That arrest was, I find, not lawful. It was therefore arbitrary and an infringement of Mr. Dhami's right to liberty as guaranteed by s. 9 of the Criminal Code. Because Mr. Dhami was being held on that charge when the drugs were retrieved by the police, it is open to Mr. Dhami to seek an order that the evidence of those drugs be excluded from the trial of the charges against him. The Crown may wish to argue that pursuant to s. 24(2) that evidence be admitted nonetheless. That argument must be the subject of a subsequent hearing.

J.J.P. Hearing

- [96] The point of departure in discussion of this leg of the application is to resolve the conflict in the evidence over what Cst. Diachok knew of Mr. Tessmer's desire to attend the J.J.P. hearing. Cst. Diachok testified that he had no recollection of Mr. Tessmer making such a request. Mr. Tessmer testified that he did say to Cst. Diachok that he wanted to attend the J.J.P. hearing and that when there he would oppose a request for a three-day investigational remand.
- [97] I am persuaded by Mr. Tessmer's evidence that Cst. Diachok told him on the phone the police would be seeking an order from the J.J.P. that Mr. Dhami be remanded for three days. I find that Mr. Tessmer told Cst. Diachok that he would oppose that application and that he wanted to attend the J.J.P. hearing when it was convened. I find that Mr. Tessmer gave his phone number to Cst. Diachok and asked that he be called when the hearing had been arranged. I have come to those conclusions on the strength of Mr. Tessmer's testimony-in-chief and the fact that he was not shaken on cross-examination. Mr. Tessmer's file notes support his evidence. On June 11, when he was before Judge Chapman, Mr. Tessmer said words to the effect that he was disappointed by the police having taken his client to the J.J.P. hearing "behind his back". I do not think that he would have said such a thing to the learned Provincial Court judge if he had not said to the police that he wanted to attend that hearing but was not called to do so.

- [98] Cst. Diachok's memory of his conversation with Mr. Tessmer has faded with time. While Cst. Diachok does not now remember the salient details of that conversation, I find that the conversation took place as Mr. Tessmer described.
- [99] The next and critical question here is whether Cst. Diachok deliberately withheld knowledge of Mr. Tessmer's wish to attend the hearing from the officer who conducted the hearing. The evidence was that Cst. Diachok spent a good portion of the afternoon of the 10th preparing a report to Crown Counsel. To do that he had to gather up and confirm information from the other officers involved in the investigation. He had to synthesize that information along with his own observations in a concise but complete report for use by the crown. He did criminal and background checks on Mr. Dhami. It is likely that as he performed those tasks his earlier conversation with Mr. Tessmer was not top of mind.
- [100] Cst. Diachok testified that he and his colleagues puzzled over what charge to specify on the materials they were to send to the J.J.P. center. They did not know precisely what drugs Mr. Dhami had in his rectum and they did not know the volume of those drugs. They decided that the best that they could do is allege that Mr. Dhami was in possession of heroin. That was because they believed that Mr. Dhami reloaded drugs for Mr. Wust and Mr. Wust was thought to be trafficking, among other things, heroin. Again, that discussion was on an important topic but would not necessarily have engaged consideration of whether Mr. Dhami's lawyer should attend the J.J.P. hearing.
- [101] The drug task force also discussed what order they would seek from the J.J.P. They confirmed Cst. Diachok's original thought that a three-day remand would be appropriate. Cst. Diachok testified that he instructed Cst. Chetwynd to ask the J.J.P. for that order. In my view, discussion of that topic ought to have brought Cst. Diachok's conversation with Mr. Tessmer to the front of his mind.
- [102] There is no doubt that Cst. Diachok did not tell Cst. Chetwynd that Mr. Tessmer wanted to attend the J.J.P. hearing with his client. It was a busy time for the officers in the drug unit. There was much to do and not a lot of time to do it. It is possible that Cst. Diachok inadvertently overlooked Mr. Tessmer's desire to appear at the hearing. I think that the evidence falls just short of showing on the balance of probability that Cst. Diachok deliberately kept Cst. Chetwynd in the dark about Mr. Tessmer. I find that it was a mistake to not pass that information on to Cst. Chetwynd - a bad mistake and one with potentially serious consequences, but a mistake nonetheless.
- [103] I find that Cst. Diachok's mistake does not reflect a systemic operational policy to frustrate representation by counsel at J.J.P. hearings. In fact, I find that the operational policy is to facilitate representation when requested by a lawyer or a prisoner. Cst. Diachok's mistake in this case is, on the evidence here, an unfortunate and isolated event.

- [104] Absent specific legislation to the contrary, fundamental justice contemplates the right of an accused to representation by counsel at a judicial hearing. Cst. Diachok's mistake resulted in Mr. Dhami being deprived of counsel at the J.J.P. hearing. The mistake infringed on Mr. Dhami's s. 7 right to be treated in accord with the principles of fundamental justice. Whether he is entitled to a remedy for that infringement and what form that remedy might take must be the subject of a subsequent hearing.

Provincial Court Hearing

- [105] Mr. Dhami says that his right to fundamental justice was infringed by the failure of the police to deliver him to the provincial courthouse at 09:30 hours on June 11, 2014. He says that he was subject to a valid order by a judicial officer to appear in court at that time and date.
- [106] There is no merit in this complaint. It suffers from a number of flaws. One flaw is that Mr. Dhami's real complaint is that he was still in custody at 13:00 hours when the drugs made their appearance. Whether he was taken over to the courthouse at 09:30 or not, he would have remained in custody until he was dealt with by law, i.e.: by order of the presiding Provincial Court judge. On the evidence, that was not going to happen until after the lunch break. Whether he was in custody at the RCMP cells or in custody at the provincial courthouse makes no difference to the fact that he would have been detained until well after the time that he could no longer keep the drugs concealed in his rectum.
- [107] Another flaw is that Mr. Dhami's counsel and agent Mr. Tessmer effectively waived whatever right Mr. Dhami might have had to insist that he be taken to the courthouse at 09:30. That waiver occurred when Mr. Tessmer insisted that the hearing proceed before Judge Chapman in his client's absence. It can hardly be right for Mr. Dhami to complain on the one hand that he was not present at the courthouse while on the other hand have the benefit of his counsel commencing the hearing without him at the soonest available time.
- [108] The final flaw in Mr. Dhami's argument on this point is that he has not shown on the balance of probability that he stayed in the RCMP cells that morning by reason of something other than normal circumstances. Here Mr. Tessmer's testimony is again helpful, although not entirely to Mr. Dhami's benefit. Mr. Tessmer said, and I accept, that it is not uncommon for prisoners to not be brought from the RCMP cells to the courthouse for their hearings at 09:30 hours sharp. There may be too many prisoners to be all accommodated in one batch on any given morning. There may be shortages among the sheriffs or court staffing. There may not be court time available on a particular morning, in which case prisoners may be kept in the RCMP cells rather than trotted to no purpose between the two facilities. Any one or a combination of those circumstances may have prevailed on the morning of June 11.

[109] It follows that Mr. Dhami has not satisfied me that his right to be treated in accord with the principles of fundamental justice were infringed by the fact that he spent the morning of June 11 in custody in the RCMP cells as opposed to spending the same time in custody at the Kelowna courthouse.

Conclusion

[110] Cst. Diachok's arrest of Mr. Dhami for possession of marihuana was lawful. The product of his search of the interior of the Mercedes was also lawful. Mr. Dhami had no reasonable expectation of privacy with respect to the Mercedes. He has no standing to challenge the legality of the search of the vehicle.

[111] Cst. Diachok's arrest of Mr. Dhami was not lawful. Mr. Dhami's detention from that point on was arbitrary and an infringement of his s. 9 rights. Whether the remedy of exclusion should apply to the evidence recovered from Mr. Dhami while he was in detention must be the subject of a subsequent hearing.

[112] Mr. Dhami's right to be treated in accord with the principles of fundamental justice was infringed by Cst. Diachok's inadvertent mistake in not advising Cst. Chetwynd that Mr. Dhami's counsel wished to attend the hearing before the J.J.P. The remedy for that infringement must be the subject of a separate and subsequent hearing.

[113] Mr. Dhami's rights were not breached when he was kept in the RCMP cells on the morning of June 11, 2014.

"P.J. Rogers J."

The Honourable Mr. Justice Rogers

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