

CANADA / JUDGMENT

R. v. Dill

2025 BCSC 996

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 996 R. v. Dill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dill,

2025 BCSC 996

Date: 20250530

Docket: 93993

Registry: Kelowna

Regina

v.

Thomas Troy Dill

Before: The Honourable Justice Laurie

Reasons for Judgment on Voir Dires 1 to 3

Counsel for the Crown:

J.M. Le Dressay

Counsel for the Accused:

N. Selamaj

Place and Date of Hearing:

Kelowna, B.C.

April 29, 30, May 1 and 15, 2025

Place and Date of Judgment:

Kelowna, B.C.

May 30, 2025

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Overview

- [1] The accused Thomas Troy Dill is charged with smuggling contrary to the Customs Act, Criminal Code offences related to firearms, and possession of controlled substances contrary to the Controlled Drugs and Substances Act. This is his application for a declaration that his rights pursuant to sections 8 and 10(b) of the Canadian Charter of Rights and Freedoms (the "Charter") have been violated in the course of the police investigation.
- [2] In brief, the allegations of breach relate to: (1) a search of Mr. Dill's apartment pursuant to a general warrant; (2) delay in access to counsel; and (3) the lawfulness of a controlled delivery of a package to Mr. Dill.
- [3] Subsequent to voir dires held on these issues (Voir Dires 1 to 3 respectively), I provided the Court's decision to the parties on May 27, 2025 with written reasons to follow. These are those reasons.
- [4] In summary, I found no violations of Mr. Dill's Charter rights on voir dires #1 and 2, however I found a section 8 violation in respect of voir dire #3.

Background

- [5] On January 2, 2022, a Canadian Border Services Agency (CBSA) officer at the Vancouver International Mail Centre examined a parcel that was shipped from China and addressed to Thomas Dill at unit 306-3623 Elliott Rd., West Kelowna, B.C. It was declared to contain an "LED tube" (the "Package").
- [6] The Package contained two firearm suppressors or silencers which are prohibited devices under the Criminal Code.

- [7] The Kelowna RCMP was contacted and subsequently a plan to conduct a controlled delivery of the Package was developed.
- [8] On January 13, 2022, in advance of the planned controlled delivery, the investigators applied for and obtained a general warrant.
- [9] The general warrant authorized the following:
- i. Covert replacement of the contents of the Package with a similar looking item;
 - ii. Installation of a notification alarm that will be monitored by the police;
 - iii. Installation of a dye;
 - iv. Entry into any dwelling house, location, premise, or vehicle where the Package is located as soon as practicable after the alarm has been activated and there are reasonable grounds to believe that the package is present in one of the places "in order to prevent the loss of evidence, to secure the dwelling house, locations, premise or vehicle, to protect investigative techniques and if grounds exist to arrest or detain person(s) located there.
- [10] The general warrant also ordered that investigators will enter the dwelling house, vehicle, place or premise as soon as practicable only when they have reasonable grounds to believe that the package located within that location has been opened and any searches "will be conducted in accordance with the law". It added that "further searches" were not authorized.
- [11] In addition to the general warrant, the investigators also obtained a tracking warrant, an assistance order, and a sealing order.
- [12] On January 19, 2022 at approximately 11:05 a.m., an RCMP undercover operator (the "UCO") attended at unit 306 - 3623 Elliot Rd., West Kelowna ("Unit 306") and gave the Package to Mr. Dill.
- [13] After the alarm in the Package was activated, the police entered Unit 306. Mr. Dill was arrested shortly thereafter.
- [14] Based on observations made inside the unit during the execution of the general warrant, the police applied for and obtained a search warrant for firearms and controlled substances, among other things.

Voir Dire #1: Section 8 - Initial Entry Search

- [15] The Defence alleges that the police breached Mr. Dill's rights under section 8 of the Charter when they searched Unit 306 pursuant to the general warrant. The allegation, as I understand it, is that the manner of search conducted by Constables Murphy and Walton was unreasonable because it exceeded the parameters of the general warrant

- [16] Cst. Shawn Murphy was the sole witness in this voir dire. He testified that one of his assignments in the investigation was to enter the dwelling to which the Package was delivered, after activation of the alarm, in order to search for and retrieve the Package which he understood to contain a silencer, pursuant to the general warrant.
- [17] On January 19, 2022, Cst. Murphy was in the area of 3623 Elliott Rd. when the Package was delivered. He was subsequently advised that the alarm had been activated. He testified that members of the Emergency Response Team ("ERT") were the first to enter Unit 306 to clear the location of people.
- [18] At 12:18 p.m., Cst. Murphy and Cst. Walton entered the unit. Cst. Walton's role was to take photographs. Cst. Murphy testified that upon entry he went to his right where there was a bathroom, a closet, and a bedroom on the south side of the apartment. He estimated the size of the unit to be approximately 700 to 800 square feet.
- [19] He observed what he believed to be the handle of a handgun sticking out from underneath some clothes in the closet. He also observed an empty holster hanging on a rack in the same closet, as well as what appeared to be a long gun in a duffel bag on the floor.
- [20] In the bathroom on the north side of the apartment, Cst. Murphy observed Ziploc bags on the floor and one in the toilet. He also observed what he believed to be methamphetamine residue on the toilet seat.
- [21] In the kitchen, Cst. Murphy observed a brown box approximately 10 inches in length which he believed to be the package that contained the silencer. The box appeared to be empty.
- [22] Cst. Murphy observed a silencer on a recliner in the living room. He testified that it had been taken apart or disassembled. He noted that the cap had been twisted off of it.
- [23] After a discussion, the officers decided that they would leave the apartment and seek another authorization. They left the apartment at 12:33 p.m., 17 minutes after they entered it.
- [24] As mentioned earlier, a search warrant was subsequently obtained based in part on the observations made by Cst. Murphy and Cst. Walton while inside Unit 306.
- [25] There is no dispute that pursuant to the general warrant, the investigators may enter the unit after the alarm had been activated and search for the Package and its contents. The Defence submits however that the packaging material and silencer were visible to the officers on the kitchen counter and living room area; despite this, the police conducted an "unrestricted search" of the residence.

- [26] The Defence further submits that Cst. Murphy was "disingenuous" in conducting the search of the apartment. As I understand the argument, the Defence alleges that Cst. Murphy conducted his search with a view to looking for other items that could provide justification to apply for a search warrant. Relying on *R. v. Smart*, 2013 ABQB 561 and *R. v. Telus Communications Co.*, 2013 SCC 16, Defence counsel submits that a general warrant must be used sparingly.
- [27] The Crown submits that the general warrant did not dictate a particular manner in which the search should be conducted. As long as the search was focused on looking for the Package and silencer, it was Charter-compliant.
- [28] Cst. Murphy was cross-examined at length about his movements inside the unit and the order in which he observed the items that he noted.
- [29] He testified that the unit was an unfamiliar place to him. Although he knew that the ERT had cleared it, he couldn't be sure that there were no animals hiding or booby traps. He chose to conduct a methodical search going from room to room starting at the south side of the unit and making his way to the north side. He testified that the apartment was messy. He stated that he did not initially notice the silencer on the recliner in the living room. His evidence was that at all times, he was searching for the Package and its contents.
- [30] I conclude that the Defence has not met its burden of establishing that Cst. Murphy and/or Cst. Walton exceeded the parameters of the general warrant. I accept Cst. Murphy's evidence that the search was focused on the Package and silencer. In my view, he gave his evidence in a direct, straightforward and careful manner. Although the ERT had cleared the residence, I accept that he still felt the need to exercise care as he was in an unfamiliar place. The photographs that were tendered in the voir dire support his evidence that the apartment was messy, and I accept that he did not initially notice the silencer when he was in the living room area.
- [31] Defence counsel submitted that Cst. Murphy gave inconsistent evidence regarding the circumstances that led him to search the bedroom, closet and bathroom on the south side of the unit. When he was initially cross-examined about this, Cst. Murphy stated that he entered that area because as part of his training he never walked past open doors. Later, when he was asked whether the door was closed, Cst. Murphy responded that he did not recall. The alleged inconsistency was not explored.
- [32] I am not persuaded that Cst. Murphy's evidence was necessarily inconsistent. I note that when he initially described that area, he stated that there were "door frames and opening". Later, he mentioned an "entryway" to the bedroom. In my view, the evidence is unclear as to how many doors were in this area and whether Cst. Murphy was referring to the same door in both portions of his evidence. The diagram of the unit that was tendered in evidence does not shed much light on this point. In any event, in light of Cst. Murphy's evidence as a whole, I do not find this point to be significant.

- [33] Nor do I find that the time stamp on the photograph of the silencer taken by Cst. Walton undermined Cst. Murphy's evidence as to when he noticed the silencer. Cst. Walton did not testify in the voir dire and here was no evidence that Cst. Walton drew Cst. Murphy's attention to the item.
- [34] Although Cst. Murphy was questioned at length as to how he could have missed the silencer on the recliner and packaging material in the kitchen, and with respect to his method of searching, it was never put to him that he had improper motives in searching the unit, or that he was looking for things that were outside the scope of the general warrant. Throughout his evidence, Cst. Murphy maintained that he was looking for the Package and its contents.
- [35] As the Crown argued, the general warrant did not specify a particular method or order in which the search of the unit was to be conducted. The observations of firearms and drugs were made in the course of searching for the things that were authorized by the general warrant: *R v. Sipes*, 2011 BCSC 1763 at para. 204. In addition, I do not consider the amount of time that the officers were inside the unit to be unreasonable.
- [36] In the circumstances, I do not find that the search conducted by Cst. Murphy and Cst. Walton exceeded the parameters of the general warrant, or was unreasonable. I do not find that the police violated Mr. Dill's section 8 Charter rights as alleged in this voir dire.

Voir Dire #2: s.10(b) Right to Counsel

- [37] In Voir Dire #2, the Defence alleges that the police breached the section 10(b) Charter rights of Mr. Dill because there was a delay of one hour and 18 minutes before Mr. Dill was able to speak to counsel after his arrest. The Defence submits that the Crown bears the burden of justifying this delay.
- [38] The Crown called Cst. William Martin, a member of the Kelowna RCMP Drug Section, in this voir dire. Cst. Martin testified that on January 19, 2022, he was assigned to arrest Mr. Dill, advise him of his rights under the Charter, and facilitate access to counsel.
- [39] Cst. Martin testified that Mr. Dill was in the lobby of the building at 3623 Elliott Rd., when he arrived. Custody of Mr. Dill was turned over to him by the ERT at that time. At 11:38 a.m., Cst. Martin then proceeded to advise Mr. Dill that he was being arrested for importation of a prohibited device. When he asked whether Mr. Dill understood, Mr. Dill replied: "Yes, I guess so".
- [40] Cst. Martin then advised Mr. Dill that he had the right to retain and instruct counsel without delay, that he may call any lawyer that he wanted including a legal aid lawyer that could provide legal advice in private. He advised Mr. Dill that the advice is given without charge and that the lawyer can explain the legal aid plan to him. Cst. Martin added that if Mr. Dill wished to contact a legal aid lawyer, the telephone number could be provided to him. Mr. Dill indicated that he understood.

- [41] Cst. Martin then asked Mr. Dill if he wanted to contact a lawyer. He testified in chief that Mr. Dill responded with "yes, I will wait yes".
- [42] He asked Mr. Dill whether he had a lawyer and Mr. Dill provided the name Blair Suffredine. Cst. Martin obtained the phone number for Mr. Suffredine. He then provided Mr. Dill with the secondary warning, i.e. that he was not required to say anything, however anything that he did say may be used in evidence. When asked if he understood, Mr. Dill responded "yes".
- [43] Cst. Martin testified that he then advised Mr. Dill that if he wished to speak with a lawyer including legal aid, that could be provided on scene immediately. Mr. Dill stated that he understood and that he would wait until he got back to the Kelowna detachment.
- [44] Cst. Martin remained with Mr. Dill in the lobby of the apartment building while they waited for a general duty member to arrive and transport Mr. Dill to the Kelowna detachment.
- [45] At 12:02 p.m., noting that the transport vehicle had not arrived, Cst. Martin told Mr. Dill that if at any point he wished to speak to a lawyer, he could let Cst. Martin know and a call on scene would be facilitated. Again, Mr. Dill advised that he would wait until he was at the detachment. Mr. Dill also stated that it was not urgent.
- [46] Cst. Martin testified that the transport vehicle arrived at 12:14 p.m. and Mr. Dill was brought to the Kelowna RCMP detachment. Cst. Martin travelled in a separate vehicle. He testified that the detachment was approximately 16 kilometers away which he estimated to be about a 15-minute drive.
- [47] When Cst. Martin arrived at the detachment, Mr. Dill was already there. After being booked in and searched as part of the usual procedure, Mr. Dill was placed in a "lawyer room". At 12:46 p.m., Cst. Martin placed a call to Mr. Suffredine and at 12:48 p.m., Mr. Dill was on the phone with counsel.
- [48] In cross-examination, Cst. Martin agreed that there were other individuals in the lobby of the apartment building when he and Mr. Dill were there. He recalled that members of the Drug Section and ERT were there.
- [49] With respect to his evidence that Mr. Dill stated "yes, I will wait yes", it was suggested to the officer that based on the way his notes were written, the first "yes" was in response to whether Mr. Dill wanted to contact a lawyer, however the phrase "I will wait yes" appeared to be in response to a different question. The officer agreed that Mr. Dill responded "yes" when asked if he wanted to contact a lawyer.
- [50] When asked what question prompted the answer "I will wait yes", Cst. Martin stated that he advised Mr. Dill that he could facilitate contact with a lawyer or legal aid on scene immediately and Mr. Dill stated "I will wait yes".

- [51] Cst. Martin stated that in the past, when people who were arrested or detained wished to make a call to counsel on scene, he would facilitate that and provide privacy to the best of his ability, for example by putting them in the police vehicle and providing them with his cell phone. His evidence was that if Mr. Dill had asked to contact counsel on scene, he would have made similar efforts.
- [52] He agreed that he did not have a conversation with Mr. Dill about what facilitating contact to counsel on scene might look like as Mr. Dill had indicated that he would wait until he got to the detachment.
- [53] When asked why Mr. Dill was not brought to the West Kelowna detachment which was only five minutes away, Cst. Martin responded that unlike the Kelowna detachment, the West Kelowna detachment did not have a jail cell. Therefore the usual practice was to transport people who are in custody to Kelowna.
- [54] When asked why he did not personally transport Mr. Dill in his own police vehicle, Cst. Martin responded that his vehicle was not a proper police transport vehicle and was not equipped with features designed for officer safety.

Governing Legal Principles

- [55] Pursuant to section 10(b) of the Charter, everyone has a right upon arrest or detention to retain and instruct counsel without delay and to be informed of that right.
- [56] The purpose of section 10(b) is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *R. v. Manninen*, [1987] 1 S.C.R. 1233 at 1242-1243. See also *R. v. Duerksen*, 2018 BCCA 46 [Duerksen] at para. 24.
- [57] Once engaged, section 10(b) imposes both informational and implementational duties on police. The informational duty requires that the detainee be informed of the right to retain and instruct counsel without delay. The implementational duty requires the police to provide the detainee with a reasonable opportunity to retain and instruct counsel. This obligation also requires the police to refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach a lawyer, or the detainee has unequivocally waived the right to do so: *R. v. Suberu*, 2009 SCC 33 at para. 38; *R. v. Fan*, 2017 BCCA 99 [Fan] at para. 51.
- [58] The police obligations flowing from s. 10 (b) are not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duties on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended: *R. v. Tremblay*, 1987 CanLII 28 (SCC), [1987] 2 S.C.R. 435, at p. 439, and *R. v. Black*, 1989 CanLII 75 (SCC), [1989] 2 S.C.R. 138, at pp. 154 55. See also *R. v. Sinclair*, 2010 SCC 35 at para. 27.

- [59] The police must advise a detainee of the right to counsel and facilitate the exercise of this right immediately upon detention and arrest. However, "immediate" is not synonymous with "instantaneous" and practical considerations play a role in what is "immediate" particularly with respect to the implementation duty. A police officer's duty is to facilitate access to counsel upon a detainee's request at the first reasonably available opportunity. The question of whether a given delay was reasonable is a factual inquiry: *Fan* at paras. 52-54.
- [60] The overall burden to prove a Charter infringement lies on the claimant on a balance of probabilities, including infringements of s. 10(b): *Duerksen* at para. 25; *R. v. Orr*, 2021 BCCA 42 at para. 44. However, the burden lies on the Crown to show that any delay in affording a detainee an opportunity to access counsel was reasonable in the circumstances: *R. v. Taylor*, 2014 SCC 50 at para. 24. The burden also lies on the Crown to prove that the detainee waived their right to counsel: *Duerksen*, at para. 25; *R. v. Prosper*, 1994 CanLII 65 (SCC), [1994] 3 S.C.R. 236 at 275.

Discussion

- [61] The Defence argues that Mr. Dill asserted his right to counsel when he responded "yes" when asked if he wanted to contact a lawyer. The Crown must then justify the delay in providing access to counsel which the Defence says was 1 hour and 18 minutes (i.e. from 11:30 a.m. when Mr. Dill was detained by the ERT to 12:48 p.m. when he was provided with access to counsel). Further, the Defence asserts that there were no concerns of public or officer safety in the circumstances that could justify the delay.
- [62] The Crown submits that the delay was 1 hour and 9 minutes and ought to be calculated from when Cst. Martin first encountered Mr. Dill. In any event, while it acknowledges that the delay was lengthy, it submits that the court ought to consider the totality of the circumstances which include most significantly the accused's own choice that he would contact counsel at the Kelowna detachment. When the totality of the circumstances is considered, the Crown says that it has discharged its onus in demonstrating that the delay in access to counsel was reasonable.
- [63] With respect to the calculation of delay, as I will explain below, in the circumstances of this case, I find that nothing turns on whether the alleged delay is 1 hour and 9 minutes or 1 hour and 18 minutes. For clarity however, in my view, the correct calculation of an alleged delay in implementing the accused's rights under section 10(b) should start from when the accused invoked their right to counsel.
- [64] The issue in this *voir dire*, as I see it, is whether the accused invoked his section 10(b) Charter rights and was reasonably diligent in exercise those rights. As the Supreme Court made clear in *R v Bartle*, 1994 CanLII 64 (SCC), [1994] 3 SCR 173, the implementational duties under section 10(b) are not triggered until a detainee indicates a desire to exercise his or her right to counsel. In other words, the obligation on the police to give an accused a reasonable opportunity to consult with counsel arises only when the accused indicates to the police

their desire to exercise that right: *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429, at para. 30; *R. v. Fuller*, 2012 ONCA 565 at para. 17.

- [65] The evidence in this case does not satisfy me that the accused has met his burden of establishing that he invoked his section 10(b) rights and that he was reasonably diligent in exercising those rights prior to his arrival at the Kelowna RCMP detachment. Although Mr. Dill indicated to Cst. Martin that he wished to contact a lawyer, he also stated twice (at 11:38 a.m. and 12:02 p.m.) that he preferred to wait until he got to the Kelowna detachment to exercise that right, despite being told that he could speak to a lawyer immediately at the scene.
- [66] The Defence submissions attempt to artificially separate Mr. Dill's expressed desire to contact counsel and his clear preference as to when he wished to exercise that right. Essentially, the Defence asks the Court to find that Mr. Dill invoked his right to counsel when he indicated that he wished to contact a lawyer, but to ignore his preference to wait until he got to the Kelowna detachment before doing so. The Defence also urges the Court to infer that Mr. Dill had little choice but to postpone contacting counsel until the detachment because he reasonably thought that he could not be afforded privacy at the scene given the presence of other people in the lobby of the building. On this point, the Defence relies on the following decisions: *R. v. Playford*, 1987 CanLII 125 (ONCA), *R. v. Quinless*, 2025 ONCJ 94, and *R. v. MacKinnon*, 2013 NSSC 365.
- [67] I do not accept this submission. There was no evidence before the Court about what the accused was thinking regarding privacy, if anything. There is no basis in the evidence upon which to make the inference sought. Further, based on what Mr. Dill told Cst. Martin, the explanation for postponing access to counsel until he got to the detachment was that Mr. Dill did not consider it urgent.
- [68] The cases relied on by the Defence are distinguishable. Significantly, the accused in those cases testified as to their belief regarding the lack of privacy while exercising their right to counsel. In *Playford* and *Quinless*, the courts accepted the evidence of the accused and found their belief to be reasonable, resulting in a finding of breach of s.10(b) Charter rights. In addition, in *Playford*, there was independent evidence of the police overhearing and taking notes of the accused's conversations when he spoke to a friend and his lawyer's secretary. Further the police in *Playford* elicited an incriminating statement from the accused. There is no such suggestion here.
- [69] In *MacKinnon*, on a summary conviction appeal, a new hearing on the issue of s.10(b) was ordered after the trial judge was found to have erred by failing to assess whether the accused's stated belief regarding lack of privacy was reasonable.

- [70] In my view, Mr. Dill's responses to Cst. Martin regarding the exercise of s.10(b) rights must be considered as a whole. Based on the evidence, I find that Mr. Dill understood that he had a right to counsel and that he had the option of contacting a lawyer of his choice immediately while at the scene. He was offered this option twice and each time he declined, stating his preference to wait until he got to the Kelowna detachment.
- [71] I conclude in the circumstances that the accused has not established on a balance of probabilities the invocation of section 10(b) rights and reasonable diligence in exercising those rights prior to his arrival at the Kelowna detachment. Therefore, the correlative duties on the police to provide a reasonable opportunity and to refrain from eliciting evidence were not triggered until then. Mr. Dill was given access to counsel within a short time of his arrival at the detachment. Based on the evidence, there was no unreasonable delay and I decline to find a breach under section 10(b) of the Charter.
- [72] In making this determination, I am guided by the courts' reasoning and conclusions in the following cases: *R. v. Boucher*, 2021 BCSC 1646, *R. v. Owens*, 2015 ONCA 652, and *R. v. Shain*, 2017 SKQB 115. These cases involve detained or arrested persons who, when asked if they wished to call a lawyer, responded with "No, not right now", "No, not now" and "Not yet". Justice Elson in *Shain* referred to these types of answers as a "provisional refusal". In these cases, the courts concluded that these responses did not amount to an invocation of s.10(b) Charter rights, therefore the s.10(b) implementational duties were not engaged. In my view, Mr. Dill's response to Cst. Martin that he would wait until he got to detachment is analogous to "not right now" or "not yet".
- [73] Since Mr. Dill stated that he wished to exercise his right to counsel when he got to the Kelowna detachment, I conclude that the implementational duties of the police under s.10(b) were triggered when Mr. Dill arrived at the detachment. I also find that the minimal delay in providing access to counsel at the detachment was not unreasonable, nor was it alleged to be unreasonable.
- [74] Nor do I accept the Defence submission that in these circumstances, the Crown has the onus of proving that Mr. Dill waived his right to counsel. This is not a situation that involves a waiver and the Crown does not assert that there was one. Rather, as the Ontario Court of Appeal stated in *Owens* at para. 27:
- "Thus, once the trial judge found that the police had complied with the informational component of s.10(b), the next question for determination was not whether the Crown had established that the respondent had waived his right to consult counsel, but whether the respondent had established that he invoked his right to consult counsel and thereby triggered the implementational duties" (emphasis in the original).
- See also *Boucher* at para. 61.

[75] The Defence does not allege that Cst. Martin failed to comply with the informational requirements of s.10(b), apart from its submission that a Prosper warning ought to have been given if there was a waiver of s.10(b), which does not arise on these facts. In any event, I am satisfied that the informational component of s.10(b) had been complied with.

[76] Even if Mr. Dill could be said to have invoked s.10(b) at the time of his arrest and was reasonably diligent in the exercise of s.10(b) rights, and that the implementational duties of the police were triggered at that time, I would not conclude that there was unreasonable delay on these facts. As the Crown argued, the primary cause of the delay in access to counsel was Mr. Dill's own insistence to wait until he got to the Kelowna detachment before contacting his lawyer.

[77] In all of the circumstances, I find no breach of Mr. Dill's s.10(b) Charter rights.

Voir Dire #3: Lawfulness of the Controlled Delivery

[78] In voir dire #3, the Defence alleges that the conduct of the UCO in attending at Unit 306 to deliver the Package to Mr. Dill constituted an unreasonable search that violated Mr. Dill's section 8 Charter rights.

[79] It is common ground that while the general warrant authorized the covert replacement of the contents of the Package, installation of an alarm and dye, and entry into any location where the Package was located after activation of the alarm, it did not authorize the controlled delivery of the Package by the UCO to Mr. Dill.

[80] The evidence in respect of the controlled delivery was tendered by way of an agreed statement of facts. I summarize those facts below.

[81] On January 19, 2022 at approximately 11:05 a.m., the UCO attended at 3623 Elliot Rd., West Kelowna to deliver the package. The UCO entered the front doors of the building and rang unit 306. A male answered. Upon being advised that it was Canada Post with a package for Thomas Dill, the male confirmed that he was Thomas Dill. Mr. Dill inquired whether he should come down or if the UCO could bring it up to Unit 306. The UCO responded that he could bring it up.

[82] At approximately 11:08 a.m., the UCO knocked on the door of Unit 306. Mr. Dill opened the door. The UCO recognized him as Mr. Dill from a photograph that he had reviewed earlier. Mr. Dill offered to show the UCO identification, however the UCO declined. The UCO handed Mr. Dill the Package and left the building.

- [83] In addition to the agreed facts, the Crown called the affiant Cst. Riley to testify in the voir dire. Cst. Riley testified that in drafting the information to obtain (the "ITO") for the general warrant, he was not aware of the specifics as to how the controlled delivery was to be executed although he knew, and the ITO disclosed, that the UCO would pose as a Canada Post employee to conduct the controlled delivery. In any event, Cst. Riley testified that he did not believe that the planned delivery constituted a search.
- [84] Relying on *R. v. Evans*, [1996] 1 S.C.R. 8 [Evans] and *R. v. Moyles*, 2019 SKCA 72 [Moyles], the Defence argues that the controlled delivery constituted a search for the purpose of section 8 of the Charter as it went beyond the scope of activities authorized by the common law doctrine of "implied invitation to knock" because the UCO's purpose in attending at Unit 306 was to gather evidence against Mr. Dill.
- [85] The facts in *Moyles* are analogous as it also involved a controlled delivery that was not authorized by a general warrant. In that case, the Saskatchewan Court of Appeal found that the controlled delivery made to Mr. Moyles at the door of a house exceeded the limits of the implied licence to knock and constituted an unreasonable search contrary to section 8 of the Charter.
- [86] The Crown submits that the conduct of the UCO in the case at bar did not constitute a search for the purpose of section 8 because it did not reveal core biographical information. Further, the Crown asserts that the investigators already possessed information about Mr. Dill's name, his appearance, and his connection to the Unit 306 prior to the controlled delivery. It emphasizes that when Mr. Dill offered to provide identification, the UCO declined. The Crown distinguishes *Moyles* on this point, as the investigators in that case knew little about Mr. Moyles' connection to the address on the package. In the Crown's submission, the circumstances here do not establish that the UCO's attendance at unit 306 was to gather evidence.
- [87] I will first address the preliminary issue of whether the conduct of the UCO interfered with Mr. Dill's reasonable expectation of privacy.
- [88] The purpose of section 8 of the Charter is to protect an accused's privacy interests against unreasonable intrusion by the State. Accordingly, police conduct interfering with a reasonable expectation of privacy constitutes a "search" within the meaning of the provision: *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Edwards*, 1996 CanLII 255 (SCC), [1996] 1 S.C.R. 128; *R. v. Law* 2002 SCC 10, [2002] 1 S.C.R. 227 at para. 15.

- [89] It is not disputed, and I agree, that Mr. Dill had a reasonable expectation of privacy inside Unit 306. Based on the Crown's theory which the Defence is entitled to rely on, Mr. Dill was the renter of the unit and he resided there at least some of the time: *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696. The point of contention here, as I understand it, is whether Mr. Dill had a reasonable expectation of privacy in observations made of him and in his interactions with the UCO at the doorway of the unit. In my view, he did.
- [90] I find that Mr. Dill's privacy interest inside his home extended to the doorway of the unit, and to his activities in that doorway. The degree to which he had a privacy interest may be reduced but I do not find, in these circumstances, that it was extinguished simply because he opened the door. Further, courts have found that section 8 of the Charter protects individuals from unauthorized police surveillance inside residential buildings where it interferes with the person's reasonable expectation of privacy. See for example *R v Pipping*, 2020 BCCA 104, *R. v. Yu*, 2019 ONCA 942, *R. v. White*, 2015 ONCA 508.
- [91] The next question is whether UCO's attendance at the unit was authorized by the implied licence to knock.
- [92] The Supreme Court in *Evans* explained this concept:
- [14] If one views the invitation to knock as a waiver of the occupier's expectation of privacy in the approach to his or her home, it becomes necessary to determine the terms of that waiver. Clearly, under the "implied licence to knock", the occupier of a home may be taken to authorize certain persons to approach his or her home for certain purposes. However, this does not imply that all persons are welcome to approach the home regardless of the purpose of their visit. For example, it would be ludicrous to argue that the invitation to knock invites a burglar to approach the door in order to "case" the house. The waiver of privacy interests that is entailed by the invitation to knock cannot be taken to go that far.
- [15] In determining the scope of activities that are authorized by the implied invitation to knock, it is important to bear in mind the purpose of the implied invitation. According to the British Columbia Court of Appeal in *R. v. Bushman* (1968), 1968 CanLII 802 (BC CA), 4 C.R.N.S. 13, the purpose of the implied invitation is to facilitate communication between the public and the occupant. As the Court in *Bushman* stated, at p. 19:

The purpose of the implied leave and licence to proceed from the street to the door of a house possessed by a police officer who has lawful business with the occupant of the house is to enable the police officer to reach a point in relation to the house where he can conveniently and in a normal manner communicate with the occupant.

I agree with this statement of the law. In my view, the implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling. The "waiver" of privacy rights embodied in the implied invitation extends no further than is required to effect this purpose. As a result, only those activities that are reasonably associated with the purpose of communicating with the occupant are authorized by the "implied licence to

knock". Where the conduct of the police (or any member of the public) goes beyond that which is permitted by the implied licence to knock, the implied "conditions" of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder.

(Italics in original; underline added)

- [93] Therefore, the determination of whether the police conduct exceeded the scope of an implied invitation to knock turns the purpose of police attendance on private property. In some cases, the courts have found that the police had a legitimate basis for going onto private property and accordingly their conduct did not constitute a search under section 8 of the Charter: see for example *R. v. LeClaire*, 2005 NSCA 165, *R. v. Lotozky*, 2006 CanLII 21041 (ONCA), and *R v. Mulligan* (2000), 2000 CanLII 5625 (ONCA). In these cases, the courts have found that the police were legitimately investigating an offence and their attendance was not to specifically gather evidence to use against the occupant of the property.
- [94] In my view, the nature of the police conduct in the case at bar is very different. I find that the attendance of the UCO at Unit 306 to facilitate a ruse by delivering a package that contained among other things a tracking device and alarm to be monitored by the police was clearly for the purpose of gathering evidence.
- [95] As the Court observed in *R v. Naess*, 2022 ONSC 6490, a case that also involved a controlled delivery without judicial authorization, "the entire point of a controlled delivery is to obtain incriminating evidence against an occupant. Through the ruse of an undercover police officer, posing as a courier or postal worker, delivering a package containing contraband, the police aim to identify the occupant who will accept delivery" (underline in the original). The Court concluded that the police exceeded the bounds of the implied invitation to knock: *Naess* at para. 99. See also *Moyles* at paras. 53-54.
- [96] In the case at bar, even though the police already knew the identity of Mr. Dill and his connection to the unit, I infer that the UCO, in physically handing the Package to Mr. Dill, was gathering evidence to potentially use against him. In all of the circumstances, I conclude that the police conduct constituted a search for the purpose of section 8.
- [97] The Crown bears the burden of demonstrating on a balance of probabilities that a warrantless search is authorized by a reasonable law and was carried out in a reasonable manner: *R. v. Mann*, 2004 SCC 52 at para. 36, [2004] 3 S.C.R. 59.
- [98] The Crown argues that since the general warrant in this case was accompanied by an assistance order that, among other things, directed Canada Post to provide assistance to the RCMP to give effect to the general warrant "for the undercover police operator to conduct a controlled delivery" of the Package to Mr. Dill at Unit 306, implicitly the controlled delivery was judicially authorized.

[99] While it would seem from the language of the assistance order that the issuing justice was also authorizing the controlled delivery as part of the general warrant, it is clear that the general warrant did not contain such a term. The assistance order is necessarily premised on the general warrant. I would not accede to the Crown's argument that the controlled delivery conducted by the UCO was authorized by virtue of the assistance order.

[100] The conduct of the UCO exceeded the scope of the implied licence to knock, therefore it was not authorized by law and was unreasonable. I conclude that the accused has established a breach of his section 8 Charter rights in this connection.

"Laurie J."

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