
CANADA / JUDGMENT

R. v. Drynock

2019 BCSC 1133

COURT

Supreme Court of British Columbia

DECIDED

2 July 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 1133 R. v. Drynock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Drynock,

2019 BCSC 1133

Date: 20190702

Docket: X080611

Registry: New Westminster

Regina

v.

Johnny Steven Drynock

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment on Voir Dires 1 and 2

Counsel for Crown:

M.A. Fortino

C.D.L. Los

Counsel for Accused:

S.R.A. Buck

A.L. Dorin

Place and Dates of Voir Dire:

New Westminster, B.C.

June 3- 7; 10-13, and 24, 25, 2019

Place and Date of Judgment:

New Westminster, B.C.

July 2, 2019

Table of Contents

I. Introduction. 3

II. Background. 4

III. Issues. 9

IV. Analysis - Voir Dire No. 1. 11

A. Was Drynock lawfully detained and arrested in the Coldwater Hotel?. 11

B. Was the warrantless search of Drynock lawful?. 21

C. Were Drynock's Charter rights under s. 10(a) and (b) violated?. 24

1. Delay in s. 10(b) implementation to facilitate access to counsel 25

2. Constable Miller's question about the gun. 26

3. When was Drynock detained or arrested for the murder?. 26

D. The Banking Records Production Orders. 28

1. Omission of information about other potential suspects. 31

2. The Search of Drynock's Personal Effects in Merritt 34

3. The ITO relied upon private banking information unlawfully disclosed to Detective Robson.
35

V. Conclusions - Voir Dire No. 1. 38

VI. Voir Dire no. 2 - Application to set aside the telephone records production order. 38

A. Background. 38

B. Analysis. 39

VII. Conclusion - Voir Dire No. 2. 42

[Introductory remarks]

I. Introduction

- [1] The accused, Johnny Steven Drynock, is charged with the first degree murder of Birinderjeet Singh Bhangu on March 13, 2017 at Surrey, B.C. His trial on this charge is scheduled to commence before me, sitting without a jury, tomorrow, July 3, 2019.
- [2] He applies for orders excluding evidence, pursuant to s. 24(2) of the Charter.
- [3] He seeks orders excluding:
1. evidence seized by police incidental to his arrest at Merritt, B.C. on April 8, 2017. In particular:
 - i. a debit card number and related information obtained by Detective Matthew Robson when he searched Mr. Drynock's wallet, and
 - ii. a Samsung cell phone;
 2. TD Canada Trust banking records associated with the debit card number, obtained by the police utilizing two production orders issued April 14, 2017, relying upon the debit card number (the "banking records production orders"); and
 3. Cellular telephone records obtained from Rogers Communications Canada Ltd. on the basis of a production order (the "telephone records production order") issued March 21, 2017, for a telephone number ending in "0044" (the "0044" phone number or telephone line).
- [4] The applications for orders set out in 1 and 2 above are intertwined, and were heard on voir dire no. 1. The application for order 3 was heard on voir dire no. 2.
- [5] The defence filed three notices of application. These voir dres and these reasons deal with all three applications, except for the application for a stay of proceedings based upon alleged breach of s. 7 of the Charter in application no. 1, which has been deferred to a voir dire, if necessary at the conclusion of the trial.
- [6] For the purposes of these reasons I will at times refer to Mr. Drynock as Johnny Drynock, or simply Drynock, and I will refer to his brother as Michael Drynock or Michael.

II. Background

- [7] Mr. Bhangu was shot and killed March 13, 2017, at about 2:24 p.m. while sitting in the driver's seat of a vehicle, an Acura MDX, that he had just parked outside the Comfort Inn and Suites Hotel on Fraser Highway in Surrey B.C. Video surveillance evidence obtained by police from the hotel and from the nearby Surrey Sport and Leisure Centre showed that the killer, a male, arrived in a vehicle about one hour before the shooting, and parked near the hotel. Several witnesses identified the vehicle as a Nissan Pathfinder SUV. Seconds after Mr. Bhangu arrived the killer exited the Pathfinder and approached Mr. Bhangu's Acura MDX. The killer shot Mr. Bhangu multiple times using a handgun, through the driver's side window of the MDX. The killer immediately departed in the Pathfinder.

- [8] Video intersection footage from the City of Surrey showed the Pathfinder's direction of travel westbound along Fraser Highway to 160th Street in Surrey where it turned and proceeded northbound.
- [9] Port Mann Bridge toll records showed that a Nissan Pathfinder with a B.C. licence plate "AM724P" crossed the Port Mann Bridge westbound at 2:36 p.m.
- [10] At about 2:40 p.m., a Coquitlam RCMP officer observed a Nissan Pathfinder that he believed matched the description of the killer's vehicle, driving eastbound on Lougheed Highway in Coquitlam. The officer determined that the vehicle's licence plate AM724P was stolen. The officer was unsuccessful in stopping the vehicle. The next day Kelowna RCMP received a report of an abandoned Nissan Pathfinder bearing plate AM724P. The police attended and observed the vehicle partially burned.
- [11] On or about March 14, investigators released a bulletin containing several photographs of the suspect derived from the video surveillance cameras to other police agencies. The bulletin was referred to in the evidence as an RTIC bulletin. ("RTIC" stands for Real Time Intelligence Centre.)
- [12] On March 17, the police issued a media release asking for the public's help in identifying the suspect in the homicide. The release included photographic images and a video clip showing the suspect.
- [13] A number of possible suspects were identified by members of the public and police officers. A correctional service employee and a probation officer identified Drynock as the person in the images.
- [14] The police were unable to locate Drynock in the Lower Mainland.
- [15] On March 19, 2017 the lead investigator, Corporal Waterman, together with Constable Fraser, travelled to Merritt B.C. in order to attempt to locate Drynock. The Merritt RCMP detachment provided previous booking photographs of Drynock. Drynock's mother provided a telephone number for Drynock, ending in "0044".
- [16] The police obtained the telephone records production order for the 0044 line on March 21, 2017, on the basis of an application and information to obtain ("ITO") prepared and sworn by Corporal Harbir Sangha. This is the production order and resulting evidence in issue on voir dire no. 2.
- [17] For purposes of these applications, I am informed by the Crown that the evidence obtained through the telephone records production order connects the 0044 line to Drynock, and the 0044 telephone was in the vicinity of the homicide when it occurred, and in the vicinity of the attempted traffic stop in Coquitlam shortly afterwards.

- [18] On March 20, the investigators put a notice on the CPIC (Canadian Police Information Centre) database, indicating that Drynock was a person of interest to IHIT (Integrated Homicide Investigation Team), which was responsible for investigating the murder. The notice would be seen by any police officer who searched the database for Drynock. The notice asked that if contact was made with Drynock, Corporal Waterman or Constable Shoesmith be contacted by telephone, and that IHIT's interest not be revealed to the subject.
- [19] As of April 8, 2017, IHIT investigators had not yet located Drynock.
- [20] In the early morning hours of Saturday April 8, 2017, Drynock was arrested in the pub, or in other words, the bar of the Coldwater Hotel in Merritt, by members of the Merritt RCMP detachment. He was with his younger brother Michael, and two female companions.
- [21] Merritt RCMP Constables Fred Miller and Dan Lachapelle entered the bar at about 12:45 a.m., intending to conduct a routine "bar check" or "bar walk" (both terms were used in the evidence; I will refer to this as a "bar walk"). They were both general duty officers, in uniform.
- [22] According to Lachapelle, upon doing a visual sweep of the bar from a point near the entrance, he noticed two young looking males acting suspiciously. They looked underage, and nervous. As he proceeded across the bar intending to check their identification, they moved away down a corridor towards the rear of the bar. Miller followed him. He told the two males to stop. Both males stopped briefly, and he asked to see their identification. When he did so, Drynock fled. He ran to a nearby doorway and opened it. Lachapelle chased him, ordered him to stop, tried to restrain him, and told him he was under arrest for obstruction. Drynock managed to release himself from Lachapelle's grip, and ran back into the bar.
- [23] At that point Drynock was tackled and taken to the floor by Miller. There was a brief struggle but Drynock quickly became compliant. He was arrested by Miller. Miller stated that he was arresting Drynock for "flight" and for possibly being a minor in a bar. He testified that in saying "flight" he meant "obstruction". I will refer to this arrest as "arrest no. 1" or the first arrest.
- [24] Upon arrest Miller provided Drynock with s. 10 Charter advice and the s. 7 warning, from memory, and handcuffed him.
- [25] Michael Drynock was also non-compliant and was arrested by Lachapelle.
- [26] Drynock and Michael were taken outside the hotel in order to be placed into police vehicles and transported to the nearby detachment.

- [27] At his vehicle, before Miller performed a pat-down search of him, Miller asked Drynock if he had any needles, knives, or any other dangerous items on his person that could harm either of them. Drynock said that he had a gun in his pocket. Miller asked him why he had a gun. Drynock said that he had it for his personal protection. Upon the search, Miller found a loaded handgun, a knife, and a pool ball wrapped in a handkerchief. He also found \$2,000 in cash, and a wallet containing BC photo identification for Johnny Drynock.
- [28] Miller then arrested Drynock a second time ("arrest no. 2") for possessing a loaded firearm. At 1:15 a.m. he provided Drynock with Charter s. 10(b) advice and a s. 7 warning that he was not obliged to say anything, but anything he said could be given in evidence. He used a script on a card, and recorded the interaction. After returning to the detachment, at 1:45 a.m., Miller checked the CPIC database. He noted that Drynock was subject to a court order prohibiting him from possessing a firearm. He arrested him for breach of the court order, ("arrest no. 3") and repeated the Charter advice and the warning. He noted that he was a person of interest for IHIT, and there were telephone numbers to call IHIT.
- [29] After placing Drynock into a cell, another officer showed Miller the IHIT RTIC bulletin allegedly relating to Drynock. Miller had seen it previously but had not recognized the person depicted. He called Corporal Waterman at 2:25 a.m. He told him that Drynock was in custody, and that he appeared to be the same person as shown in the RTIC bulletin. Waterman asked him to photograph his jacket and running shoes, and to send the photos to him.
- [30] At 2:05 a.m. on Drynock's behalf Miller called Drynock's counsel of choice, Mr. Terry La Liberte. The answering service advised that Mr. La Liberte would call back in the morning. Drynock declined Miller's offer to contact another lawyer. He was placed in cells at 2:09 a.m. At 10:00 a.m. the following morning Drynock spoke to Mr. La Liberte.
- [31] At 11:49 a.m., Drynock was charged with possessing a loaded prohibited firearm and breaching a firearms prohibition order. At 12:06 p.m. a Judicial Justice ordered that he be remanded in custody to appear in Kamloops Provincial Court on Monday, April 10, 2017.
- [32] Corporal Waterman and Detective Robson drove to Merritt from the Lower Mainland, departing at 7:22 a.m. and arriving at the Merritt detachment at approximately 11 or 11:30 a.m.
- [33] At 1:10 p.m. Waterman spoke to Drynock in the cellblock area. He did not attempt to elicit any information regarding the homicide. He formed the opinion that Drynock was the person seen in the images from the murder.
- [34] Drynock was arrested for the murder of Mr. Bhangu by another IHIT investigator, Constable Pulchny, at 4:23 p.m. This was "arrest no. 4."
- [35] Drynock was once again given the Charter advice and warning. At 4:36 p.m. he spoke once again with legal counsel, Mr. La Liberte.

- [36] The IHIT investigators were interested in video surveillance evidence from the Coldwater Hotel pub, in connection with a possible line of investigation, called a gait analysis. I understand this to mean a comparison of the gait of Drynock as shown by pub security surveillance videos with the video of the shooter. This line of inquiry was not pursued, ultimately. However for this purpose Waterman and Robson attended the Coldwater Hotel on April 9 to seize copies of video surveillance from the pub relating to Drynock's attendance and arrest there on April 8. They were not able to obtain the video at that time. At IHIT's request Merritt RCMP officer A. Gill obtained the video clips from the owner of the Coldwater Hotel, John Reed, later in the day on April 9. The video files were provided to Waterman subsequently. Three of the video clips showing some of the events in the bar associated to the first arrest were the subject of extensive testimony on voir dire no. 1.
- [37] On Sunday April 9, at 3:35 p.m. while Drynock continued to be held in the Merritt detachment cells, Robson seized some of Drynock's personal effects. The items seized included his jacket, eyeglasses, and a Samsung cell phone. Detective Robson searched his wallet and examined the TD Canada Trust card that was in the wallet. He noted the account number on the debit card, but did not seize the card itself. The card did not have a name on it. He testified that he searched the debit card for investigative purposes, incidental to the arrest of Drynock for the murder.
- [38] On April 13, 2017, Robson swore an ITO for two production orders compelling TD Canada Trust to provide financial records relating to the debit card account. The applications were granted on April 14, 2017 by a judicial justice. The Crown seeks to tender the records obtained in order to establish that Drynock is the person responsible for the murder.

III. Issues

[39] The defence argues:

1. The detention and arrest of Drynock in the bar (arrest no. 1) was unlawful, and therefore in breach of s. 9 of the Charter;
2. Constable Miller's search of Drynock at the vehicle was unlawful, in breach of s. 8 of the Charter, as:
 - i. it was based on an unlawful arrest; and
 - ii. it was not a valid, authorized search incidental to arrest;
3. Accordingly, the discovery of Drynock's wallet containing the debit card was unlawful;
4. Drynock's subsequent arrest (arrest no. 2) at the vehicle for possession of the firearm was unlawful, as it was based upon the prior unlawful arrest;
5. Drynock's s. 10(a) and (b) rights were violated because:

- i. there was excessive delay (more than one hour) before Drynock was afforded an opportunity to consult legal counsel;
 - ii. Miller breached his duty to refrain from questioning Drynock when he asked him why he was carrying a gun; and
 - iii. Drynock was detained for the murder at the moment that Miller realized that he was a suspect in a murder, and when Waterman asked him to photograph his jacket and shoes. The police should have complied with s. 10 of the Charter for the murder at that point in time.
6. The search of Drynock's personal effects including examination of the debit card by Robson was not incidental to the arrest for murder. The effects were already in possession of the Merritt detachment;
 7. The search of the personal effects was unlawful because it was subsequent to an unlawful arrest (arrest no. 1, in the bar). Therefore the paragraph in Robson's ITO referring to Drynock's personal effects including the debit card and the Samsung phone must be excised;
 8. Robson's ITO for the banking production orders was deficient, in that it:
 - i. omitted relevant information relating to other potential suspects, and was therefore misleading;
 - ii. relied on information obtained in an unlawful search of Drynock's effects;
 - iii. relied on private information provided by TD Canada Trust that Robson knew the bank provided in breach of its privacy obligations.
 9. The ITO prepared by Sangha in support of the telephone records production order was deficient, in that it:
 - i. omitted relevant information relating to other potential suspects, and was therefore misleading;
 - ii. included unreliable information about the association between Drynock and the 0044 telephone number.
 10. After excision of the offending parts of the ITOs, the production orders must be set aside.
- [40] The parties have not yet addressed issues relating to potential exclusion of evidence under s. 24(2) of the Charter.

IV. Analysis - Voir Dire No. 1

A. Was Drynock lawfully detained and arrested in the Coldwater Hotel?

- [41] The Crown's position is that Drynock was lawfully detained by Lachapelle for the purpose of verifying his age and compliance with the Liquor Control and Licensing Act, S.B.C. 2015, c. 19 [LCLA]. Section 78 of the LCLA states:

78 (1) A minor must not, except as provided under this Act or unless the minor does so with other lawful excuse,

- (a) purchase liquor,
 - (b) consume liquor, or
 - (c) possess liquor.
- (2) A minor must not, except as provided by the terms and conditions of a licence, authorization or permit or the regulations or with other lawful excuse, enter or be in a liquor store or service area.

[Emphasis added.]

- [42] A detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave: *R. v. Le*, 2019 SCC 34 [Le] at para. 26. However, not every police-citizen interaction is a detention within the meaning of s. 9 of the Charter. Even where a person under investigation for criminal activity is questioned, that person is not necessarily detained: *Le* at para. 27.
- [43] The police are entitled to detain a person for investigative purposes where they have reasonable grounds to suspect that the individual is connected to particular criminal activity and that such a detention is reasonably necessary in the circumstances: *R. v. Mann*, 2004 SCC 52 [Mann] at para. 45.
- [44] Reasonable suspicion must be based on objectively discernible facts. It is an expectation that the targeted individual is possibly engaged in some criminal activity. A reasonable suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. Reasonable suspicion engages the possibility, rather than probability, of crime: *R. v. Chehil*, 2013 SCC 49, at paras. 26, 27.
- [45] In this case, as the Crown concedes that Drynock was detained by Lachapelle, I do not need to consider whether he was in fact detained as a matter of law.
- [46] The defence argues that Lachapelle's detention of Drynock was not lawful because, on the evidence, he did not subjectively suspect that Drynock was committing an offence by being in a bar.
- [47] I have no difficulty concluding that Lachapelle lawfully detained both Drynock and his brother Michael for the purpose he testified to, which was, simply, to check their identification in order to determine whether they were in breach of the LCLA by being underage.
- [48] Constables Miller and Lachapelle were engaged in usual, routine duties in attending the Coldwater Hotel bar that evening. The defence does not contend otherwise.

- [49] Miller and Lachapelle were on duty in separate vehicles patrolling the downtown Merritt area on the evening of April 7, 2017 into the early morning of April 8, 2017. Via radio, Miller suggested to Lachapelle that they do a bar walk of the Coldwater Hotel. Miller radioed Lachapelle saying, "Dan, you wanna take the temperature in there? Go in and do a quick walk?" They then parked their vehicles outside the front door and entered.
- [50] The Coldwater Hotel bar is one of three bars in downtown Merritt, a small town with a population of about 8,000 persons. Both officers testified that checking the bar for purposes of law enforcement for laws such as the Code, Motor Vehicle Act and the LCLA was part of their routine duties on a Friday night in Merritt. Both described the bar walks as part of the concept of proactive policing. The Coldwater Hotel bar is a very familiar place for local police.
- [51] Police duties at common law include the preservation of the peace, the prevention of crime, and the protection of life and property: Mann, at para. 26, citing R. v. Dedman, [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97. In my view their routine bar walks as part of "proactive policing" fall well within these duties. One of their legitimate concerns was making sure that persons in the bar were not underage.
- [52] The arrest of Drynock in the bar had no connection to the murder investigation. Neither officer was aware that IHIT was interested in finding him, nor that he could be a suspect in a murder. Both officers had previously seen the RTIC bulletin but did not recognize the person depicted. It is of course highly improbable that general duty officers would unilaterally decide to apprehend a suspect in a murder investigation late at night in a crowded bar. IHIT had certainly not asked the officers to apprehend Drynock.
- [53] The hotel owner Mr. Reed testified that the hotel pub is "the place to be" in Merritt after 10 p.m. Mr. Reed and Miller both testified that the crowd tends to be younger. There are signs posted outside and inside the bar informing the public and patrons that minors are prohibited, and that identification may be checked, and two forms of identification are required. Friday and Saturday nights are the busiest, and on those nights the hotel employs a doorman to monitor persons entering the bar, including checking identification of persons who appear to be under the age of 30. Reed explained that the establishment is obliged to check ID of anyone who looks to be under the age of 25, but they take a conservative approach. He confirmed that minors are not lawfully permitted to be in the bar by the terms of the applicable licence.
- [54] He testified that police patrols inside the bar are common, and the hotel welcomes them, "with open arms". He sees the patrols as part of their police duties. The hotel has a very good relationship with the local police.
- [55] The doorman on duty that evening, Connor MacDonald, testified to similar effect. Police officers attending the bar is routine.

- [56] The video evidence also supports this. As the police officers enter the bar, one can see that in general, the patrons take no notice of them.
- [57] The defence contests the sequence of events leading to the arrest of Drynock. The relevant testimony is that of the two officers, as well as that of Drynock, and the video evidence. The video evidence is very useful as it shows with reasonable clarity many of the actions of the officers and the Drynock brothers at the material times. The three relevant video clips were played many times during the course of these voir dres.
- [58] Based upon the totality of the evidence, I find as follows:
1. Lachapelle entered the bar first, with Miller following behind. They entered through the front door. Miller engaged in some brief inconsequential conversation with the doorman, MacDonald, who was at his post just inside the door;
 2. As I will explain in more detail later, I do not accept the evidence of MacDonald that Miller asked him about the presence of two young Indigenous males. I think he must be mistaken about that;
 3. Lachapelle surveyed the bar from his location near the entrance. He noted two males who in his view were acting suspiciously. They were looking at him and talking to each other. They looked nervous. As later revealed, these two males were Johnny and Michael Drynock. He thought that they appeared to be minors because they looked young, and appeared uncomfortable with the police presence. As he said, usually people in the bar continue on with their activities taking little or no note of the presence of the police, unless they are not supposed to be there. He decided to approach the two males to check their ID, to confirm that they were not underage. Lachapelle proceeded to walk towards the males, while at the same time he beckoned Miller, who was behind him, to follow, with a hand gesture;
 4. The suspicion of Lachapelle was well founded. Johnny Drynock acknowledged in his evidence that he looked young, and looked underage at the time. Michael was younger than he was. The video evidence supports the conclusion that the Drynocks both noticed the police officers enter the bar, supporting the testimony of Lachapelle in this respect;
 5. Just as Lachapelle (with Miller following) proceeded towards the Drynocks, they began to walk away, down a corridor towards the rear of the bar. This too was suspicious behaviour. Lachapelle testified and I accept that he said, loudly, "guys, stop". It makes sense that he would do so. As the Drynocks reached a spot near the washrooms and a lotto machine and an ATM, they stopped. This is a somewhat confined space. The video shows the two men stopping very briefly. Lachapelle put his hand on the shoulder of Michael Drynock, to steady him, as he was very unsteady on his feet, due to gross intoxication;
 6. Lachapelle asked them for their identification, for the purpose he testified to: to check if they were underage;

7. Just as he did so, Johnny Drynock immediately bolted, running towards a door at the end of the corridor. I reject his testimony that had the officer asked for his identification, he would not have run. He ran away immediately, because he wanted to avoid any encounter with the police. He testified that he ran because he was worried that the police would find the gun he was carrying;
 8. Lachapelle chased him down the corridor. He said "stop." The problem for Drynock was that the door at the end of the corridor was not an exit. It led to another door. Lachapelle tried to physically restrain Drynock at or near the opened door. There was a struggle between them. He told him he was under arrest, for "obstruction". Although Drynock was much smaller than Lachapelle, he managed to break free. He ran back down the corridor, where he was tackled and taken to the floor by Miller. There was a brief struggle between them; and
 9. Miller arrested him, telling him that he was under arrest for "flight" and "possibly being a minor in a bar." He testified that when he said "flight" he meant "obstruction", in that he observed him flee from Lachapelle, and struggle with and break away from Lachapelle, who had told him he was under arrest.
- [59] In the subsequent recording of Miller's Charter warning for the firearms offence, he reiterated that the initial arrest was for flight from police.
- [60] As noted, Drynock testified. He denied noticing that police had entered the bar. He denied making eye contact with Lachapelle when Lachapelle was surveying the bar. He could not recall hearing, "guys, stop" or some such command from Lachapelle, and said that he could not recall hearing Lachapelle ask for identification. He recalled Lachapelle saying something to him when they were at the door at the end of the corridor, but could not recall what words he heard. He acknowledged in cross-examination that it was possible that Lachapelle told him to stop, and told him he was under arrest for obstruction.
- [61] In general Drynock was not a credible witness. There are many areas of his testimony that are not credible. It is unnecessary for me to review them all.
- [62] His description of the reasons for going to the bar in the first place made no sense. They were at his brother's girlfriend's home. He testified that his brother was unmanageable due to consumption of drugs and alcohol, so he thought going to bar would be a good idea.
- [63] He testified that when he went to the rear of the pub he was just following his brother, who had said to him, "We have to go, brother." He testified that he assumed this was because his brother had observed people in the bar who were unfriendly to him (Johnny). Why they would proceed to the rear of the bar, where there was no known exit, rather than departing through the main entrance was unexplained.
- [64] He had no reasonable explanation for the weapons in his possession.

- [65] It is impossible to accept that it is simply a coincidence that he and his brother would choose to depart, by moving in a direction away from the officers, just as Lachapelle noticed them and began moving in their direction.
- [66] Drynock admitted that he knew he was prohibited by court order from possessing a firearm. He knowingly defied this court order by bringing the loaded firearm into the bar, a crowded, busy, public place.
- [67] His explanation for having the pool ball in a handkerchief is not credible. He testified that it was in Michael's possession before they went to the bar, and he took it from him, so he would not have a chance to use it. He did not think to leave it behind.
- [68] His evidence about conversations and observations he says he heard or saw between the police officers outside the bar, at the vehicle, are not credible. Specifically, I reject his evidence that Lachapelle suggested to an officer, (not Miller) that he should hold off making notes. The testimony was vague, and did not make much sense. If Lachapelle had wanted anyone to hold off making notes, it would be Miller. No other officer had more than an incidental role in the events.
- [69] The doorman, MacDonald, testified that when the officers entered, one of them asked about the presence in the bar of an identified Indigenous person. His testimony suggests that the officer who asked this would have been Miller. MacDonald says he pointed or gestured in the direction of the washrooms, toward the Drynocks. The officers then went in that direction.
- [70] His evidence suggests that the officers were not simply doing a "bar walk" but were looking for an individual. However in my view MacDonald's evidence about this is not reliable, and I do not accept it. There is no other evidence that supports it, and it is contrary to other reliable evidence. The evidence is contrary to that of the officers, who were credible witnesses. The evidence is contrary to the video evidence, which clearly shows Lachapelle gesturing to Miller to follow him. Miller does not take the lead, as the evidence of MacDonald would suggest. The video clearly shows Lachapelle taking the lead in moving quickly towards the Drynocks, without following any direction or indication from MacDonald or Miller. The video evidence does not show any kind of pointing, gesture or physical indication of direction by MacDonald, whose arms remain folded across his chest. He was mistaken about some other matter, such as the part of the bar the Drynocks went to initially after they entered. He was not interviewed about his recollection of events until recently, some two years after the events. Interactions with police were common for him. As he seemed to be an honest disinterested witness doing his best, I infer that he must have been confusing the events of April 8, 2017 with some other occasion.

- [71] I conclude that Lachapelle had reasonable grounds to detain both Johnny Drynock and Michael Drynock for the simple, ordinary purpose of investigating whether they were in contravention of the LCLA by being underage, in a bar. He briefly detained both men for that purpose, when Johnny Drynock (and then also Michael Drynock) fled. Lachapelle attempted to or perhaps did arrest Johnny Drynock for the offence of resisting or wilfully obstructing a peace officer in the execution of his duty, contrary to s. 129 of the Code.
- [72] Lachapelle clearly had grounds to arrest Drynock and at a minimum, attempted to do so. Miller heard Lachapelle tell Drynock that he was under arrest, and then saw him break free in the struggle. Drynock was obviously resisting or obstructing Lachapelle in the execution of his duties. In arresting Drynock, Miller was essentially carrying out Lachapelle's attempt to arrest Drynock, based upon his own assessment of the circumstances. He did not act on the express request of Lachapelle, but in the circumstances he needed no such direction. There was likely no time for it. The entire sequence of events from when Lachapelle approached the Drynocks to the arrest of Johnny Drynock by Miller occurred within a few seconds.
- [73] In addition, and in any event, Miller had independent subjective grounds to arrest Drynock for the offence that he reasonably believed Drynock was committing in his presence (see *R. v. Storrey*, [1990] 1 S.C.R. 241, 53 C.C.C. (3d) 316). His failure to accurately articulate the offence (i.e. "flight" rather than "resisting" or "wilfully obstructing" a peace officer) is of no consequence.
- [74] The legal principles governing the right of a police officer to arrest without warrant under s. 495(1)(b) of the Code were recently summarized by Frankel J.A. in *R v. Lofty*, 2017 BCCA 418, leave to appeal ref'd [2018] S.C.C.A. No. 14:
- [32] It is well-established that when an accused challenges the validity of a warrantless arrest the burden is on the Crown to show the police acted in a lawful and reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265 at 277–278. To do so, the Crown must prove the facts on which it relies on a balance of probabilities: *Collins* at 278; *R. v. Buhay*, 2003 SCC 30 at para. 32, [2003] 1 S.C.R. 631.
- [33] When an arrest has been made pursuant to s. 495(1)(b) of the Criminal Code the Crown must establish that the arresting officer had reasonable grounds to believe the person arrested was committing a criminal offence in the officer's presence: *R. v. Roberge*, [1983] 1 S.C.R. 312 at 323–325; *R. v. Abel & Corbett*, 2008 BCCA 54 at para. 52, 229 C.C.C. (3d) 465; *R. v. Gonzales*, 2017 ONCA 543 at para. 103, 136 O.R. (3d) 225. As Justice Hall stated in *R. v. Boyd*, 2013 BCCA 19 at para. 6, 332 B.C.A.C. 85, "A peace officer exercising the arrest power [under s. 495(1)(b)] must provide some sensible reason for believing an offence was being committed by the person arrested."

- [34] A two-part test is applied in determining the validity of a warrantless arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250–251. In the context of s. 495(1)(b) the first stage involves factual determinations: (a) whether the arresting officer subjectively believed the person arrested was committing a criminal offence in the officer's presence; and (b) the grounds for such belief, i.e., the factual matrix that informed the officer's decision.
- [35] If the Crown proves the officer held the requisite subjective belief, then the second stage involves determining whether the officer's grounds for that belief are objectively reasonable. This is a question of law: *R. v. Shepherd*, 2009 SCC 35 at paras. 18–20, [2009] 2 S.C.R. 527; *R. v. MacKenzie*, 2013 SCC 50 at para. 54, [2013] 3 S.C.R. 250. It involves determining whether, from an objective perspective, it was reasonable for the officer to believe he or she had come across someone in the very act of committing a criminal offence. The officer's training and experience are relevant in assessing objective reasonableness. *MacKenzie* at para. 73; *R. v. Wilson*, 2012 BCCA 517 at para. 26, 99 C.R. (6th) 76, leave to appeal ref'd, [2013] 3 S.C.R. xii.
- [75] In addition to grounds under s. 495(1)(b), Miller also had grounds to arrest Drynock under s. 495(1)(a), as he had reasonable grounds to believe he had committed an indictable offence in contravention of s. 129.
- [76] The offence under s. 129 of the Code is a hybrid offence, and therefore is an indictable offence within the meaning of s. 495(1)(a) due to the operation of s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. I-21; see *R. v. Ashby*, 2013 BCCA 334 [Ashby] at para. 48.
- [77] A peace officer is engaged in the execution of their duties if their activities fall within the duties related to ensuring public peace and the prevention and detection of crime, or duties and responsibilities prescribed by statute: *R. v. Noel* (1995), 101 C.C.C. (3d) 183 (B.C.C.A.) [Noel] at para. 14.
- [78] The intention to obstruct need not be tied to a specifically defined duty. The offence of obstruction is made out where the accused was "aware or knew at the time of the obstructive conduct, that the peace officer was engaged in the execution of a duty, whatever that duty may have been." (*Noel* at para. 21).
- [79] The lawfulness of an arrest of an individual under s. 495(1)(a) of the Code for obstruction is not contingent on the individual's conviction for the actual offence - it depends on whether the arresting officer had reasonable grounds for the belief that the individual committed the offence of obstruction at the relevant time: *R. v. Anderson* (1996), 111 C.C.C. (3d) 540 (B.C.C.A.) at para. 43, leave to appeal ref'd [1997] S.C.C.A No. 10.
- [80] The defence relies on Miller's testimony that he did not know what offence Lachapelle was investigating when he followed him and observed him interact briefly with the Drynocks near the ATM. He also acknowledged that at the time he had no subjective belief that Johnny Drynock was a minor in a bar. However, he knew from the general circumstances that Lachapelle was investigating something. Although this point is not essential, Miller could reasonably infer that Lachapelle was investigating both Drynocks for being minors in a bar.

This was a regular, common sort of investigation in the circumstances. This offence was reflected in Miller's own words when he arrested Drynock.

- [81] However, Miller did not need to know what offence his colleague was investigating, and did not need to believe that Johnny Drynock was a minor. The essential point is that he subjectively believed that Drynock had committed the offence of resisting or obstructing Lachapelle in the execution of his duty. Miller confirmed that he had this belief at the relevant time in stating that he was arresting him for "flight," and as he stated in his testimony.
- [82] The objective basis for that belief is clear. Again, he observed Drynock run from Lachapelle, he heard Lachapelle tell him he was under arrest, he observed a struggle between them, and saw Johnny Drynock break free in an obvious attempt to flee from a police officer in the execution of his duties.
- [83] I conclude that the arrest of Drynock by Miller in the bar (arrest no. 1) was lawful.

B. Was the warrantless search of Drynock lawful?

- [84] As noted, the defence argues that Miller's search of Drynock at the vehicle was unlawful, in breach of s. 8 of the Charter, as (1) it was based on an unlawful arrest (arrest no. 1); and (2) it was not a valid search incidental to arrest.
- [85] The following principles are drawn from *R. v. Caslake*, [1998] 1 S.C.R. 51, 121 C.C.C. (3d) 97 [Caslake]:
1. A warrantless search is *prima facie* unreasonable. Therefore, the Crown has the burden of showing that the search was, on the balance of probabilities, reasonable: at para. 11.
 2. The arrest must be lawful: at para. 14.
 3. The three main purposes of search incident to arrest are:
 - i. ensuring the safety of the police and public;
 - ii. the protection of evidence from destruction at the hands of the arrestee or others; and
 - iii. the discovery of evidence which can be used at the arrestee's trial: at para. 19.
 4. The search must be "truly incidental" to the arrest. This means that the police must be attempting to achieve some valid purpose connected to the arrest. This will depend on what the police were looking for and why.
 5. There are subjective and objective aspects to this issue:
 - i. The police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted;
 - ii. the search must actually be for purposes related to the arrest; and

iii. the police officer's belief that he or she has a legitimate reason to search must be reasonable in the circumstances: at paras. 19, 21.

6. The standard is not reasonable and probable grounds. The only requirement is that there be some reasonable basis for doing what the police officer did: at para. 20.

[86] A similar summary is found in the reasons of Chiasson J.A. in *R. v. Majedi*, 2009 BCCA 276, at para. 19.

[87] I have ruled that the arrest was lawful. Therefore, the basis for a valid search incidental to the arrest existed. The next issue is whether there was a valid lawful purpose for conducting the search incident to arrest.

[88] Miller testified that he conducted a pat-down search of Drynock before placing him in the car, for safety reasons. Before performing the pat-down he asked if he had anything on his person which could harm himself or Drynock. At this point Drynock revealed that he had a gun in his pocket. Miller testified that he was shocked by this ("awestruck") as he realized that Drynock could have reached for the gun inside the car as they struggled.

[89] Miller conducted the pat-down search, as he said, in typical fashion, from head to toe. He found the knife (sheathed), the handkerchief and pool ball, a large amount of cash (\$2,000), a wallet, and the cell phone. He checked the wallet for identification. He confirmed Drynock's identity with the BC photo ID in the wallet. Lachapelle secured the gun (a revolver) by removing the six round cylinder and the six rounds of ammunition, and checking the chamber. Miller counted and photographed the cash, so as to prevent allegations of loss or theft.

[90] The search of Drynock's person was a valid search for the safety of the police and of the public and Drynock himself. The common law specifically authorizes safety searches for weapons conducted incident to arrest (*Caslake*; see also *R. v. Golden*, 2001 SCC 83, at para. 94).

[91] The defence argues that the safety search was not for a valid purpose as Miller had no reason to believe that Drynock was in possession of a weapon, and the search went beyond the stated reason of officer safety. However, as *Caslake* makes clear, the standard for the search is not reasonable and probable grounds. *Lamer J.* dealt with this precise point (see para. 20).

[92] The only reason for the search Miller expressly gave in his testimony was for the safety of himself and Drynock. The safety concern might not account for checking the identification in the wallet. However, I can confidently infer that Miller's subjective purpose in checking the wallet was for a manifestly valid purpose connected to the arrest; namely, to confirm Drynock's identity. This step was necessary for multiple purposes, such as booking procedures, and checking police databases such as CPIC. There is a pressing and essential need for the police to know who they are dealing with, both for immediate purposes and for use as evidence at trial. Miller did not otherwise search the wallet. He did not search the

telephone. His purpose in counting and photographing the cash was prudent.

[93] As the first arrest was lawful, and the search incidental to that arrest was also lawful, Miller's discovery of the loaded handgun was lawful. Arrest no. 2 for the weapons offence was lawful. Arrest no. 3 following the determination via CPIC that Drynock was prohibited from possessing a firearm was lawful.

C. Were Drynock's Charter rights under s. 10(a) and (b) violated?

[94] The defence argues that Drynock's Charter rights under s. 10(a) and (b) were violated in that:

1. He was not afforded an opportunity to consult legal counsel until 2:05 a.m., in excess of one hour after the first arrest;
2. Miller asked him why he had the gun in his possession before he advised him of his Charter rights in relation to the possession offence and before he had an opportunity to consult counsel; and
3. Drynock was in reality detained on the murder charge as soon as Miller realized that he was a suspect in a murder. Drynock should have been provided with Charter advice and warnings for murder, at the time of detention.

1. Delay in s. 10(b) implementation to facilitate access to counsel

[95] I adopt my review of the legal principles applicable to police duties under s. 10(a) and (b) set out in *R. v. Reddemann*, 2016 BCSC 442, at paras. 50-53.

[96] The delay between his first arrest and the provision of access to counsel was modest, and is reasonably explained.

[97] The police entered the bar at about 12:45 a.m. Miller returned to his police vehicle on the street outside the bar with Drynock at about 12:55 a.m. He conducted the search. He counted the cash, and spread it out on the trunk lid of his vehicle so it could be photographed. The gun was secured. At 1:15 a.m. he arrested Drynock for possession of the loaded firearm. He provided the Charter information and warning, which he recorded, while he and Drynock were seated in the vehicle, concluding at 1:19 a.m. He departed the scene at 1:29 a.m. and drove to the RCMP detachment nearby. Lachapelle was already there, with Michael Drynock, who he had arrested. There is a single secure parking bay. Only one prisoner can be processed at a time in the small detachment, so he had to wait. He assisted Lachapelle in booking Michael Drynock.

[98] At 1:45 a.m., Miller ran the CPIC check on Johnny Drynock and learned of the weapons prohibition, as well as IHIT's interest. He arrested Drynock again (arrest no. 3) and once again provided the s. 10 Charter notice and warned him, at 1:50 a.m. This conversation was also recorded. It concluded at 1:54 a.m. Drynock was then taken to the cell block area, and provided with a book with telephone numbers for lawyers. At Drynock's request, Miller called Mr. La Liberte's number. At 2:05 a.m. he spoke with a female with Mr. La Liberte's

answering service. She said that Mr. La Liberté would call in the morning. Drynock declined Miller's offer to call another lawyer, or legal aid. He said he would wait for Mr. La Liberté. Drynock was entitled to wait a reasonable time in order to speak with the lawyer of this choice: *R. v. Willier*, 2010 SCC 37 [Willier] at para. 35. He was lodged in cells at 2:09 a.m. He spoke with Mr. La Liberté at 10:00 a.m. the next morning.

[99] The elapsed time from the first arrest just after 12:45 a.m. until legal counsel's answering service was contacted at 2:05 was approximately 1 hour and 15 minutes. Much occurred during that time. The delay is reasonably explained. Access to legal counsel was provided at the first practical opportunity (see *R. v. Taylor*, 2014 SCC 50 [Taylor] at para. 32). The exigencies of an arrest situation can excuse immediate compliance with s. 10(b): *Ashby*, at para. 72. There was no breach of Drynock's rights under s. 10(b) in providing access to counsel.

2. Constable Miller's question about the gun

[100] The police are obliged to refrain from questioning the detainee until a reasonable opportunity to consult legal counsel is provided: *Willier*, at para. 33. Miller's question about why Drynock was carrying the gun was at least technically in breach of that duty. He explained that he was shocked, and the question was a spontaneous reaction. He was aware of his duty, and that he should not have asked this question. He refrained from asking any further questions. Lachapelle asked no questions of Drynock.

[101] The Crown advises that it will not be tendering Drynock's statement to Miller in evidence at the trial.

3. When was Drynock detained or arrested for the murder?

[102] Miller called Waterman as requested by the notice on CPIC at 2:25 a.m. Waterman asked him to photograph his jacket and running shoes, and to send the photos to him.

[103] As noted, IHIT investigators travelled to Merritt later on the same day, April 8. After seeing Drynock in the cells, Waterman formed the opinion that Drynock was the person seen in the images from the scene of the murder. He was arrested (arrest no. 4) by another IHIT investigator at 4:23 p.m. At that time he was properly advised and cautioned, and provided with access to legal counsel.

[104] As noted, the defence contends that Drynock was detained on the murder from when Miller spoke to Waterman on the telephone at 2:25 a.m., and therefore he should have been provided with Charter advice at that time, in connection with the murder. On cross-examination Miller conceded that he was "involved in" a murder investigation when Waterman requested that Miller photograph Drynock's jacket and running shoes for him. He conceded that in his mind he was detained on the murder at that time.

- [105] I do not accept that Drynock was detained on the murder charge prior to his arrest for murder by IHIT at 4:23 p.m. Waterman did not direct Miller to hold Drynock for questioning by IHIT, or to interview him or to ask him for any information on IHIT's behalf. Legally and factually, Drynock was initially detained for obstruction, which was quickly overtaken by his detention and arrest for the weapons possession and breach charges. His later arrest for the murder added to the legal basis for his detention but of course had no practical effect on his detention. He was already detained on the prior charges, and indeed he had already been remanded in custody on the firearms and breach offences by a judicial officer.
- [106] For the purposes of the Charter, "detention" refers to a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the state: *R. v. Suberu*, 2009 SCC 33 [Suberu] at paras. 21-25; *Le* at para. 27. Therefore, detention requires state action to restrict the liberty of the individual, either physically or psychologically. Here, it is clear that there was no such action relating to the murder until he was actually arrested for the murder.
- [107] Miller's subjective belief makes no difference.
- [108] Similarly, Miller's actions in photographing the jacket and shoes at the request of IHIT made no difference to Drynock's detention status. Although it can be said that Miller was tangentially "involved in" the murder investigation in some sense, this makes no difference to the status of Drynock's detention.
- [109] A purposive consideration of s. 10 serves to support the conclusion that Drynock was not detained on the murder until his arrest for the murder. The purpose of the section 10(b) right to counsel is to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty: *Suberu*, at para. 41. In the circumstances, regaining liberty was not a realistic possibility. Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy "is able to make a choice to speak to the police investigators that is both free and informed": *Taylor*, at para. 21, citing *R. v. Sinclair*, 2010 SCC 35 [Sinclair]. Here, there was no questioning or interrogation of Drynock in connection with the murder until after his arrest for murder. The circumstances are not akin to a change in jeopardy of a detainee during the course of police interrogations, which may trigger renewed s. 10(b) access to counsel rights: *Sinclair*, at para. 65.
- [110] I conclude that Drynock was not detained on the murder charge until his arrest for murder, and he has not established that there was a breach of s. 10 of the Charter in this respect.

D. The Banking Records Production Orders

- [111] On the basis of Robson's applications and ITO, on April 14, 2017 a judicial justice issued the two banking records production orders, directed to TD Canada Trust. The orders were issued under the authority of s. 487.014 ("general" production order) and s. 487.018 ("financial data" production order), respectively.
- [112] The Crown intends to rely on the banking records along with the telephone records to show that the 0044 telephone was present in the area of several banking transactions in the Lower Mainland and Merritt during March 2017 both before and after the homicide, and as evidence connecting the 0044 telephone to Drynock.
- [113] The statutory provisions insofar as they are relevant are as follows:

General production order

487.014 (1) Subject to sections 487.015 to 487.018, on ex parte application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.

Conditions for making order

- (2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that
- (a) an offence has been or will be committed under this or any other Act of Parliament; and
 - (b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

Production order -- financial data

487.018 (1) On ex parte application made by a peace officer or public officer, a justice or judge may order a financial institution, as defined in section 2 of the Bank Act, or a person or entity referred to in section 5 of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, to prepare and produce a document setting out the following data that is in their possession or control when they receive the order:

- (a) either the account number of a person named in the order or the name of a person whose account number is specified in the order;
- (b) the type of account;
- (c) the status of the account; and
- (d) the date on which it was opened or closed.

Identification of person

- (2) For the purpose of confirming the identity of a person who is named or whose account number is specified in the order, the order may also require the institution, person or entity to prepare and produce a document setting out the following data that is in their possession or control:
 - (a) the date of birth of a person who is named or whose account number is specified in the order;
 - (b) that person's current address; and
 - (c) any previous addresses of that person.

Conditions for making order

- (3) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to suspect that
 - (a) an offence has been or will be committed under this or any other Act of Parliament; and
 - (b) the data is in the possession or control of the institution, person or entity and will assist in the investigation of the offence.

487.019 (1) An order made under any of sections 487.013 to 487.018 may contain any conditions that the justice or judge considers appropriate including, in the case of an order made under section 487.014, conditions to protect a privileged communication between a person who is qualified to give legal advice and their client.

[Emphasis added.]

[114] There is a significant difference in wording between the two sections, in that section 487.014(2) requires "reasonable grounds to believe" whereas the standard in s. 487.018 is lower: "reasonable grounds to suspect". On the view I take of this matter, the difference is not material to the issues in this case.

[115] The defence contends that various paragraphs of the Robson ITO should be excised, and that upon excision of the offending paragraphs the orders could not have been issued, and must be set aside, and the evidence obtained ruled inadmissible. The defence argues, in particular:

1. The ITO omitted relevant evidence going to the issue of Drynock as the suspect in the murder;
2. The ITO relied upon information obtained in an unlawful search of Drynock's personal effects in Merritt; and
3. The ITO relied upon private banking information unlawfully disclosed to Robson.

- [116] A production order is akin to a search warrant, in that it is a judicially authorized search of information in which an individual can reasonably be expected to have a privacy interest. The legal principles applicable to the review of search warrants and wiretap affidavits apply to the review of production orders with necessary modifications, to assess the existence of the statutory preconditions.
- [117] A summary of the general principles is set out in *R. v. Wong*, 2017 BCSC 306 [Wong] at paras. 49- 74, where Kent J. quoted extensively from the comprehensive summary of the general principles found in *R. v. Boussoulas*, 2014 ONSC 5542. In the interests of brevity, I adopt the summary set out in Wong.
- [118] Also helpful is the concise summary set out in the decision of Garson J.A. in *R. v. Liu*, 2014 BCCA 166 (while bearing in mind the difference in wording of the sections that I refer to above):
- [39] I would summarize the main points from this jurisprudence in the following way:
- The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant.
 - The trial judge should examine the information in its totality, not on a piece meal basis, in a "practical, non-technical, and common sense basis".
 - The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so.
 - The appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.
 - Reasonable grounds may be said to exist at "the point at which credibly-based probability replaces suspicion".
1. Omission of information about other potential suspects
- [119] The defence argues that the ITO was not full, frank and fair because it failed to include references to a number of potential suspects other than Drynock. The defence argues that the ITO was therefore misleading (although not intentionally so), and that the misleading portions should be excised. The defence argues that the paragraphs identifying Johnny Drynock as a potential suspect (paragraphs 67 and 68) are misleading because, due to the omissions, the justice was unable to assess the weight of the identification evidence in the totality of the circumstances. The defence argues that the justice was misled into believing that the evidence identifying Johnny Drynock was stronger than it actually was.

[120] I do not accept these arguments. In my view the omitted information did not render the ITO materially misleading, and could not have made a difference to the decision of the justice to make the orders.

[121] The ITO stated clearly that Johnny Drynock was one of several suspects. The ITO clearly laid out the general circumstances of the investigation. Robson explained that the police had obtained video surveillance evidence and utilized that to send information as to the identity of the shooter from police through RTIC and from the public via the media. He stated:

IHIT received a number of tips from various sources including law enforcement and the public, identifying the suspect in the shooting and homicide of BHANGU.

[122] He referred specifically to four potential suspects: Drynock, Allen, King, and an unidentified male. The information relating to each of these potential suspects was set out. In the case of Drynock, the information included identification by Waterman in the Merritt detachment cell block on April 8, and identification by two individuals, both of whom had a significant association with Drynock.

[123] Robson did not include information as to the identity of six persons who had been identified as potential suspects, but who had been ruled out by IHIT: Koulterman, Quesnelle, Drake, Vu, Halkett, and an unnamed individual on a tip from Prentice. He testified that he did not include this information because he did not consider it to be relevant. He also did not include information as to three other potential suspects that he was not aware of at the time: Feldman, Spence, and Michael Drynock.

[124] The issues for the justice were whether there were reasonable grounds to believe (or suspect) that:

1. firstly, an offence has been committed under this or any other Act of Parliament; and
2. secondly,
 - i. [for s. 487.014] the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence;
 - ii. [for s. 487.018] the data is in the possession or control of the institution, person or entity and will assist in the investigation of the offence.

[125] There was no issue as to whether an offence had been committed.

The questions were whether the bank had documents or data that would afford evidence respecting the commission of the offence, or assist in its investigation.

- [126] The authorizing justice was not deciding whether the Crown could prove the identity of Johnny Drynock as the shooter. That issue is for trial, not for the authorizing justice, or for me as the reviewing justice: *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, at para. 30; *R. v. Loewen*, 2016 BCCA 351, at para. 48. Plainly, the police were seeking to obtain evidence about that question.
- [127] The justice needed to be satisfied only that Johnny Drynock was a legitimate potential suspect in the homicide to decide the questions material to the application. The fact that the police had several potential suspects was expressly stated. Robson stated that the bank records would assist the investigation by either refuting or showing that Drynock was involved in the murder. This statement reinforced that Drynock was a suspect, only.
- [128] Given the nature of the investigation, the fact that the police probably received other tips could have been readily inferred.
- [129] Robson expressly said that IHIT received a number of tips from various sources. He did not say that all of the tips received were referred to in the ITO. A fair reading of the ITO as a whole would suggest otherwise. In my view, Robson's decision to exclude references to other possible suspects who had already been eliminated by the police was not misleading. Including references to them would have needlessly added to the length of the ITO without adding substance. Similarly, references to the tips or potential suspects that the police were aware of but had not yet excluded, would not have added anything material to the ITO.
- [130] Fortifying this conclusion, the amplification evidence does not materially affect the grounds for issuing the orders one way or another.
- [131] I conclude therefore that the ITO was not misleading in relation to Drynock's connection to the homicide, and there is no basis to excise portions of the ITO on this ground.

2. The Search of Drynock's Personal Effects in Merritt

- [132] The relevant search in relation to the banking records is Robson's examination of the debit card, on April 9 at 3:35 p.m., while Drynock remained in custody. The debit card was in the wallet that was among his effects when he was initially arrested. Robson did not seize the card, but his examination of it constituted a search. The issue is whether the search was truly incidental to the arrest.
- [133] Robson testified that he was relying on his authority to search incidental to the arrest for murder, and his purpose was to obtain evidence for the murder investigation.
- [134] That was a valid, objectively reasonable purpose (see Caslake at para. 19).

- [135] The defence argues in effect that the search of the debit card was not truly incidental to the arrest. The main facts relied upon are that: (1) the wallet and debit card had already been seized in another investigation, and therefore it cannot be said that the search was incidental to the arrest for murder; and (2) there was a delay of approximately 23 hours between when he was arrested for the murder and when the card was examined.
- [136] In the circumstances of this case, in my view these are not material points. The connection between his arrest for murder and his wallet and the other personal effects relevant to the murder charge is clear. The fact that he was already in custody did not mean he could not be arrested again, or detract from the police power to search incidental to that newly effected arrest. The wallet was no longer on his physical person due to the prior arrests, but remained in his personal effects at the detachment where he was re-arrested.
- [137] In fact, although this is not essential to my conclusion, the items were not previously formally seized in the sense of having been made exhibits. There is nothing to suggest that the bank card and telephone were relevant to the weapons possession and breach charges. Upon his release, his effects other than whatever was relevant to the other charges (such as, presumably, the weapons) would have been released with him.
- [138] The delay in the search makes no difference in the circumstances of this case. Drynock remained in custody in the detachment prior to transport to court for his April 10 appearance on the other charges. The items were held in the detachment. There was no urgency, and nothing changed or practically speaking could change, due to the delay. Robson and Waterman took advantage of the time to carry out other investigative steps while they were in Merritt, such as going to the Coldwater Hotel to attempt to seize the video evidence.
- [139] In the context of whether the search was truly incidental to arrest, delay is relevant, but not determinative. Delay may cause the court to draw a negative inference on that question, which may be rebutted by a proper explanation for the delay: Caslake, paras. 24-25, 28. However in this case I draw no such negative inference. In any event, there is a reasonable explanation for the delay.
3. The ITO relied upon private banking information unlawfully disclosed to Detective Robson
- [140] The defence contends that Robson had no lawful authority to obtain confirmation from TD Canada Trust that the debit card account number was associated to a bank account held by Drynock. The defence argues that Robson knew that the bank violated the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 [PIPEDA], in providing private information about Drynock's bank account, and that Robson knowingly relied on the unlawfully disclosed information. The defence argues that the unlawfully disclosed information must be excised from the ITO. The defence argues that paragraph 78 of the ITO should be excised.

[141] Section 7(3) of PIPEDA sets out the circumstances in which an organization may disclose personal information without consent. There are 18 subsections. The defence argues that the applicable subsection would be (c.1). The section reads:

(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law,

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province,

[142] The defence argues that the statute was breached in that Robson did not identify his lawful authority to obtain the information.

[143] Robson testified that he was already aware that the debit card number was associated to Drynock because the card was found on his person when he was arrested. As noted it was in his wallet, which was among his personal effects at the detachment when he was arrested for the murder. The card identified TD Canada Trust as the issuing financial institution, but did not show a name.

[144] Robson testified that he contacted the bank for information because he needed confirmation that the bank had indeed issued the card. He had experience in the past with forged or fraudulent bank cards. He did not ask the bank to confirm that the card was associated to Drynock.

[145] Robson spoke by telephone with a person with the bank's security department, Weaver, who had responsibility for responding to law enforcement information requests. Robson identified himself as a police officer who was investigating a murder. He informed Weaver that a suspect in the murder was found with a TD debit Visa card in his wallet. He advised that he would be seeking a production order. He asked about the types of records that the bank would have. He needed to know what records he should seek. He followed up with an email confirming the request, and asked, "Are you able to confirm that the card number is associated to TD Bank?" In the email he included the name of the suspect, Johnny Drynock. He included the card number, expiry date and security number from the card. Mr. Weaver replied in an email, stating, "Hi Mat: Yes I can confirm that this is Johnny Drynock's TD Bank Accesscard".

- [146] In the email response the bank volunteered more information than was requested, in confirming not just that the card was a valid TD bank debit card but also that the card number was associated to Drynock in the bank's records. This was understandable in the circumstances.
- [147] I accept that Robson did not expressly ask for the additional information, and that he did not need it.
- [148] Even without the additional information, the issuing justice could have issued the production orders, even if paragraph 78 of the ITO were excised entirely. The ITO included the fact that the debit card number and other information came from the card found in Drynock's possession. The connection to TD Canada Trust was displayed on the card. The justice could easily infer that the card was Drynock's and if so that the bank would have relevant records.
- [149] Robson could have limited the ITO to the information he had plus confirmation that the card number was associated to the bank, but doing so would be problematic. He could be accused of withholding relevant information. Having received it, he was practically speaking compelled to provide it in the ITO.
- [150] For the purposes of these reasons I assume without deciding that the bank disclosed additional, unsolicited information in breach of the PIPEDA. It was a minor breach, in the circumstances. The police already had the key information. Robson did not request any specific or detailed information such as transaction records. He sought a production order for the information he knew to be private. In my view, Robson did not knowingly request the bank to disclose private information in breach of PIPEDA. His conduct in seeking the information was not unlawful.
- [151] I conclude that paragraph 78 of the ITO should not be excised, but even if it were, the production orders could have issued.
- [152] In the circumstance it is not necessary for me to consider the Crown's argument, relying on *R. v. Wong*, 2016 BCSC 1834, that the additional disclosure did not trigger s. 8 rights.

V. Conclusions - Voir Dire No. 1

- [153] The record supported the applications for the banking records production orders.
- [154] There were no Charter breaches relating to the arrests which could ground orders for exclusion of evidence, other than Miller's question about the gun, which the Crown does not rely on.
- [155] The defence applications no. 1 and no. 2 are dismissed, except for the portion of application no. 1 seeking a stay of proceedings based upon alleged breach of s. 7 of the Charter, which was not dealt with at this time.

VI. Voir Dire no. 2 - Application to set aside the telephone records production order

A. Background

- [156] On March 21, 2017, Sangha swore an ITO for an application for a production order to compel Rogers Communications to provide records relating to the 0044 telephone number. The order was granted the same day.
- [157] Utilizing the information obtained, the police learned that the 0044 telephone was used at the location of the homicide at the relevant time. The Crown seeks to tender these records at the trial in order to establish that Drynock is the person responsible for the murder.

B. Analysis

- [158] The main argument the defence makes is essentially the same as that set out above in relation to the Robson ITO -- namely, that Sangha omitted information about other potential suspects, thereby misleading the justice about the weight of the information in the hands of the police identifying Drynock as a suspect in the investigation.
- [159] As in the case of the Robson ITO, Sangha provided information about the homicide and the nature of the investigation to that point, which was early in the investigation. He stated that IHIT had released photos and a video clip of the suspect to the media on March 17, 2017 and requested assistance from the general public. The ITO identified two potential suspects, Drynock, and a person named King. In each case, information connecting the potential suspect to the homicide was set out.
- [160] Sangha did not include references to tips the police had received identifying Quesnelle, Koulterman, Allen; and an unnamed "young Asian male", as they had either been ruled out or there had been limited investigation of the tip. He did not refer to other tips that he was not aware of: an unnamed male referred to by Prentice, Feldman, Vu, Drake, and Halkett.
- [161] The order was obtained relying on s. 487.014(2), which as noted previously, requires the justice to be satisfied that there are reasonable grounds to believe that an offence has been committed, etc., and that "the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence".
- [162] As in the case of the Robson ITO, in my view, omitting the information about other potential suspects did not render the ITO misleading, and could not have made a difference to the decision of the justice to make the order. Therefore it was not material to the application.
- [163] Sangha identified Drynock accurately as "a potential suspect in the investigation" and provided the evidence available for that assertion. He did not indicate that the police case identifying Drynock was strong, and could not have done so. Manifestly, the issue of identification of the killer was the purpose for seeking the order. He stated that the information sought could potentially implicate Drynock further, or conversely, show that Drynock was not in the area of the scene where the homicide occurred. Sangha referred to the possibility that the information sought could lead to the identification of other potential

suspects, or witnesses.

- [164] The overall circumstances in relation to Drynock's connection to the case as a suspect were accurately portrayed. Express reference to other potential suspects would not have added anything material to the ITO, having regard again to the issues before the justice.
- [165] The situation would have been different, for example, if Sangha had failed to disclose information that could materially undermine the information provided as to Drynock's connection to the telephone number.
- [166] The defence relies on Sangha's voir dire cross examination in which he acknowledged that he was aware that identification was "the key issue". It was the key issue for the police of course, as the authorizing justice could not have failed to appreciate, but that was not the "key issue" for the authorizing justice.
- [167] Sangha also testified that he should have included the other tips or potential suspects. Ambiguously, at the same time, he denied that he did not comply with his duty to provide full, fair and frank disclosure. He testified that the inclusion of the other names would not add to or detract from anything in the ITO. I agree with this. It seemed to me that his concession that he "should have" included the other information derived from pragmatic considerations, in hindsight. Namely, it would have been easy to do, and would avoid criticism. Inclusion of extraneous material in an ITO only to avoid criticism should not be encouraged. Of course, his testimony is in no way determinative of the issue before me.
- [168] The defence argues that the information provided by Sangha regarding Drynock's association to the 0044 telephone number was unreliable, in two ways:
1. the ITO says that the 0044 telephone number that Drynock's mother provided to Waterman at her residence on March 19, 2017 was his "current" cell phone number, when she had not actually said "current"; and
 2. the ITO says that when Waterman phoned the number he was given, a person named "Jordon" answered, and said that the phone was Drynock's, and he got the phone at a party in Sechelt, but did not know how to reach or locate Drynock in order to return his phone. Waterman accused "Jordon" of being untruthful. "Jordon" hung up and further calls went to voicemail.
- [169] The first point was a fair inference by the police and by Sangha. The police asked Drynock's mother for his telephone number. Initially she provided a similar but incorrect telephone number. Then Waterman met her at her residence in Merritt. There she provided the 0044 number from her own telephone. Especially given the nature of the inquiry (Waterman had said that it was very important that they speak with Johnny) there would be no reason to suppose that the telephone number provided was not his current number, or that she was attempting to mislead police.

[170] The defence contends that on review, the information about the "Jordon" telephone call was not reliable and should be excised. I do not agree. The fact that some of the information from "Jordon" was potentially unreliable and that Waterman accused him of being untruthful was expressly stated. The justice was given information with which to assess reliability. Sangha was obliged to include this information, as it went to the question of whether the 0044 number was associated to Drynock, or not. At minimum, it showed that the telephone number was active and in use by someone who was familiar with Drynock. In any event, the order could have been issued without the information from "Jordon".

VII. Conclusion - Voir Dire No. 2

[171] The application to set aside the telephone records order is dismissed. Accordingly the telephone records were lawfully obtained.

"Verhoeven J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/11/2019BCSC1133.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-drynock-2019>

Prepared on 26 October 2026 · Esheria