

CANADA / JUDGMENT

R. v. Islam

2024 BCSC 1752

COURT

Supreme Court of British Columbia

DECIDED

20 September 2024

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2024 BCSC 1752 R. v. Islam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Islam,

2024 BCSC 1752

Date: 20240920

Docket: 33912

Registry: Vancouver

Rex

v.

MD Rafiqul Islam

Before: The Honourable Justice MacNaughton

Reasons for Judgment

(Voir Dire #6: Challenge to Warrantless Arrest on June 24, 2021, and Compliance with Mr. Islam's s. 10(b) Rights under the Canadian Charter of Rights and Freedoms)

Counsel for the Crown:

T. Lattimer

A. Hathorn

Counsel for MD Rafiqul Islam:

M. James

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 9-10, and 12, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 20, 2024

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Introduction

- [1] MD Rafiqul Islam alleges that the Vancouver Police Department ("VPD") breached his rights under sections 9 and 10(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter].
- [2] In particular, Mr. Islam alleges that the VPD did not have grounds to arrest him under s. 9 of the Charter and that it failed to comply with its implementational duty to ensure that he was able to immediately, or as soon as reasonably practicable, access his right to speak to counsel under s. 10(b) of the Charter.
- [3] Counsel agree that if Mr. Islam's arrest is determined to be unlawful, then the search incident to that arrest was also unlawful for breach of his rights under s. 8 of the Charter.
- [4] On June 24, 2021, Mr. Islam was arrested following a number of days of surveillance and investigation by the VPD during an investigation known as Project Tache. Charles Flynn, a passenger in Taxi V41, was also arrested on June 24, 2021. Mr. Flynn has since pled guilty to charges arising from his arrest.
- [5] Project Tache was initiated after the VPD received a confidential informant tip about a dial-a-dope drug trafficking operation. The informant reported that a Vancouver taxi bearing fleet number V41 ("Taxi V41") was being used to deliver drugs in downtown Vancouver. Project Tache was methodical and proceeded in stages, albeit over a relatively short time frame.
- [6] Following records checks in PRIME and CPIC, which confirmed some of the information provided by the confidential informant, the VPD engaged in surveillance of Taxi V41 and obtained a tracking warrant for it.

- [7] The VPD then obtained production orders for CCTV footage from two associated addresses, 933 Hornby Street ("933 Hornby") and 1283 Howe Street ("1283 Howe"). Police also obtained general warrants to conduct covert surveillance on the 15th floor of 933 Hornby and the 35th floor of 1283 Howe and in the common areas of both addresses. Police later obtained search warrants for two units at 933 Hornby and 1283 Howe. These warrants were executed on June 24, 2021, at or about the same time as Mr. Islam and Mr. Flynn were arrested.
- [8] I have made a number of earlier rulings with respect to Project Tache. Briefly, those reasons are as follows:
1. R. v. Islam et al., 2024 BCSC 235: granting limited leave to the co-accused Jordan Trembley, Quintin Anthony, and Charles Flynn to cross-examine then Detective Constable, now Sergeant Kevin Yuen, who swore a June 17, 2021 Information To Obtain ("ITO") in support of production orders, and, if necessary, to cross-examine Detective Constable David Leslie-Greaves who swore an earlier ITO in support of the tracking warrant for Taxi V41 (the "Tracking Warrant");
 2. R. v. Islam, 2024 BCSC 896: dismissing Mr. Flynn's Charter application alleging that the VPD conducted a warrantless search of CCTV footage from 933 Hornby;
 3. R. v. Islam, 2024 BCSC 1025: dismissing Mr. Anthony's application to cross-examine Sgt. Yuen on the tracking data obtained pursuant to the Tracking Warrant;
 4. R. v. Islam, 2024 BCSC 1090: dismissing Mr. Trembley's, Mr. Anthony's, and Mr. Flynn's sub-facial challenges to the production orders for CCTV footage from 933 Hornby and 1283 Howe obtained based on Sgt. Yuen's June 17, 2021 ITO but finding a Charter breach with respect to electronic key fob and Form K tenancy records;
 5. R. v. Islam, 2024 BCSC 1525: dismissing Mr. Anthony's and Mr. Trembley's challenges to a general warrant obtained based Detective Constable Leslie-Greave's June 19, 2021 ITO; and
 6. R. v. Anthony and Trembley, 2024 BCSC 1622: allowing Mr. Anthony's and Mr. Trembley's facial challenges to search warrants issued for units in 933 Hornby and 1293 Howe on June 22-23, 2021 under s. 11 of the Controlled Drugs and Substances Act, S.C. 1996, c.19.

Mr. Islam's Applications

- [9] Mr. Islam's applications arise from his June 24, 2021 "takedown" during a traffic stop. Mr. Islam, the driver of Taxi V41, was arrested for trafficking in a controlled substance and possession of a controlled substance for the purposes of trafficking (the "Offences"). Mr. Flynn, who was a passenger in Taxi V41 during the takedown, was also arrested for the same offences. In these reasons, I will refer to the traffic stop as the "Takedown".

Evidence on the Applications

- [10] On these Charter applications, Mr. Islam's counsel and counsel for the Crown filed Admissions of Fact (the "Agreed Facts") pursuant to s. 655 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The Agreed Facts set out some of the circumstances of Mr. Islam's arrest and his access to counsel.
- [11] In addition to the Agreed Facts, I heard evidence from Detective Constables Dhiren Kumar and Tara Munro. Detective Constable Kumar was the lead investigator on Project Tache and, in that capacity, directed Mr. Islam's arrest for the Offences. Detective Constable Munro was the officer assigned to arrest Mr. Islam on June 24, 2021. She was responsible for administering his Charter warnings, advising Mr. Islam of his right to counsel, and facilitating his access to counsel. In addition, she was the exhibits officer and performed other administrative tasks on June 24, 2021, in relation to the Takedown.
- [12] Attached as appendices to the Agreed Facts was:
- a) a copy of an arrest script used by Detective Constable Munro on Mr. Islam's arrest; and
 - b) the Vancouver Jail Arrest Report and Attachments following Mr. Islam's transport to the Vancouver Jail.

Agreed Facts

- [13] The following are the facts agreed to by the parties:

Overview

1. In May 2021, the Vancouver Police Department ("VPD") received information from a confidential informer that a driver of a taxi in Vancouver was using his cab to transport and distribute bulk quantities of drugs to various locations.
2. The VPD commenced an investigation which was given the name 'Project Tache'.

Take Down & Traffic Stop

3. On June 24, 2021 at approximately 8:38 p.m., a traffic stop was conducted on Vancouver Taxi V41 ("Taxi V41") in connection to Project Tache. The traffic stop was conducted by members of the VPD Emergency Response Team ("ERT") in the 700-block of Helmcken Street.
4. The traffic stop was conducted by Cst. Donnelly with the VPD ERT.
5. At the time of the traffic stop, MD Rafiqul Islam was the driver of Taxi V41. There was one passenger seated in the rear of the cab. The passenger was later identified as Charles Flynn.
6. After the traffic stop had been conducted, Mr. Islam was removed from Taxi V41 and placed into handcuffs.

Arrest & Search Incidental to Arrest

7. After being removed from Taxi V41, Mr. Islam was advised he was under arrest by Cst. Conroy, a member of the VPD ERT. Cst. Conroy also confirmed Mr. Islam's identity.
8. At 8:43 p.m., Detective Constable Tara Munro formally arrested Mr. Islam for trafficking and possession for the purposes of trafficking pursuant to a prepared arrest script
9. At 8:43 p.m., Det. Cst. Munro searched Mr. Islam incident to arrest and found \$300 in Canadian currency in his left shirt pocket.
10. In Taxi V41, Det. Cst. Munro seized the following items, connected to Mr. Islam:
 - a. A blue nylon bag containing Mr. Islam's wallet and BC drivers' license;
 - b. An iPhone from a hands-free holder near the steering wheel; and
 - c. \$1,390 in Canadian currency.
11. Also in the rear seat of Taxi V41, Det. Cst. Munro seized a brown canvass backpack, which contained the following drug-related items:
 - a. A plastic bag (labelled "Terry"), located inside a paper bag, containing 86.3 grams of cocaine (including packaging);
 - b. A vacuum-sealed bag (labelled "Doll"), located inside a paper bag, containing 3.75 grams of cocaine (including packaging);
 - c. A vacuum-sealed bag (labelled "Ace"), located inside a paper bag, containing 58.66 grams of cocaine (including packaging); and
 - d. A plastic bag, located inside a paper bag (labelled "Chris"), containing 31.45 grams of cocaine (including packaging).
12. Also in the rear seat of Taxi V-41, Det. Cst. Munro seized a white, letter-sized envelope (labelled "Yogi"), which contained a plastic bag that held 31.39 grams of cocaine (including packaging).
13. In total, 211.55 grams of cocaine was found in the rear of the taxi (in the backpack and white envelope).

Access to Counsel

15. Mr. Islam's responses to the administration of his section 10(b) Charter rights, official warning, and other warning were recorded, verbatim, on the prepared arrest script attached as Appendix "A" to the Agreed Facts.
16. Excerpts from the prepared arrest script are reproduced below with respect to:
 - a. Mr. Islam's s. 10(b) rights:

Arrest Script**Recorded response by Mr. Islam**

It is my duty to inform you that you have the right to retain and instruct counsel in private, without delay. You may call any lawyer you want.

There is a 24 hour telephone service available which provides a legal aid duty lawyer who can give you legal advice in private. This advice is given without charge and the lawyer can explain the legal aid plan to you.

If you wish to contact a legal aid duty lawyer, I can provide you with a telephone number (1-866-458-5500 or 1-250-882-9451).

If you wish to contact a lawyer immediately, I have a cellular phone available for you at this time.

Should you choose to contact a lawyer immediately with this phone I will provide to you, while I will make all attempts to afford you privacy, I will not be able to guarantee you a level of privacy given the public surroundings.

Should you wish to contact a lawyer with a guaranteed level of privacy, there is a private phone booth available at the Vancouver Jail.

Do you understand?

Do you want to call a lawyer?

I don't understand - I'm just a cab driver.

I don't know nothing about this. I don't know what it's for.

b. Mr. Islam's official warning:

Arrest Script

Recorded response by Mr. Islam

You are not obliged to say anything, but anything you do say may be given in evidence.

Do you understand?

Yes.

c. Mr. Islam being advised of audio and video recording while in-custody:

Arrest Script

Recorded response by Mr. Islam

You will be subject to audio and video recording at any time while in police custody, except when speaking to legal counsel.

Do you understand?

Yes.

d. Canvassing Mr. Islam's choice of counsel:

Arrest Script

Recorded response by Mr. Islam

Do you have a counsel of choice?

No I don't know nobody. I'm just a cab driver -- I don't know anything.

Vancouver Jail & Facilitation of Access to Counsel

17. Mr. Islam was transported to the Vancouver Jail via the VPD wagon.
18. Before being transported to the Vancouver Jail, Det. Cst. Munro canvassed whether Mr. Islam wished to speak to a lawyer roadside. Mr. Islam declined and advised Det. Cst. Munro that he would wait.
19. The VPD wagon left the scene at approximately 9:37 p.m.
20. Mr. Islam arrived at the Vancouver Jail at 9:50 p.m.
21. Jail Guard James Pennington facilitated Mr. Islam's access to counsel via telephone call at 10:20 p.m. Mr. Islam instructed to call his personal lawyer. The call ended at 10:22 p.m. A voicemail was left.
22. A further telephone call was placed at 10:31 p.m. This call was to Legal Aid. The call ended at 10:41 p.m.

Warned, Recorded Statement & Release from Custody

23. Later that evening, Mr. Islam provided a warned and recorded statement to VPD investigators. The statement commenced at 11:05 p.m. and concluded at approximately 12:33 a.m. (June 25, 2021).
24. Mr. Islam was released without process at 1:15 a.m.

The Parties' Positions

Mr. Islam's Position

- [14] Mr. Islam submits that his warrantless arrest was unlawful because he was arrested without reasonable and probable grounds. Mr. Islam acknowledges that Detective Constable Kumar had subjective grounds for his arrest, however he submits that those grounds were not objectively reasonable, resulting in a breach of his s. 9 Charter rights.

- [15] Where a person is arrested without a warrant, the Crown must prove, on a balance of probabilities, that the arrest was lawful. As previously stated, the Crown concedes that, if Mr. Islam's arrest was unlawful, the warrantless search of Mr. Islam's person and Taxi V41 were also unlawful and thus breached Mr. Islam's s. 8 Charter rights.
- [16] Mr. Islam also submits that the delay in implementing his right to counsel breached his s. 10(b) Charter rights. He was arrested at 8:43 p.m. and held by the police roadside until approximately 9:42 p.m., when he arrived at the Vancouver Jail. He did not speak to counsel until 10:31 p.m., approximately 1 hour and 43 minutes after his arrest. Mr. Islam says that, since he asserted his right to counsel at the time of his arrest, the burden is on the Crown to show that any delay in facilitating access to counsel was reasonable in the circumstances.

The Crown's Position

- [17] The Crown submits that the totality of the evidence obtained and observed by the VPD during Project Tache, up to and including June 24, 2021, more than satisfies the reasonable and probable grounds standard required to effect a warrantless arrest of Mr. Islam in his capacity as the driver of Taxi V41. In particular, the Crown points to the confidential informant information, the police database checks, and multiple days of surveillance on Taxi V41.
- [18] The VPD submits that it took active steps to fulfil its obligations under s. 10(b) of the Charter. After Mr. Islam's arrest, he was informed of his s. 10(b) Charter rights, using an arrest script, and offered the opportunity of speak with a lawyer roadside, without delay, on three different occasions. Each time, he declined to consult with counsel and expressed that he wished to wait to speak to a lawyer until he arrived at the Vancouver Jail. He was provided the opportunity to speak with a lawyer at the Vancouver Jail and he did so before he was interviewed by the VPD shortly after 10:45 p.m. As a result, the Crown submits that Mr. Islam's application should be dismissed.
- [19] In these reasons, I will deal first with the issue of the lawfulness of Mr. Islam's arrest and then with the issue of the timeliness of his access to counsel.

Lawfulness of Mr. Islam's Arrest

Applicable Law

- [20] Section 9 of the Charter provides that everyone has the right not to be arbitrarily detained or imprisoned. However, s. 495(1)(a) of the Code permits a police officer to arrest, without a warrant, someone "who has committed an indictable offence or who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence".

- [21] Where an accused challenges the validity of a warrantless arrest, the burden is on the Crown to establish, on a balance of probabilities, that the officer had reasonable grounds to believe, at the time of arrest, that the accused had committed or was about to commit an indictable offence.
- [22] For an arrest under s. 495(1)(a) of the Code to be lawful, the arresting officer must subjectively believe that there are reasonable grounds upon which to base an arrest, and those grounds must be objectively reasonable: *R. v. Storrey*, [1990] 1 S.C.R. 241 [Storrey] at 250-251. The officer's subjective belief is what they personally believed at the time of the arrest. It must include an honest belief that they had reasonable grounds to believe that an offence had been committed. Mere suspicion is not enough: *R. v. Day*, 2014 SCC 74, affirming 2014 NLCA 14 at para. 26; *R. v. Gerald Judson Brownridge*, 2000 BCSC 795 at para. 26.
- [23] In assessing whether the grounds for arrest are objectively reasonable, the court will consider the officer's observations through the lens of someone with the same experience, training, knowledge, and skills and decide whether a reasonable person with the same lens would come to the same conclusion: *R. v. Luong*, 2010 BCCA 158 at para. 24.
- [24] In *Storrey* at 250-251, Justice Cory summarized the Code requirements for a warrantless arrest and the policy concerns on which they are based. He concluded:

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

- [25] Most recently in *R. v. Beaver*, 2022 SCC 54 [Beaver] at para. 72, the Supreme Court summarized the "settled" essential legal principles governing a warrantless arrest. The parties agree on these principles. I set out the principles summarized in *Beaver*, without the specific references to the cited cases:
1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint.
 2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence. Subjective grounds for arrest are often established through the police officer's testimony. This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal.

3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer.
4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism". Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting] officer", deference is not necessarily owed to their view of the circumstances because of their training or experience. The arresting officer's grounds for arrest must be more than a "hunc[h] or intuition".
5. In evaluating the objective grounds to arrest, courts must recognize that, "[o]ften, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete". Courts must also remember that "[d]etermining whether sufficient grounds exist to justify an exercise of police powers is not a 'scientific or metaphysical exercise', but one that calls for the application of '[c]ommon sense, flexibility, and practical everyday experience'".
6. "Reasonable and probable grounds" is a higher standard than "reasonable suspicion". Reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds requires a reasonable probability of crime. At the same time, police do not require a prima facie case for conviction before making an arrest. Nor do the police need to establish that the offence was committed on a balance of probabilities. Instead, the reasonable and probable grounds standard requires "a reasonable belief that an individual is connected to the offence". A reasonable belief exists when "there is an objective basis for the belief which is based on compelling and credible information". The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest.
7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest.
8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds.

[Citations omitted.]

- [26] In this case, Detective Constable Kumar made the decision to arrest Mr. Islam and Detective Constable Munro effected it. The issue is therefore whether Detective Constable Kumar had objectively justified subjective grounds to arrest Mr. Islam.

[27] As set out in *R. v. Harms*, 2020 BCCA 242 [Harms] at para. 43, citing to an earlier authority, the applicable standard in assessing the grounds for a warrantless arrest is one of reasonable probability--or credibly-based probability--that an indictable offence has been committed. This standard is less than the criminal and civil standards of proof, but more than mere suspicion. It envisions a practical, non-technical and common-sense probability as to the existence of the salient facts and inferences in question.

[28] In the Crown's written submissions, the reasonable grounds standard was helpfully situated in spectrum as follows:

No Grounds

ß Lower threshold

Higher threshold à

Certainty

Hunch,

Intuition, or mere suspicion

Reasonable suspicion

E.g., tracking warrants

Reasonable & probable grounds

E.g., Warrantless arrests, search warrants

Prima

facie

case

Civil standard of

proof: balance of

probabilities

Criminal

standard of

proof: beyond a reasonable doubt

- [29] Reasonable grounds may be based on indirect evidence, partial information, and reasonable inferences drawn from personal observation or information provided by others: Harms at para. 44. The key question is whether the officer's belief was reasonable at the time of arrest, not whether, in hindsight, it turns out to have been accurate: R. v. Bush, 2010 ONCA 554 at para. 66; R. v. Vance (1979), 48 C.C.C. (2d) 507 (Y.T.C.A.) at 515.
- [30] In conducting the assessment of reasonable and probable grounds, the court should not examine the evidence in isolation or in a piecemeal fashion. Instead, "[a] determination with respect to whether reasonable grounds exist requires a consideration of the 'totality of the circumstances': R. v. Whitaker, 2008 BCCA 174 at para. 41, leave to appeal ref'd [2008] S.C.C.A. No. 296, citing R. v. Bracchi, 2005 BCCA 461 at para. 20; R. v. Jir, 2010 BCCA 497 at para. 28.
- [31] In this case, since the arresting officer was not the same person as the officer who effected the arrest, the temporal period at issue is the moment at which Detective Constable Kumar decided to arrest Mr. Islam. On the facts, that moment was at the morning briefing, approximately twelve hours before Detective Constable Munro effected Mr. Islam's arrest.

Relevant Facts on the Grounds to Arrest

- [32] Detective Constable Kumar testified that, in June 2021, he was the VPD primary or lead investigator on Project Tache. At that time, he had more than ten years' experience as a police officer, including three years with the VPD Drug Unit, a specialized drug investigative team that was part of the Organized Crime Section, and seven years on patrol in Vancouver's northeast section, including the Downtown Eastside. As a patrol officer, he gained experience targeting larger dial-a-dope operations and investigating stash houses in private residences. As a member of the Drug Unit, he gained experience in a variety of drug-specific investigations, involving multi-kilogram distribution networks, drug labs, surveillance, and dial-a-dope investigations. Overall, he had been involved in about ten large-scale investigations or projects, some of which involved dial-a-dope operations.
- [33] Detective Constable Kumar explained that each Drug Unit investigation, including Project Tache, is led by a command triangle consisting of three officers:
- a) the team commander, who supervises the investigation;
 - b) a file coordinator, who is responsible for assigning officers' tasks and compiling investigative materials and documents; and
 - c) the lead investigator, who is responsible for the speed, flow, and direction of investigative steps.
- [34] The command triangle meets throughout an investigation and makes collaborative decisions about its course. Project Tache was Detective Constable Kumar's first time as lead investigator because team members cycle through the various roles.

- [35] Detective Constable Kumar testified that, in his role as lead investigator on Project Tache, he made both day-to-day and holistic-scale decisions. According to his testimony, Project Tache was a source-driven file. The VPD's Human Source Handling Unit (the "Source Unit"), which is responsible for handling confidential informants, received a tip that a Vancouver taxi was the delivery vehicle for a multi-kilogram drug distribution network in the Vancouver area (the "Tip"). The confidential informant reported that the taxi was driven by a middle-aged South Asian male with a medium build and a thin moustache. Upon receipt of this information, the Source Unit provided it to the Drug Unit for investigation.
- [36] In Detective Constable Kumar's experience, dial-a-dope is a typical method of distributing drugs. Usually, it involves a vehicle and a dedicated driver, either alone or with a passenger. The purchaser and the dealer arrange a time and place to meet by phone. The dealer drives to the pre-arranged pick-up spot and the buyer typically enters the vehicle. The transaction occurs inside the vehicle for privacy. A short time later, the buyer exits the vehicle at, or a short distance away from, the pick-up spot.
- [37] The totality of Detective Constable Kumar's grounds to arrest Mr. Islam, as the driver of Taxi V41, included the cumulative information police had received about Taxi V41 and its driver from:
- a) the confidential informant information received from the Source Unit and which Detective Constable Kumar believed to be credible;
 - b) Detective Constable Kumar's police database queries; and
 - c) the extensive surveillance conducted on Taxi V41 throughout Project Tache.

Confidential Informant Information

- [38] Project Tache began after the police received the Tip. In his direct evidence, Detective Constable Kumar explained that with respect to source information, the Drug Unit (and the umbrella Organized Crime Section) is in regular contact with the Source Unit. After receiving a tip, the Source Unit contacts the Organized Crime Section to see if the information received is viable for a potential investigation. Detective Constable Kumar further testified that he believed the information received in this case was reliable because it came to him from the Source Unit, which he trusted, and it was consistent with his experience with other source driven files.
- [39] I am satisfied that the confidential informant information met the compelling, credible, and corroborated reliability threshold as set out in *R. v. Debot*, [1989] 2 S.C.R. 1140 [Debot] at 1143, 1168.

- [40] The information provided was compelling in that it was specific and did not consist of bald conclusory statements or mere rumour or gossip: Debot at 1143. The Source Unit believed the information was from a credible source and Detective Constable Kumar relied on its assessment of credibility.
- [41] The information was also corroborated during surveillance because:
- a) during surveillance, the driver of Taxi V41 matched the confidential informant's physical description;
 - b) the same driver was observed driving Taxi V41 on each day of surveillance (June 1, 8, 9, 10, 19, 21, and 24); and
 - c) the pattern of driving observed--in which a sole, exclusive passenger occupied Taxi V41 for prolonged periods of time during which short-duration meetings and exchanges were observed--was consistent with dial-a-dope drug trafficking. This pattern was enhanced by the fact that when an exclusive passenger was on board, Taxi V41 engaged in unusual driving patterns.

Police Database Queries

- [42] On receipt of the confidential informant information, Detective Constable Kumar took initial steps to investigate the information he received, including searching Taxi V41's fleet number in various police databases. From these steps, he ultimately learned that:
- a) Taxi V41's license plate (as of July 7, 2020) was ND6048;
 - b) the suspected driver was MD Rafiqul Islam; and
 - c) a phone number associated to Mr. Islam.
- [43] That information was later verified when Taxi V41 was surveilled bearing licence plate ND6048 and when Mr. Islam's phone number was confirmed by a successful drop call on June 3, 2021. Detective Constable Kumar explained how surveillance officers conducted the drop call and observed and heard Mr. Islam respond to the call. This confirmed that the phone number identified through records searches belonged to Mr. Islam.
- [44] With that information confirmed, the VPD engaged in physical surveillance of Taxi V41.

Physical Surveillance

- [45] The VPD conducted surveillance of Taxi V41 on a number of days in June 2021 including June 1, 8, 9, 10, 19 and 21. Detective Constable Kumar testified about his review of the surveillance reports and the observations recorded on those dates. In his role as the lead investigator for Project Tache, he was responsible for reviewing all the ongoing surveillance reports. On some dates, he was also a member of the surveillance team.

- [46] Detective Constable Kumar explained that a consistent pattern emerged in which Taxi V41 was occupied by an exclusive passenger for extended periods of time. As days went by, he focused on, and his interest was piqued by, a pattern in which an Unknown Male ("UM") 102, UM103, or latterly UM104, was observed inside Taxi V41 for extended periods, and/or in which Taxi V41 dropped any of the three off at one of two recurring locations and waited for them.
- [47] Detective Constable Kumar testified that while one of the exclusive passengers was on board, the driving behaviour displayed by Taxi V41 was consistent with the vehicle engaging in dial-a-dope drug distribution. Taxi V41 also regularly frequented 933 Hornby or 1283 Howe, and the surrounding areas, where the exclusive passenger would exit Taxi V41 and enter the building. In some instances, Taxi V41 would wait upwards of 20 minutes for the exclusive passenger to return without taking any other fares.
- [48] Over the course of surveillance, Detective Constable Kumar observed and/or reviewed surveillance reports about eight short-duration meets that he testified were significant to him in forming subjective grounds to arrest Mr. Islam.

June 1, 2021

- [49] Detective Constable Kumar testified that the primary focus of the surveillance on June 1 was to corroborate the initial source information. On that date, surveillance identified the driver of Taxi V41 as UM1 and the exclusive passenger as UM5.
- [50] At 3:38 p.m. on June 1, 2021, UM5 was observed in the rear of Taxi V41. It parked in the lane at the rear of 540 East Hastings Street. UM6 exited the rear of the residence, approached the driver side of Taxi V41, and quickly walked back to the rear of the residence. UM6 was never observed getting into Taxi V41. Taxi V41 then drove to 1283 Howe where UM5 exited it and went into the building. It waited for 33 minutes before UM5 re-entered.
- [51] At 5:09 p.m. that day, with UM5 again inside Taxi V41, it drove to the 100-block of West Hastings and stopped mid-block. UM7 entered the passenger side of Taxi V41, with UM5 still on board. Three minutes later, the vehicle stopped one block away. UM7 exited and walked away. Mr. Islam conceded that this was a suspicious interaction between UM5 and UM7.
- [52] Detective Constable Kumar testified that, based on his professional experience and after reviewing the surveillance report from June 1, he formed a belief that the driver of Taxi V41 was the exclusive driver for a drug distribution network for which UM5 worked, and that the operation was associated with 1283 Howe. This belief was based on other dial-a-dope operations he had observed as a police officer and drug investigator, where a similar pattern occurred: namely, a vehicle drives to a location and someone gets on board and then exits shortly after, with the vehicle either having driven nowhere or a very short distance.

- [53] Detective Constable Kumar explained that the point of using a vehicle to make such an exchange is to provide as much privacy as possible for a drugs-for-cash transaction. Observing an actual exchange is one indicia of drug trafficking occurring via a dial-a-dope operation. Other indicia can include the duration of the meeting as well as a pattern of people going to and from a vehicle. He agreed that no actual exchanges were observed on this date.

June 8, 2021

- [54] On this date of surveillance, the VPD assigned the identifier UM101 to the driver of Taxi V41 because he was observed as its driver in several days of surveillance. Following the VPD's successful drop call to Mr. Islam's telephone number, the VPD suspected that the driver was Mr. Islam.
- [55] On June 8, 2021, UM101 drove a passenger assigned the identifier UM102. He was the same passenger as UM5 from the June 1, 2021 surveillance.
- [56] At 5:59 p.m., UM101 drove Taxi V41 to the Park Royal Mall in West Vancouver with UM102 inside. At Park Royal, UM1 was observed handing UM102 a lacrosse-sized ball through the driver-side passenger door.
- [57] Taxi V41 then drove back to the area of 1283 Howe. UM102 exited Taxi V41 and entered 1283 Howe.
- [58] Detective Constable Kumar testified that, based on his drug investigation experience, this observed behaviour was consistent with a dial-a-dope transaction. In this case, the VPD observed UM1 hand an unknown ball-like object to UM 102 while UM 102 remained inside Taxi V41. Detective Constable Kumar testified that, at this point in surveillance, he believed this interaction was consistent with other dial-a-dope operations and investigations he had been involved in as a police officer. The only difference between the observed exchange and his previous experience was the fact that the delivery vehicle in this case was a marked taxi.
- [59] In submissions, counsel for Mr. Islam suggested that the observation was the reverse of what would be expected in a dial-a-dope drug transaction. Rather than a passenger exchanging money for drugs with a buyer, in this instance the exchange was one-sided: UM1 passed something to the passenger of Taxi V41.
- [60] I accept that the observed transaction had some unusual features and that it occurred in an area that is not notorious for drug transactions. Nonetheless, it was another example of unusual behaviour for Taxi V41 and it formed part of Detective Constable Kumar's reasonable belief about the role Taxi V41 played in the drug trafficking operation.

June 9, 2021

- [61] On this day of surveillance, at 6:13 p.m. on June 9, 2021, UM102 was observed sitting in the rear of Taxi V41. The driver was Mr. Islam. UM102 exited Taxi V41 and walked into a 7-Eleven at 1039 Homer Street.
- [62] At 6:15 p.m., UM102 exited the store and re-entered the rear of Taxi V41. UM1 walked to the rear of Taxi V41, empty-handed. Two minutes later, UM1 exited Taxi V41 carrying a black, reusable grocery bag with the top rolled down. The bag appeared half-full. Taxi V41 then drove away with UM102 onboard.
- [63] At 10:23 p.m. that evening, Taxi V41 parked in front of 933 Hornby. UM102 exited Taxi V41 wheeling a large, hard shell rolling suitcase, which he took inside the building. At 10:34 p.m., UM102 exited the building empty-handed and re-entered Taxi V41.
- [64] Detective Constable Kumar testified that, based on his experience, this was another visual observation of a drugs-for-cash transaction typical of a dial-a-dope drug operation. In particular, he explained that it was significant to him that UM102, the exclusive passenger on June 9, exited Taxi V41 empty-handed, went into the 7-Eleven, and returned empty-handed. At the same time, UM1 approached Taxi V41 empty-handed but, after being inside Taxi V41 for two minutes, left carrying a bag. Detective Constable Kumar testified that this was significant to him as it appeared UM102 entrusted the bag, and the items it contained, to the driver of Taxi V41 when he went into the 7-Eleven.
- [65] Detective Constable Kumar was pressed in cross-examination about the fact that the surveillance report did not refer to UM102 entering the 7-Eleven empty-handed. He was firm in his evidence that the surveillance report would have mentioned UM102 carrying something if that had been observed because that fact would have been notable and the exchange of packages was something the VPD was looking for. When it was put to him that UM102 could have brought the bag into Taxi V41 and UM1 left with it, Detective Constable Kumar said that was not what he saw and he would have noted UM102 coming out of the 7-Eleven with a bag. I accept his evidence in that regard. He presented as a witness who was fair and balanced. As an experienced drug investigator, he would have noticed whether a target of an investigation was carrying something.

June 10, 2021

- [66] On this day of surveillance, Mr. Islam again drove Taxi V41. The exclusive passenger was identified as UM4. Later, after UM4 was observed in subsequent days of surveillance, he was assigned the identifier UM103.
- [67] At 9:40 p.m., UM4 entered the rear passenger door of Taxi V41 on Hornby Street. Three minutes later, Taxi V41 pulled over and UM2 entered the rear passenger seat. Taxi V41 drove a short distance east on Robson Street and then south on Granville Street before pulling to the side of the road. Visual continuity of surveillance was temporarily broken.

- [68] Taxi V41 continued south on Granville Street. At 9:47 p.m., UM3 entered the rear passenger side of Taxi V41 and it drove away. Within one block, Taxi V41 stopped and UM3 exited the vehicle and walked away.
- [69] Later, UM4 exited Taxi V41 at 933 Hornby. UM4 entered the building. Taxi V41 waited for over 20 minutes at that location, until 10:45 p.m. UM4 then exited the front door of the building and re-entered Taxi V41 carrying a beige backpack and large beige duffle bag which appeared to be full.
- [70] Detective Constable Kumar testified that, based on his experience, the driving pattern observed on June 10 was consistent with UM4 also being associated with Taxi V41 and the drug distribution network. These observations indicated that Taxi V41 was associated not only with UM102 but with other individuals as well.
- [71] The driving pattern observed was also consistent with the vehicle going to different locations, engaging in very quick stops with the exclusive passenger UM4 onboard. Although visual continuity was broken during surveillance that day, Detective Constable Kumar said that, looking at the observations overall, the driving pattern and interactions were consistent with dial-a-dope operation. Specifically, Taxi V41's driver (UM101 now known to be Mr. Islam) was the designated driver for the operation, which also employed UM102 and UM103 and used 933 Hornby and 1283 Howe as drug stash sites. The observed driving pattern was also an example of unusual taxi behaviour, as in Detective Constable Kumar's experience, it was not typical for taxis to wait for long periods without taking any fares.

June 19, 2021

- [72] On this day of surveillance, UM101, Mr. Islam, drove Taxi V41. The exclusive passenger was UM103, formerly identified as UM4 in the June 10 surveillance.
- [73] At 6:37 p.m. on June 19, 2021, UM103 exited Taxi V41 and entered 933 Hornby. Later, at 8:49 p.m., UM103 entered Taxi V41 and it drove away, stopping in the Downtown Eastside before returning to the 900-block of Smithe Street. Upon arrival at 9:05 p.m., UM103 exited Taxi V41 and entered 933 Hornby.
- [74] Later, surveillance observed UM102 and UM103 (identified as UM4 on June 10) together, after which UM103 got into the rear of Taxi V41 and UM102 walked away.
- [75] Detective Constable Kumar testified that, based on his experience, the pattern of driving observed while UM103 was the exclusive passenger on board Taxi V41 was consistent with other observations from previous days of surveillance. Moreover, the observations of UM103 attending at 933 Hornby and using Taxi V41 exclusively throughout the day furthered his belief that UM103 was also involved in the drug distribution operation.

[76] The cumulative evidence--the confidential informant's tip, the fact that Taxi V41 had an exclusive driver, and the odd driving patterns observed during surveillance--strengthened Detective Constable Kumar's belief that UM101, Mr. Islam, was the exclusive driver for Taxi V41 and that the individuals were using the vehicle to distribute drugs.

June 21, 2021

[77] On this day of surveillance, UM 101, Mr. Islam, drove Taxi V41. The exclusive passenger was UM1 who was designated as UM104, because he was observed engaging with Taxi V41 on multiple occasions.

[78] At 6:43 p.m., Taxi V41 stopped in the 100-block of Melville Street. UM1 exited Taxi V41 carrying a brown paper bag in his hand, and walked toward the Burrard SkyTrain station. Four minutes later, UM1 walked back toward Taxi V41 but did not get back inside.

[79] At 6:47 p.m., UM2 walked up to the side of Taxi V41 and spoke with UM1. UM2 got into the passenger side of Taxi V41. UM2 remained inside for five seconds and then exited the vehicle. UM2 and UM1 had a brief conversation and then UM2 walked towards the SkyTrain station. UM1 re-entered Taxi V41, which then drove to the Downtown Eastside.

[80] At 7:13 p.m., Taxi V41 drove to 933 Hornby where UM1 exited the vehicle and entered the building.

[81] Detective Constable Kumar testified that, based on his experience, when UM1 exited Taxi V41 with the brown paper bag, this signified that the package was being transported by Taxi V41. The 6:43 p.m. observation signifies UM1 attending the SkyTrain Station to facilitate an exchange involving the bag he was carrying.

[82] The second observation at 6:47 p.m. was also significant because Taxi V41 was void of passengers and solely occupied by the driver UM101, while Detective Constable Kumar believed UM 1 left contents inside Taxi V41. He testified that this demonstrated a level of trust between UM1 and the driver.

[83] Overall, Detective Constable Kumar said that these observations were consistent with a dial-a-dope operation. They were also consistent with the types of interactions observed during surveillance throughout Project Tache. Based on the behaviours of UM1 and Taxi V41, Detective Constable Kumar believed UM1 was also associated with the drug operation .

[84] Finally, at 7:13 p.m., Taxi V41 and UM1 drove to 933 Hornby. UM1 was observed entering the building, which was consistent with this address being used by the drug distribution network as a stash location.

[85] Detective Constable Kumar testified that it was after the June 21, 2021 surveillance that he formed grounds to believe that Mr. Islam, the driver of Taxi V41, and the exclusive passengers using it during the dial-a-dope transactions, were arrestable for trafficking in a controlled substance and possession of controlled substance for the purposes of trafficking.

[86] In their totality, the grounds for arrest were summarized by Detective Constable Kumar as follows:

- The confidential source information that the VPD received about Taxi V41 had been corroborated during the course of surveillance, and as a result of subsequent investigative steps as to the driver;
- During surveillance on June 1, 8, 9, 10, 19, and 21, Taxi V41 was observed being driven by UM 101, who was believed to be MD Rafiqul Islam;
- Taxi V41 was being used as the exclusive delivery vehicle for a drug distribution network operating out of Vancouver;
- Various unknown males, namely UM102, UM103, and UM104, were all part of the drug distribution network operating out of Taxi V41 and were also connected to addresses in Vancouver;
- The driver of Taxi V41 was the dedicated driver for the drug distribution network, had been entrusted by the exclusive passengers, as observed on various days of surveillance, and was complicit in this drug distribution operation; and
- The overall result of surveillance yielded eight short duration meets, including two observed exchanges.

[87] Ultimately, Detective Constable Kumar authorized the Takedown of Taxi V41, and the arrest of its driver and any of its occupants, on June 24, 2021. This was the same day as search warrants were to be executed in respect of one apartment unit at each of 933 Hornby and 1283 Howe, as part of separate investigative steps taken on Project Tache.

[88] Detective Constable Kumar testified that at a meeting of the command triangle on the morning of June 24, 2021, the team discussed an operational plan for the Takedown of Taxi V41.

[89] The team was looking for a sequence of events consistent with what had been observed in surveillance up to that point. Specifically, the team wanted to see Mr. Islam and Taxi V41 attending at either 933 Hornby or 1283 Howe and to observe any of UM102, UM103 or UM104 exiting from either of those addresses carrying a bag and then entering Taxi V41 driven by Mr. Islam. Once these events were observed and Taxi V41 drove away, the arrest plan would become operational.

[90] Detective Constable Kumar briefed the members of the team in the early morning of June 24, 2021 and assigned roles to others who would be part of the Takedown. Later that day, when the requisite events were observed, Detective Constable Kumar authorized the Takedown.

Application of the Law to the Facts

Subjective Beliefs

- [91] Mr. Islam concedes that Detective Constable Kumar had subjective grounds for the arrest of Mr. Islam.
- [92] As explained by Detective Constable Kumar throughout his testimony, Project Tache was a source-drive police investigation into a drug distribution network, utilizing a specific vehicle driven by a particular individual. As a result of further police investigative steps, including database searches and physical surveillance, police observed eight short duration meets that were each consistent with dial-a-dope drug trafficking. Of particular note, in two of those instances there were exchanges which took place inside Taxi V41 and which involved the exclusive passenger of the day.
- [93] Detective Constable Kumar detailed his belief that Mr. Islam was the exclusive driver for the drug trafficking operation. He acknowledged that during surveillance the officers did not observe Mr. Islam being connected to, or participating in, the observed specific short duration meets or transactions other than as a driver. He testified that his belief for ultimately authorizing the arrest of Mr. Islam pertained to Mr. Islam's specific role in the dial-a-dope operation--that of the driver. Detective Constable Kumar described his experience in these kinds of cash-for-drug transactions and the roles individuals typically play in them, including being solely responsible for driving around those who were responsible for the transaction aspects of the drug deal.
- [94] I accept that Detective Constable Kumar honestly believed that Mr. Islam was part of the commission of the dial-a-dope drug trafficking operation. Detective Constable Kumar was candid, frank, and detailed in his explanation as to why each observed short duration meet and exchange was significant to his overall grounds, and how each observation built on what had occurred before.

Objective Justification

- [95] I find that Detective Constable Kumar's subjective grounds were objectively justified in the totality of the circumstances of Project Tache. A reasonable person with comparable knowledge, training, and experience could find that there was an objective basis to form the belief based on the compelling, reliable, and consistent nature of the information gathered from the Project Tache investigation.
- [96] While I accept that there may be innocent explanations for some of what Detective Constable Kumar and the surveillance team observed, the VPD was not required to rule out innocent explanations. Nor is each observation considered in isolation from what happened before and what happened afterwards.

- [97] In assessing the objective justification of an officer's subjective beliefs for a warrantless arrest, particularly in the context of a dial-a-dope investigation, it is not helpful to use a checklist approach to the various indicia observed during the investigation: *R. v. Lo*, 2015 BCSC 1159 at paras. 87-89; *R. v. Gayle*, 2015 BCSC 1950 at para. 52; and *R. v. Gill*, 2021 BCSC 548 at para. 40. Rather, it is the totality of the circumstances known to the officer at the time of the arrest that must be considered: *Beaver* at para. 72.
- [98] In submissions, Mr. Islam focused on the lack of objective evidence of Mr. Islam's involvement in the drug trafficking operation. Objective justification does not require objective evidence. It is sufficient if a reasonable person with comparable knowledge, training, and experience could find that there was an objective basis to form a reasonable belief of criminal activity.
- [99] In this case, Detective Constable Kumar formed his grounds based on reliable confidential informant information, information from police database queries, a drop call, and seven cumulative days of physical surveillance during which police observed unusual taxi behavior and eight short duration meets consistent with dial-a-dope drug trafficking. When each observation is considered separately, it may not amount to more than suspicious behaviour. However, that is not the appropriate approach. Rather, all the observations must be assessed in their totality.
- [100] Doing so significantly alters the objective assessment. Each piece of observed information colours the subsequent information and consistent patterns of behavior emerge. The fact that particular indicia often associated with dial-a-dope drug transactions was not observed on some days is not determinative and does not detract from the overall objective assessment of an officer's subjective grounds. A checklist approach is inappropriate. Detective Constable Kumar frankly acknowledged that exchanges were not always observed. Nevertheless, he explained that in his experience, non-detection of an exchange was the purpose of a dial-a-dope operation of this nature.
- [101] Events observed during surveillance happen quickly and it is not always possible for officers to have the ideal vantage point from which to observe exchanges. Buyers walk away with no visible evidence of having purchased something. Detective Constable Kumar explained that this is the disguise to the untrained eye. An experienced drug investigator sees things differently.
- [102] To an untrained eye, a short duration meet of a few minutes, an unknown male entering a taxi and getting out a short distance away, or a person approaching a vehicle for a short time and then leaving, may not seem significant. But after factoring in all of the observations in totality, these short duration meets and short trips take on greater significance and weight, particularly when exchanges have been observed.

- [103] As I have said, in assessing the justification for Mr. Islam's arrest, the VPD was not required to rule out all possible innocent explanations for the alleged illegal conduct. The surveillance disclosed that Taxi V41, when it was not exclusively driving UM102, UM103, or UM104, took on typical taxi fares and engaged in typical taxi driving behaviours. Further, on one occasion when UM102 was on board with Unknown Female 1, Taxi V41 took the pair shopping.
- [104] In cross-examination, Detective Constable Kumar was asked about certain hypothetical situations in which a passenger in a taxi might leave something with the taxi driver while they conducted other business. He agreed that the hypotheticals were possible. However, the hypotheticals were possible innocent explanations for what was observed in surveillance and the VPD was not required to rule them out. The hypotheticals also did not consider the totality of the VPD's investigation but focussed on isolated observations during surveillance.
- [105] Detective Constable Kumar also fairly acknowledged that it was not unheard of for a taxi driver to act as the exclusive driver for a client. He did not purport to be an expert in the taxi business. However, he was entitled to rely on his common sense and practical everyday experience in concluding that Mr. Islam, acting as the exclusive driver for three unknown males, over a number of days, and attending at two recurring locations, was unusual for a working taxi.
- [106] Detective Constable Kumar focused on the unusual behaviour of Taxi V41 when any of UM102, UM102, and UM104 were alone inside it. Looking at this from an objective perspective, there was a difference between it and the normal operation of Taxi V41. The normal trips were clear and distinctive from when UM102, UM103, and UM104 were exclusively on board. Detective Constable Kumar clearly acknowledged this difference in his direct evidence and during cross examination.
- [107] It was not objectively unreasonable for Detective Constable Kumar to place significant weight in forming his grounds for arrest on the VPD's specific observations involving short duration meets and observed transactions. This is particularly so in light of his police experience involving dial-a-dope investigations, the reliable confidential tip, the number of observations made over the seven days of surveillance, and Taxi V41's overall pattern in terms of exclusive passenger occupancy periods, short duration meets and exchanges, and visits to the two subject addresses.

Conclusion on Grounds to Arrest

- [108] Looking at everything that the police observed from the lens of an objective observer with Detective Constable Kumar's experience and background, the behaviour of Taxi V41 and its driver was more than merely suspicious. While the observations did not amount to a prima facie case for drug trafficking, they provided a subjectively and objectively reasonable basis for Mr. Islam's arrest.

[109] As a result, I dismiss Mr. Islam's application under s. 9 of the Charter and find that the warrantless arrest was subjectively and objectively reasonable. It follows that the searches incident to arrest were also Charter-compliant.

[110] I will now turn to Mr. Islam's challenge under s. 10(b) of the Charter.

The Right to Counsel on Arrest or Detention

Applicable Law

[111] Section 10 of the Charter provides that:

10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right; and
 - (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

[112] Mr. Islam alleges that his s. 10(b) rights were breached because the VPD did not facilitate his request to speak to counsel without delay. Mr. Islam has the onus of demonstrating the breach, on a balance of probabilities.

[113] As is now well-settled, police have three corresponding duties on the arrest or detention:

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

See *R. v. Willier*, 2010 SCC 37 at paras. 29-35; *R. v. Bartle*, [1994] 3 S.C.R. 173 at 192, 1994 CanLII 64; *R. v. Manninen*, [1987] 1 S.C.R. 1233 at 1241-1242, 1987 CanLII 67; *R. v. Evans*, [1991] 1 S.C.R. 869 at 890, 1991 CanLII 98; and *R. v. Brydges*, [1990] 1 S.C.R. 190 at 203-204, 1990 CanLII 123.

[114] As explained in *R. v. Suberu*, 2009 SCC 33 at paras. 41-42, the duty to inform a detained person of their right to counsel arises immediately upon arrest or detention. The duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. An arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a delay was reasonable in the circumstances. Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.

- [115] Police obligations flowing from s. 10(b) are not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the corresponding 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. Sinclair*, 2010 SCC 35 at para. 27.
- [116] In *R. v. Oswald*, 2019 BCSC 705 [Oswald] at para. 107, the court helpfully summarized the principles set out by Supreme Court of Canada in *R. v. Taylor*, 2014 SCC 50. Those principles are:
- the purpose of the s. 10(b) right is to "allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important[ly], to obtain advice as to how to exercise those rights";
 - the duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel;
 - the arresting officer has a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity;
 - this includes allowing the detainee upon his request to use a telephone for the purposes of contacting counsel if such a telephone is available;
 - in light of privacy and safety issues, the police are under no legal duty to provide their cellphone to a detained individual for the purposes of exercising his right to counsel;
 - the police have an obligation to provide phone access as soon as practicable to reduce the possibility of accidental self-incrimination and they also have an obligation to refrain from eliciting evidence from the individual before access to counsel has been facilitated;
 - the burden is on the Crown to show that any given delay in facilitating access to counsel was reasonable in the circumstances--this is a factual inquiry; and
 - the constitutional right to access counsel without delay cannot be displaced by assumptions of impracticality--barriers to access must be proven, not assumed, and proactive steps are required to turn the right to counsel into access to counsel.

[Emphasis removed.]

Relevant Facts on Access to Counsel

Offers to Access Counsel Roadside

- [117] At the morning briefing on June 24, 2021, Detective Constable Munro was assigned the responsibility of arresting, chartering, and warning Mr. Islam, the driver of Taxi V41. She was also responsible for handling the exhibits found on his person and in Taxi V41, and for interviewing him after he had been provided access to counsel.

- [118] Detective Constable Munroe is a very experienced police officer with 20 years of experience and extensive drug investigation experience. She began her career in March 2004 and currently works in the Drug Unit of the Organized Crime Section. She has been involved in thousands of drug investigations and hundreds of arrests. She has field trained and mentored police recruits and has been recognized as a drug expert in previous cases: see e.g., *R. v. Renshaw*, 2022 BCSC 685; *R. v. Randhawa*, 2020 BCPC 205.
- [119] While surveillance of Taxi V41 started in the morning of June 24, 2021, the Takedown only occurred in the evening when the requisite events described by Detective Constable Kumar were observed.
- [120] Shortly before 8:43 p.m., Detective Constable Munroe arrived at the 700-block of Helmcken Street. She got out of her unmarked police vehicle and immediately took custody of Mr. Islam from the VPD's emergency response team who had conducted the Takedown of Taxi V41 and removed its passenger and driver.
- [121] At 8:43 p.m., Detective Constable Munro formally arrested Mr. Islam and provided him with his s. 10(a)-(b) Charter rights and official warning. She used an arrest script that she read verbatim and filled out contemporaneously with Mr. Islam's responses. The arrest script contained verbatim wording of ss. 10(a) and (b) of the Charter as well as the official and other warnings. The arrest script, as completed by Detective Constable Munro was attached to the Agreed Facts.
- [122] Detective Constable Munro testified that she understood she was required to facilitate access to counsel as soon as practicable or without delay. She also testified that during the arrest, she had three phones available to facilitate Mr. Islam's access to counsel, had he requested to do so: two police phones and her personal phone that she was prepared to use if necessary.
- [123] At 8:48 p.m., Detective Constable Munro searched Mr. Islam. She testified that she explained the charges against him in plain language, telling him about some of the observations that had been made of him during the police investigation. Mr. Islam responded "I don't understand I'm just a cab driver" in response to being advised of his right to seek counsel's advice under s. 10(b) of the Charter. Nonetheless, Detective Constable Munro testified she did not believe there was a language barrier because Mr. Islam was able to respond to her questions appropriately. She also testified that she had separate conversations with Mr. Islam about his medical history while he was in-custody.
- [124] Detective Constable Munro testified that she first offered Mr. Islam the opportunity to contact a lawyer at 8:43 p.m. Mr. Islam declined to do so and said he would wait until he was at the police station. She offered him a second opportunity at approximately 9:00 p.m. Again, Mr. Islam declined and said he would wait.

- [125] Just as the police wagon was about to leave to take Mr. Islam and Mr. Flynn--the passenger in Taxi V41 arrested alongside Mr. Islam--to the Vancouver Jail, Mr. Flynn changed his mind about speaking to counsel roadside. This caused a transportation delay. Increasingly concerned about the delay, Detective Constable Munro offered Mr. Islam a third opportunity to speak to counsel a third time. He declined the offer despite Mr. Flynn's change of mind. At the time this offer was made, Mr. Islam was seated in the driver's side compartment of the wagon. According to Detective Constable Munro's testimony, the offer was made just prior to 9:37 p.m., when the police wagon departed the scene of arrest bound for the Vancouver Jail.
- [126] Detective Constable Munro followed Taxi V41 as it was towed to the police garage. She and her partner had to wait for a tow truck because one had not been kept on standby in light of the uncertainty as to exactly when the Takedown would occur. At the police garage, Detective Constable Munro retrieved a blue nylon bag from Taxi V41 which she brought with her to the police station. The bag had been described to her by Mr. Islam and contained his medication and wallet.
- [127] Mr. Islam arrived at the Vancouver Jail at 9:50 p.m. At 10:20 p.m., he attempted to call his counsel of choice. The call ended, unanswered, at 10:22 p.m. Mr. Islam left a voicemail.
- [128] At 10:31, Mr. Islam made a second call to counsel, this time to the Legal Aid number. The call ended at 10:41 p.m. The total period of delay between arrest roadside and access to counsel was approximately 1 hour and 43 minutes.

Credibility and Reliability of Detective Constable Munro

- [129] In cross-examination, Detective Constable Munro testified that she specifically recalled telling Mr. Islam that Mr. Flynn had changed his mind regarding access to counsel roadside. Since Mr. Islam and Mr. Flynn were to be transported to the jail together, Mr. Flynn's change of heart was part of the reason for the delay in taking Mr. Islam to the Vancouver Jail. The other contributing factor was the initial delay in the wagon arriving at the scene of the arrest. The police did not have a dedicated wagon for Project Tache and did not know when the arrest would unfold. As a result, there was no police wagon on standby. Detective Constable Munro also noted that it would have taken too much time to send the wagon to the Vancouver Jail with one accused and wait for another wagon to arrive to take the second accused.
- [130] On each of the three occasions on which Mr. Islam was offered the opportunity to speak to counsel roadside, he told Detective Constable Munro that he did not wish to do so roadside but would speak to counsel after he arrived at the Vancouver Jail. Detective Constable Munro candidly agreed that she did not record his first response on her arrest script. However, in her notes she recorded that he declined the second offer to speak to counsel at roadside.

- [131] Mr. Islam's counsel submitted that Detective Constable Munro's evidence should not be accepted because it was unreliable and uncorroborated by her notes, which did not reflect three offers to Mr. Islam to speak with counsel. I do not agree.
- [132] I accept Detective Constable Munro's evidence because it was clear that she recalled significant detail about Mr. Islam's arrest that was not recorded in her notes. In particular, Detective Constable Munro gave detailed evidence that having his hands cuffed behind his back caused Mr. Islam discomfort due to a past surgery. Since she did not perceive Mr. Islam as a threat, she re-cuffed Mr. Islam's hands in front of him. She also recalled speaking to the driver of the police wagon about whether Mr. Islam's hands could be cuffed in front of him during transport to the Vancouver Jail. The driver was an inexperienced officer who said that the protocol was for prisoners' hands to be cuffed behind them. She recalled that the driver agreed to alleviate Mr. Islam's discomfort by joining two pairs of cuffs together and cuffing Mr. Islam's hands behind his back more loosely. Finally, she recalled Mr. Islam describing to her the bag in which he had his medication and she retrieved it for delivery to the Vancouver Jail. Considering these details, I find that her recollection of Mr. Islam's arrest was reliable.
- [133] I also accept Detective Constable Munro's evidence about her increasing concern about the delay in transporting Mr. Islam to the Vancouver Jail, particularly when Mr. Flynn changed his mind about accessing counsel roadside just before the police wagon was to leave. That resulted in her third offer to Mr. Islam to speak to counsel before going to the station.

Application of the Law to the Facts

- [134] Mr. Islam's complaint is with respect to the second implementational duty as set out in Willier. I accept that Mr. Islam was given three opportunities to speak with a lawyer roadside and that, in response to each offer, he declined to do so because he wanted to wait to access counsel until he was at the Vancouver Jail.
- [135] The first opportunity was given, without delay, at the time of Mr. Islam's arrest roadside. Detective Constable Munro could have facilitated a call then had Mr. Islam wished to speak to a lawyer. Detective Constable Munro testified, and I accept, that he was clear that he wanted to speak to a lawyer later from the Vancouver Jail. As a result, Mr. Islam did not invoke his right to counsel when he was arrested.
- [136] Detective Constable Munro was also clear that, on the two subsequent occasions on which Mr. Islam was offered the opportunity to speak to counsel, he repeated that he wanted to speak to a lawyer later from the Vancouver Jail. I accept that Detective Constable Munro understood her obligations under s. 10(b) of the Charter, and could have facilitated Mr. Islam's access to counsel on any of the three occasions that she offered to do so. He declined.
- [137] Mr. Islam's wish to access counsel at the Vancouver Jail was facilitated at the Vancouver Jail.

- [138] In this regard, the facts in this case are similar to those presented in *R. v. Boucher*, 2021 BCSC 1646, in which Justice Wedge wrote that the two implementational obligations of the police under s. 10 of the Charter "are not triggered until the accused indicates a desire to exercise his right to consult counsel": para. 41. Justice Wedge concluded that the right to counsel was not triggered when an accused says that he will exercise his right to counsel eventually, but not at that time. In this case, since Mr. Islam expressed that he wished to access counsel at a later time, I find that his right to counsel was not triggered at the time that any of the three roadside offers were made.
- [139] Detective Constable Munro provided Mr. Islam with his Charter rights, without delay. She read from a prepared arrest script that set out the charges he faced, his right to retain and instruct counsel in private without delay (including information concerning Legal Aid duty counsel), and that he was not obliged to say anything but anything he did say, may be given in evidence. I accept that she had the necessary means to facilitate his phone call to counsel or to Legal Aid roadside, had he accepted any of her offers to do so.
- [140] Detective Constable Munro was clear that she believed that Mr. Islam understood her questions based on his responses. She did not believe there was a language barrier. She believed that Mr. Islam's response of "I don't understand" was made in relation to the circumstances of his arrest and the charges he was facing and did not reflect a comprehension issue about the content of her script. Her evidence in that regard was not tested in cross-examination.
- [141] The law is clear that it is only when a detainee diligently expresses a desire to access counsel that they then must be given a reasonable opportunity to contact counsel without delay, as soon as practicable.
- [142] Between the time of his arrest until he left the scene in the police wagon, Mr. Islam reiterated on three separate occasions that he did not wish to speak to a lawyer roadside. Instead, he wished to wait. Even when he was advised that reason for the transportation delay was Mr. Flynn's decision to invoke his right to speak to counsel, Mr. Islam continued to decline to invoke his own access rights roadside.
- [143] There is no evidence that Mr. Islam did not understand his rights or that he insisted on something other than what Detective Constable Munro testified about. His response that he wanted to wait to speak with a lawyer until he arrived at the Vancouver Jail is insufficient to invoke his s. 10(b) right. Applying the analysis from *Boucher*, and the cases cited therein, I find that Mr. Islam did not invoke his right to counsel until he arrived at the Vancouver Jail.
- [144] I conclude that the VPD reasonably fulfilled its obligation to Mr. Islam. As he opted not to speak to counsel until his arrival the Vancouver Jail, Mr. Islam has not established that his s. 10(b) rights were infringed.

[145] I also conclude that, upon his arrival at the jail, as set out in the Vancouver Jail Arrest Report and Attachments to the Agreed Facts, Mr. Islam was processed, screened, including for COVID-19, and booked. The 30 minutes that elapsed from his arrival at the Vancouver Jail and his first phone call to counsel falls within the scope of what is reasonably practicable.

[146] For the foregoing reasons, I dismiss Mr. Islam's claim that his s. 10(b) Charter rights were breached.

Conclusion

[147] I have concluded that Mr. Islam's s. 9 and s. 10(b) Charter rights were not breached by the VPD. His applications are dismissed.

"MacNaughton J."

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Prepared on 25 October 2026 · Esheria