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CANADA / JUDGMENT

## R. v. MacDonald

2014 BCSC 2406

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COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2406 R. v. MacDonald

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. MacDonald,

2014 BCSC 2406

Date: 20141114

Docket: 78401

Registry: Kelowna

Regina

v.

Connor John MacDonald

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

Counsel for the Crown:

M. F. McParland

Counsel for the Accused:

Robert H. Davidson

Place and Date of Trial:

Kelowna, B.C.

October 6-9, 2014

Place and Date of Judgment:

Kelowna, B.C.

November 14, 2014

## Introduction

- [1] THE COURT: The accused, Connor John MacDonald, is charged with one count of unlawfully trafficking in cocaine on or about March 17, 2013 at or near Big White Ski Resort, contrary to s. 5(1) of the Controlled Drugs and Substances Act.
- [2] Mr. MacDonald has pleaded not guilty to the charge. Moreover, Mr. MacDonald asserts that the manner in which the police obtained his identification on the morning of March 17, 2013, breached his rights (specifically under sections 9 and 10) under the Charter, and that he is entitled to a remedy under s. 24(2).
- [3] Jurisdiction, the date (as stated in the indictment), continuity of the substance, and the nature and amount of the substance (one gram of cocaine) have all been admitted.
- [4] I am first going to set out a narrative of the facts. In the narrative, I am going to refer to some individuals by their first name only. I intend no disrespect by doing so. After the narrative, I will then turn to the substantive issues, beginning with Mr. MacDonald's application under the Charter.

## Facts

- [5] Mr. MacDonald was born in June 1992 in Edmonton. His father has enjoyed a successful career in commercial real estate. His mother is a homemaker. The family has homes in Edmonton and Kelowna. Mr. MacDonald has two older siblings: a sister (who is a nurse) and a brother (who works at the World Bank).
- [6] Mr. MacDonald graduated high school. However, while in high school, he was tested and determined to be learning disabled. He was placed in a modified program, with less emphasis on academic subjects and more emphasis on manual skills such as metalwork and automotive. I will return to Mr. MacDonald's cognitive impairments later in these reasons.
- [7] As of March 2013, Mr. MacDonald was working at Big White Ski Resort. He was living at his parents' condo. His parents were at the condo about half the season, but in mid-March, Mr. MacDonald was living at the condo alone.
- [8] On March 16, 2013, earlier in the evening, Mr. MacDonald and a friend, Devon, were having some drinks at the condo before going out. Mr. MacDonald and Devon had known one another for a number of years, and they had gone to school together. As Mr. MacDonald recalled, at the condo, he and Devon had a couple of beers and a rum and Coke or two. They then went out and arrived at one of the local pubs, "Snowshoe Sam's" ("Sam's"), at or about 10:00 or 10:30 p.m.

- [9] As Mr. MacDonald remembered, at Sam's, he went to the bar and ordered a pint of beer. He went to sit near one of the pool tables at the pub. His friend Devon and another friend, Cody Van Nice, were playing pool. Mr. MacDonald explained that he usually just watched pool rather than play. In addition to the pint of beer, Mr. MacDonald also remembered sharing a pitcher of beer while at Sam's.
- [10] While Mr. MacDonald was watching his friends playing pool, a man sat down next to him and started talking to him in a friendly way. Unbeknownst to Mr. MacDonald, the man was in fact an RCMP officer, Constable Jared Dyck, a senior constable in the Kelowna drug section.
- [11] In March 2013, Constable Dyck and another officer, Constable Judith Bertrand, were working undercover at Big White as part of a project file related to illegal drug activity at Big White. Both Constable Dyck and Constable Bertrand were experienced police officers. On March 16, Constable Dyck and Constable Bertrand, posing as a couple, were instructed to attend two local pubs, in particular: Sam's and Raakels Ridge ("Raakels"). They had been told by their cover person that they were most likely to encounter drug trafficking at these two pubs.
- [12] Constable Dyck and Constable Bertrand arrived at Sam's about 11:00 p.m. At trial, Constable Bertrand explained that they had spent time earlier that evening at Raakels, but it was very quiet there. It was so quiet that Constable Dyck did not recall being at Raakels at all before going to Sam's. When Constable Dyck and Constable Bertrand arrived at Sam's, Constable Dyck recognized Cody. The evening before, Constable Dyck had purchased drugs from "Phil", and he had seen Phil purchase the drugs from Cody at Raakels. Cody was therefore someone of interest to the police in their investigation of illegal drug trafficking at Big White.
- [13] At Sam's, according to Constable Dyck, he saw Cody and Devon playing pool. As he recalled, it appeared they were interacting with Mr. MacDonald between shots and that they were all friends. This is consistent with Mr. MacDonald's evidence. Although, because of events the previous evening, Constable Dyck was interested in Cody, he decided it was best to talk to Mr. MacDonald rather than interrupt the pool game. It was Mr. MacDonald who introduced Constable Dyck to Cody and Devon. Both Constable Dyck and Mr. MacDonald remember the atmosphere at Sam's as being very happy and friendly.
- [14] After the pool game was over, Cody and Devon came over to Mr. MacDonald and Constable Dyck. As Constable Dyck recalled, he tried to get Cody to remember him from the evening before and mentioned Phil. Constable Dyck asked Cody whether Cody had any more cocaine, but Cody responded no. When Constable Dyck asked where he could get some, Cody said at Raakels. Constable Dyck recalled joking that he could not believe how hard it was to find cocaine in Big White.

- [15] Mr. MacDonald also recalled Constable Dyck talking about trying to score some "blow" and about having trouble, and asking the group where he could find some. Mr. MacDonald recalled Constable Dyck's question about where he could find some being directed to Cody, which is consistent with Constable Dyck's evidence about Cody being the person of interest to the police. Mr. MacDonald recalled Cody and Devon telling Constable Dyck that he would have better luck finding someone at Raakels. Mr. MacDonald probably agreed.
- [16] About Midnight, Cody, Devon and Mr. MacDonald decided to go to Raakels. As Constable Dyck recalled, he and Constable Bertrand were in the middle of a pool game, and he told the other three they would meet them at Raakels. Cody and Mr. MacDonald took Constable Dyck's cell number, and he took Mr. MacDonald's. As Constable Dyck recalled, he then received a text from Cody saying that Raakels was good and they should come down.
- [17] As Mr. MacDonald recalled, at Raakels, he split off from Cody and Devon to go and mingle. He went to the bar and ordered a beer, and then went off to find his friends. He located them at a table and sat down.
- [18] Constable Dyck and Constable Bertrand arrived at Raakels about 12:15 a.m. Constable Dyck recalled they were greeted by Cody and sat down at a table with others including Devon and Mr. MacDonald. There is no dispute on the evidence that the atmosphere was party-like and very friendly. Everyone was in a good mood.
- [19] As Constable Dyck recalled, Devon, who was sitting next to him, asked him if he was still looking for "blow." When Constable Dyck said yes, Devon pointed out someone that Constable Dyck recalled was named "Justin" as the guy, and indicated that he was working on helping Constable Dyck out, although Constable Dyck had to be patient. Eventually, when Constable Dyck asked Devon what was happening, Devon asked Constable Dyck if he had \$80. Constable Dyck said yes and gave the money to Devon. Constable Dyck recalled that Devon then gave the money to Mr. MacDonald and told Constable Dyck that Mr. MacDonald was going to get the drugs for him. Constable Dyck did not recall any discussion taking place between Devon and Mr. MacDonald. As Constable Dyck recalled, Mr. MacDonald then went into the crowd with the money.
- [20] Mr. MacDonald's recollection of events was not materially different. Mr. MacDonald testified that he vaguely remembered Constable Dyck was looking for cocaine and was talking to Devon. He recalled that Devon seemed somewhat concerned for Constable Dyck and said to Mr. MacDonald words to the effect of "are we able to help him out?" According to Mr. MacDonald, Devon had \$80 in his hand and Mr. MacDonald made the connection - that he could go and try and find someone. Mr. MacDonald testified that he then took the money from Devon and went off into the crowd. When asked why he would do this for a stranger, Mr. MacDonald explained that, since he was working at Big White, he would know people better, that Constable Dyck seemed like a nice guy, and Mr. MacDonald wanted to "befriend him" and be nice to him.

- [221] As Mr. MacDonald recalled, he looked around Raakels. He explained there were some known drug dealers and they were not hard to find. He knew one, Tyson, as someone who sold cocaine. According to Mr. MacDonald, Tyson was frequently at Raakels and Mr. MacDonald had previously purchased marihuana from him. Mr. MacDonald located Tyson that night at Raakels. He recalled saying to Tyson that he had a guy who wanted to buy cocaine, but Tyson told him that he did not sell to people he did not know.
- [222] Both Constable Dyck and Mr. MacDonald testified that Mr. MacDonald then returned to the table with the \$80. Constable Dyck recalled turning to Devon and expressing surprise that there were no drugs, that it was "crazy." He recalled that Devon then said to Mr. MacDonald words to the effect of "can't we help him out?" Mr. MacDonald also recalled Constable Dyck expressing disbelief that he could not get cocaine in Big White and, according to Mr. MacDonald, Constable Dyck appeared unhappy about not being able to have a good time. Mr. MacDonald then said he would buy the cocaine for Constable Dyck. He took the money and went back into the crowd.
- [223] According to Mr. MacDonald, he located Tyson again and told Tyson he would buy from him. They made the exchange in a washroom. Mr. MacDonald then returned to the table where Constable Dyck was sitting and passed the cocaine to him.
- [224] Mr. MacDonald explained that he wanted to help Constable Dyck because of the friendly atmosphere and Constable Dyck had been friendly toward him. He explained that Constable Dyck was being nice, and he wanted to be nice back. He was not thinking of the consequences. Mr. MacDonald explained that his mind was on "helping my new-found friend."
- [225] During his testimony, Constable Dyck explained that, in March 2013, Mr. MacDonald had long hair and a beard. At the trial, Mr. MacDonald had relatively short hair and no beard. Nevertheless, at the trial, Constable Dyck identified Mr. MacDonald as the individual who passed the cocaine to him at Raakels.
- [226] I return to the narrative.
- [227] By the time Mr. MacDonald passed the cocaine to Constable Dyck, it was about 1:00 a.m., and Raakels was closing. Constable Dyck and Constable Bertrand left the pub with Mr. MacDonald and another individual, Clay, from whom Constable Dyck had purchased drugs earlier in the evening. When they were leaving, Constable Dyck informed Constable Bertrand that he had received drugs from Mr. MacDonald. Until then, Constable Bertrand had paid no attention to Mr. MacDonald. There was no reason for her to do so. Clay lived within walking distance of Raakels, and he and Mr. MacDonald headed up to Clay's house. Although Constable Dyck and Constable Bertrand were invited to come along to Clay's, they said goodbye and parted ways with Mr. MacDonald and Clay.

- [28] Constable Dyck and Constable Bertrand then met with their cover person. Although Constable Dyck had received cocaine from Mr. MacDonald, the officers realized that they did not know Mr. MacDonald's last name. Indeed, although the police knew both Clay and Cody as potential targets of their investigation, Mr. MacDonald was entirely unknown to them and their investigation had made no mention of him at all. Constable Dyck, Constable Bertrand, and their cover person then devised a scenario, the object of which was to get proper identification for Mr. MacDonald. They came up with a plan whereby Constable Dyck and Constable Bertrand would accept the invitation to Clay's, then, on arrival, quickly stage an argument in which Constable Dyck would leave, following which Constable Bertrand would ask Mr. MacDonald to come outside with her to help her look for Constable Dyck. Another RCMP officer, Constable Stanviloff, would drive a marked vehicle to where Constable Bertrand and (hopefully) Mr. MacDonald were on the road, and then see if he could engage Mr. MacDonald in conversation during which Mr. MacDonald would be asked for identification.
- [29] To implement this scenario, Constable Dyck and Constable Bertrand then went up to Clay's, on the basis that they had changed their minds about calling it quits for the evening. They found Mr. MacDonald stretched out on a couch, relaxing and looking like he was done for the evening. Constable Dyck and Constable Bertrand then staged a mock argument in the lower level of the house, out of sight of Clay and Mr. MacDonald, but within earshot. Mr. MacDonald described it as a "commotion." Constable Dyck left Clay's, slamming the door behind him. Constable Bertrand then went upstairs to where Clay and Mr. MacDonald were, and asked for help finding her "boyfriend." Clay was eager to help. But for the scenario to work, Constable Bertrand needed her helper to be Mr. MacDonald and for him to agree quickly to help. He did.
- [30] Mr. MacDonald and Constable Bertrand then left Clay's and walked down the road in search of Constable Dyck. Constable Bertrand was calling out for "Jared." Before they walked very far, Constable Stanviloff, who had been briefed on the situation and that the objective was to obtain identification for Mr. MacDonald, drove up to them in a marked RCMP SUV. An auxiliary officer was in the front passenger seat. Neither the emergency lights nor the siren were activated at any time. Neither Constable Stanviloff nor the auxiliary officer ever got out of the SUV.
- [31] Although there is some contradiction in the evidence, I find that when Constable Stanviloff drove up beside them, Mr. MacDonald and Constable Bertrand were on the passenger side of the SUV, not the driver's side. This is consistent with Mr. MacDonald's and Constable Stanviloff's evidence. It is also consistent with Constable Dyck's.

- [32] According to Constable Stanviloff, when he pulled up beside Mr. MacDonald and Constable Bertrand, he rolled down the window on the passenger side. There is no dispute that he initiated the conversation with Mr. MacDonald. He was speaking in a normal conversational tone and a normal tone of voice. He said words to the effect of "I think I recognize you from downtown. I think there's a warrant out. What's your name?"
- [33] Constable Stanviloff recalled that Mr. MacDonald told him his name. When Constable Stanviloff asked for ID, Mr. MacDonald gave him his driver's licence. Constable Stanviloff took it, ran a search on the computer and took down the information. He recalled saying to Mr. MacDonald words to the effect of "It looks like it's someone else," and that Mr. MacDonald was "free to go." The whole encounter did not last more than a minute or two. Constable Stanviloff remained in the driver's seat of the SUV throughout.
- [34] Mr. MacDonald's recollection of events is not materially different. He recalled that, as he and Constable Bertrand were walking down the road calling for Constable Dyck (although I note that Mr. MacDonald was unable to remember his name at trial), a police cruiser pulled over beside them and the window was rolled down. He thought the officer may have gestured to him. He recalled the officer saying to him words to the effect of "Hey, sir, can you come over? You look familiar. I believe I have a warrant." Mr. MacDonald recalled that he then went over to the SUV to try and figure out what was going on. When the officer asked for ID, Mr. MacDonald gave him his driver's licence. His thinking was that you do not walk away from a police vehicle, but stay and see what they want, and that you do not deny a request made by a police officer. After the officer ran the information, Mr. MacDonald recalled the officer saying he was free to go. He turned around to see Constable Dyck and Constable Bertrand reunited.
- [35] Mr. MacDonald was not cross-examined on his evidence concerning his encounter with Constable Stanviloff.
- [36] Constable Bertrand was not at the SUV when Constable Stanviloff and Mr. MacDonald were speaking to one another. She agreed on cross-examination that the officer did something to get Mr. MacDonald and her to come over to the SUV, although she could not remember what. When Mr. MacDonald went to the window to speak to Constable Stanviloff, she walked away in the direction of Constable Dyck. She did not hear the exchange between Constable Stanviloff and Mr. MacDonald.
- [37] While Mr. MacDonald was speaking with Constable Stanviloff, Constable Dyck was some distance away, walking up to Constable Bertrand and the SUV. As the SUV was pulling away, he walked up to Mr. MacDonald and apologized for the drama. He and Constable Bertrand then parted company with Mr. MacDonald. According to Constable Bertrand, it was about four minutes from the time she and Mr. MacDonald left Clay's until the time she and Constable Dyck finally parted ways for the night with Mr. MacDonald.
- [38] That completes my narrative.

Was Mr. MacDonald "detained"?

[39] I turn then to the issues raised by Mr. MacDonald concerning a breach of his rights under the Charter.

[40] On behalf of Mr. MacDonald, Mr. Davidson argues that Mr. MacDonald's encounter with Constable Stanviloff constituted a breach of Mr. MacDonald's rights under sections 9 and 10 of the Charter.

[41] Section 9 provides that "Everyone has the right not to be arbitrarily detained or imprisoned."

[42] Section 10 provides in relevant part:

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;

...

[43] Mr. Davidson argues that all evidence obtained - specifically Mr. MacDonald's provision of his driver's licence identification to Constable Stanviloff - must be excluded as a result of the asserted breaches of Mr. MacDonald's rights under the Charter.

[44] At this point, I am going to observe that there was some confusion about the manner in which the trial was conducted.

[45] There was no question that, in advance of the trial, Mr. Davidson had filed a notice of application for Charter relief, outlining the arguments based on sections 9 and 10 and indicating that a remedy under s. 24(2) would be sought. Typically, in such circumstances, counsel for the accused at the outset of the trial (or at the appropriate time) would make it clear he or she wishes a voir dire to be declared. A voir dire would then be declared and evidence potentially subject to challenge would be heard in the context of the voir dire, not as part of the trial proper. Counsel for the Crown and for the accused sometimes also agree that, if the court rules against the accused on the Charter issues, then the evidence called during the voir dire will form the evidence for purposes of the trial proper.

[46] However, none of that was done in this case.

[47] Despite this, there can be no doubt that Mr. MacDonald always intended to advance the arguments concerning section 9 and section 10 and, during closing submissions, I heard full submissions from Mr. Davidson and Ms. McParland (for the Crown) concerning them. Counsel agreed that I should first address the Charter arguments, before going on to deal with the substantive offence.

[48] I will, therefore, proceed to address the accused's Charter arguments as if the evidence had been heard in the context of a voir dire. In my view, that is the only just approach.

- [49] The threshold issue is whether Mr. MacDonald was detained. If he was not, there is no breach of s. 9 or of s. 10.
- [50] The question of what amounts to a "detention" and the proper approach to making that determination are discussed in detail in the majority judgment in *R. v. Grant*, 2009 SCC 32. The court adopted a purposive approach to the definition of "detention" and held that a detention for the purposes of the Charter 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. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. See *Grant*, at paragraph 44. Whether a reasonable person would conclude that he or she had no choice but to comply is an objective determination, made in the light of the circumstances of the encounter as a whole: see *Grant*, at paragraphs 31 and 43, and *R. v. Suberu*, 2009 SCC 33, at paragraph 22.
- [51] Here, there was no physical restraint. Mr. MacDonald did not have any legal obligation to comply with any restrictive request or demand, so there was no possibility of any psychological detention in that sense. The question is whether, objectively, a reasonable person in Mr. MacDonald's circumstances would conclude that he or she no longer had the freedom to choose whether or not to comply with a police direction or demand, and had no choice but to comply.
- [52] The evidence is equivocal whether Constable Stanviloff waved to Mr. MacDonald to come over to the SUV or Mr. MacDonald simply came over.
- [53] I conclude that Constable Bertrand has no real memory of what happened. For example, she recalled that she and Mr. MacDonald were on the driver's side of the SUV, although they were not. However, what happened at the SUV was not important to Constable Bertrand, so her sketchy memory is not surprising. She was not paying attention to details.
- [54] Constable Stanviloff and Mr. MacDonald are the persons in the best position to say what occurred. The accounts are more or less consistent with one another. Moreover, Mr. MacDonald was not cross-examined on his recollection.
- [55] Mr. MacDonald recalled that Constable Stanviloff gestured for him to come over, although Constable Stanviloff had no clear memory about this. On this point, I accept Mr. MacDonald's evidence. Both agree that Constable Stanviloff spoke first and he directed his words to Mr. MacDonald.
- [56] However, objectively, the discussion was casual and low key. People spoke in normal conversational tones. There were no raised or loud voices. Constable Stanviloff, from his seat in the SUV, posed a question. He had no idea whether he would simply be told to "pound sand," in which case, that would be the end of the matter. However, Mr. MacDonald responded in a polite way. This led to the request for Mr. MacDonald's driver's licence, which

Mr. MacDonald produced. The whole encounter was brief. Constable Bertrand had already walked away, so Mr. MacDonald was alone by the side of the SUV when he was speaking to Constable Stanviloff. Constable Stanviloff and the auxiliary officer were both seated in the SUV. There is no evidence a vehicle door was ever opened at any time.

- [57] Objectively, and accepting Mr. MacDonald's version of events (which I do), I find that there was nothing inherently intimidating about the encounter or that would support the conclusion Constable Stanviloff was putting Mr. MacDonald under his control and depriving Mr. MacDonald of his choice concerning how to respond. The circumstances, in my opinion, did not create a psychological detention. Objectively, even the production of the driver's licence was the result of a request rather than a demand or a command.
- [58] Constable Stanviloff telling Mr. MacDonald that he was "free to go," in the context of the encounter as a whole, cannot transform something that, objectively, is not a detention into a detention. Up to that point, nothing had been done to prevent or obstruct Mr. MacDonald from being on his way. He was always free to go. In context, the "free to go" comment should be understood as Constable Stanviloff saying goodbye, in what I will call police-speak.
- [59] Subjectively (and as he testified), Mr. MacDonald may have felt that when approached by police, he needed to stay where he was and see what the officer wanted. But I find that, objectively, a reasonable person in the circumstances would not have concluded that he had no choice but to stay, and no choice but to respond to the officer's request for information. Objectively, there was no psychological detention.
- [60] I find, therefore, that Mr. MacDonald was not detained within the meaning of s. 9 of the Charter, and there was no breach of Mr. MacDonald's rights under s. 9 or s. 10 of the Charter. Accordingly, all of the evidence given by the witnesses (including Mr. MacDonald) at trial and notionally heard in the context of a voir dire will be treated for all purposes as evidence in the trial proper.

Has the Crown proved the charge of trafficking?

[61] I turn then to deal with the specific charge of trafficking.

[62] Section 5(1) of the Controlled Drugs and Substances Act provides that:

No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

[63] Section 2(1) defines "traffic," and states:

"traffic" means, in respect of a substance included in any of Schedules I to IV,

- (a) to sell, administer, give, transfer, transport, send or deliver the substance,
- (b) to sell an authorization to obtain the substance, or
- (c) to offer to do anything mentioned in paragraph (a) or (b),

otherwise than under the authority of the regulations.

[64] Ms. McParland submits that, on the evidence, Mr. MacDonald was in fact the person engaged in conduct amounting to trafficking. She submits that this is not a situation where Mr. MacDonald was only assisting the purchaser, Constable Dyck.

[65] Before I can convict Mr. MacDonald of the offence of trafficking, the Crown must prove each element of the offence beyond a reasonable doubt.

[66] As I noted above, certain elements have been admitted. Mr. MacDonald has admitted that the offence occurred at the time and place set out in the indictment and that the substance in question is a controlled substance, namely, cocaine. He has also admitted the amount, one gram.

[67] Constable Dyck identified Mr. MacDonald as the individual from whom he received the package of cocaine on March 17, 2013, and Mr. MacDonald admitted passing the package to him. Identity is, therefore, established.

[68] The critical areas of dispute are:

- (a) whether Mr. MacDonald engaged in conduct that falls within the definition of "traffic," or aided or abetted someone to do so; and
- (b) whether Mr. MacDonald intended to traffic in cocaine.

[69] I find that, by handing the package of cocaine to Constable Dyck, Mr. MacDonald engaged in conduct that falls within the definition of "traffic." The definition includes to "give" and to "deliver" the substance. On the undisputed evidence, Mr. MacDonald delivered the package containing one gram of cocaine to Constable Dyck. I find that the Crown has proved this element of the offence beyond a reasonable doubt.

[70] However, has the Crown proved the necessary intent for the offence beyond a reasonable doubt?

[71] Mr. Davidson argues that the evidence concerning Mr. MacDonald's state of intoxication and his cognitive impairments raises a reasonable doubt concerning the final element of the offence.

[72] I do not accept that Mr. MacDonald was too drunk to know what he was doing.

[73] I accept Mr. MacDonald's evidence concerning the amount of alcohol he had consumed during the evening of March 16 and into the early morning hours of March 17, for example, a beer and one or two rum and Cokes at the condo with Devon, a pint and sharing a pitcher of beer at Sam's, and more beer at Raakels.

- [74] When asked at trial, Mr. MacDonald rated his level of intoxication at eight on a scale of 10, implying that, by the time he left Raakels, he was very drunk. However, I do not think this conclusion - that Mr. MacDonald was very drunk - is consistent with the other evidence, including Mr. MacDonald's own evidence.
- [75] No one, including Mr. MacDonald, indicated that Mr. MacDonald was at any time staggering or unsteady on his feet or slurring his words. On arrival at Raakels, he went to the bar. He was not cut off, but was served a pint of beer. Mr. MacDonald was able to find his friends in a crowded pub and was able to find Tyson. At trial, Mr. MacDonald's memory of events that evening was reasonably good and was broadly consistent with the evidence of Constable Dyck, Constable Stanviloff and Constable Bertrand. At Clay's, Mr. MacDonald was relaxing on the couch, not passed out.
- [76] All of this satisfies me that, even though Mr. MacDonald had consumed a fair amount of alcohol during the evening, he was not so intoxicated so as to be unaware of what was going on or unable to remember how the events transpired. I find that, in fact, he was aware of what was going on, and he was able to remember it about 18 months later at the trial.
- [77] I find, therefore, that Mr. MacDonald was not so intoxicated that he did not know what he was doing when he delivered the package of cocaine to Constable Dyck.
- [78] I turn then to Mr. MacDonald's cognitive impairments and how these might have affected him in relation to the element of intent for the charge of trafficking.
- [79] I heard evidence from two persons who were qualified as experts, Dr. Klaus Gendemann, a psychiatrist, and Dr. George Pugh, a psychologist. Both met with and assessed Mr. MacDonald after the events in March 2013.
- [80] Dr. Gendemann was qualified as a psychiatrist and forensic psychiatrist, and he was permitted to give opinion evidence concerning his medical diagnosis or diagnoses of Mr. MacDonald based on his assessment of Mr. MacDonald in July 2013. However, I did not find Dr. Gendemann's evidence to be helpful. He acknowledged that he had never arrived at an actual diagnosis, apart from observing that Mr. MacDonald demonstrated some brain dysfunction and mild intellectual dysfunction, and that he felt Mr. MacDonald was having "processing issues" that made Mr. MacDonald vulnerable and affected his social judgments. Rather, because Dr. Gendemann was not able to have neuropsychological testing done, he deferred making a diagnosis.
- [81] Moreover, I have concerns about Dr. Gendemann's impartiality. It is essential that a person called to give expert evidence be independent and impartial. It appeared that Dr. Gendemann had a prior relationship with Mr. MacDonald's family. In addition, Dr. Gendemann was asked on cross-examination whether he was being paid a fee for his work, something that would be completely normal. Mr. Davidson objected to the question, but Dr. Gendemann wanted to answer it. He testified that he was not taking any fee because he had a very strong opinion, implying that he saw Mr. MacDonald's cause as a righteous one. This

attitude is not compatible with Dr. Gendemann assisting the court as an independent expert.

- [82] Dr. Pugh was qualified as an expert able to give opinion evidence regarding the administration and interpretation of psychological tests and the preparation of psychological assessments. He assessed Mr. MacDonald in October 2013 and had Mr. MacDonald complete a number of standard intelligence and personality tests. I do not have the same concerns about Dr. Pugh as I do with Dr. Gendemann, and I found Dr. Pugh's evidence, generally speaking, to be helpful, particularly his evidence concerning the results of the tests he administered to Mr. MacDonald.
- [83] Dr. Pugh testified that on the Wechsler Adult IQ test, Mr. MacDonald scored in the very low percentile range (the second percentile) when measuring processing speed. This resulted in a lower-than-average overall IQ score. Dr. Pugh explained that the very low percentile score concerning processing speed indicated that Mr. MacDonald has difficulty processing information. This was consistent with Mr. MacDonald's experience in high school. Dr. Pugh explained that someone receiving a low percentile score when processing speed is measured will struggle when trying to complete a complicated task with many variables, and also in setting priorities. Dr. Pugh indicated there are ways for such an individual to compensate, such as practice and following directions from other trusted individuals. Dr. Pugh observed that, as a coping method, Mr. MacDonald appears to have developed a warm friendly personality style, although Dr. Pugh thought that Mr. MacDonald may overuse this as a problem-solving mechanism.
- [84] Apart from the unusually low scores on the IQ testing, Mr. MacDonald scored in the normal range in the other tests administered by Dr. Pugh.
- [85] Dr. Pugh observed that Mr. MacDonald's low IQ scores should not affect Mr. MacDonald's ability to deal with moral problems, at least not directly, nor should these affect Mr. MacDonald's ability to tell right from wrong. However, Dr. Pugh indicated that if Mr. MacDonald is confronted with a more complicated moral problem, he would likely have more difficulty.
- [86] I also heard evidence from Mr. MacDonald's current employer, Mr. Pat Begoray, who owns and runs a successful business, Marine Management Services. Although Mr. MacDonald worked for Mr. Begoray's company in the 2011 and 2012 seasons, Mr. Begoray's examples of Mr. MacDonald's problems at work were all after March 2013. In addition, while some of the behaviours Mr. Begoray described might be seen as odd and might be explained as examples of how the IQ deficits identified by Dr. Pugh affect Mr. MacDonald's day-to-day functioning, I agree with Ms. McParland that, in context, they could also be explained as simply a young adult finding his way in his first real job. Mr. MacDonald was not asked about these incidents during his evidence, so I do not know whether he would say he acted in ways that Mr. Begoray found strange because he was confused and had problems following simple instructions, or for some other reason.

- [87] I note that I did not hear from either of Mr. MacDonald's parents, who were present in court during the trial. They would likely be in a position to say something about whether, from their perspective, Mr. MacDonald has particular challenges that might be relevant to the issues in this case. However, neither of them testified. Based on Mr. MacDonald's evidence, I conclude that, as of March 2013, his parents had sufficient confidence in Mr. MacDonald's ability to look after himself that they left him living alone in their condo.
- [88] Of course, I also heard from Mr. MacDonald himself at the trial. Testifying at a trial is an unusual and anxiety-provoking experience for most people. The setting is unfamiliar and often uncomfortable. Nerves are normal. However, Mr. MacDonald came across as relatively calm and articulate. He was able to communicate his evidence well and in a straightforward manner, and able to respond to questions appropriately. His memory of events, based on the other evidence, appeared to be relatively good. Mr. MacDonald struggled with some questions on cross-examination. But the questions were somewhat convoluted and not necessarily easy to understand. He acknowledged that he was able to tell right from wrong, and that he knew drug possession and trafficking are illegal.
- [89] I find that, in the early morning of March 17, 2013, Mr. MacDonald intended to do what he in fact did: to buy the cocaine from Tyson, using Constable Dyck's \$80, and then to deliver the cocaine to Constable Dyck.
- [90] I have not been persuaded by the evidence concerning the amount of alcohol that Mr. MacDonald consumed that evening, or by the evidence of the experts or Mr. Begoray or the other witnesses that, on March 17, 2013, Mr. MacDonald was not capable of forming the intent required for the charge before me. Based on Mr. MacDonald's evidence, he was quite capable of acting independently from friends Cody and Devon, as he did when they arrived at Raakels. The events that unfolded that evening, particularly at Raakels, were straightforward. On the evening of March 16 at Sam's and into the early morning at Raakels, Mr. MacDonald was not presented with a complicated series of choices and decisions that required him to process information rapidly, set priorities, and make complex decisions.
- [91] I do not therefore have any reasonable doubt that Mr. MacDonald had the ability to form the necessary intent with respect to his activities that evening. Based on all of the evidence, including the evidence concerning the alcohol Mr. MacDonald had consumed and his cognitive impairments, I am satisfied beyond a reasonable doubt that Mr. MacDonald intended to deliver one gram of cocaine to Constable Dyck in the early morning of March 17, 2013, and that the Crown has proved the final element of the offence of trafficking beyond a reasonable doubt.
- [92] I therefore find Mr. MacDonald guilty as charged.

[93] Since I have found Mr. MacDonald guilty as a principal, that is, the person who carried out the acts constituting the offence, I will mention only relatively briefly the submissions and cases concerning "agent of the purchaser." If I had not found Mr. MacDonald guilty on the basis that he was the person who in fact carried out the acts constituting trafficking, these submissions would be relevant to the included offence of aiding the commission of an offence under Criminal Code s. 21(1)(b). Section 21 provides in relevant part that:

Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it;

[94] Both the Crown and Mr. MacDonald relied on the leading case discussing the concept of "agent of the purchaser" in the context of a charge of trafficking, *R. v. Greyeyes*, [1997] 2 S.C.R. 825. However, I note that the Supreme Court of Canada upheld the conviction on the basis that Mr. Greyeyes was guilty of trafficking as a party pursuant to s. 21(1)(b) and (c) of the Criminal Code: see paragraph 14 (per the judgment of Madam Justice L'Heureux-Dubé for the majority) and paragraph 39 (Mr. Justice Cory for the minority). Mr. Justice Cory says (at paragraph 41):

41 In light of my conclusion regarding the appellant's liability as a party to the offence of trafficking, it is not necessary to consider whether the appellant was also guilty of trafficking as a principal.

[95] Thus, the context of the discussion of the activities of Mr. Greyeyes and whether they were sufficient for a conviction was in relation to whether he could be found guilty as a party, not whether the accused could be found guilty as principal, that is, the person who actually committed the offence.

[96] That is also the context for the analysis in *R. v. Bruzzese*, 2012 BCSC 369, where Mr. Justice Powers found the accused guilty as charged based on the facts described in paragraphs 67 to 69. Mr. Justice Powers concluded, at paragraph 70:

[70] I am satisfied that on the cases, as I understand them, that Mr. Bruzzese was a party to this offence and I do note that it is certainly at the lower end of trafficking, but it still amounts to trafficking at law and, therefore, I find him guilty as charged.

[97] Both Ms. McParland and Mr. Davidson also cited *R. v. Unger*, 1999 BCCA 350. Section 21 is not mentioned expressly in the reasons. However, based on the facts described (in particular at paragraph 8 of the reasons), and the fact that the trial court followed and applied *R. v. Greyeyes*, the logical inference is that the trial court convicted Mr. Unger on the basis that he was a party, rather than a principal.

- [98] R. v. Ross, 2004 ABQB 524, aff'd 2005 ABCA 123, might appear to be an exception. The accused was acquitted at trial and the Crown's appeal was dismissed. The essential facts are conveniently summarized in the judgment of Picard J.A. at paragraphs 4 and 5:
- [4] In a bar, an undercover R.C.M.P. officer started a conversation with the respondent, a 50-year-old aboriginal man who had had a considerable amount to drink, asking him if anyone had any [cocaine]. The respondent pointed to a person in the bar, "Jay", whom he did not know personally but knew to be a member of a gang. The respondent said that he would get drugs for him and approached "Jay" and got cocaine, which he brought back to the undercover agent. The undercover agent questioned the weight and the respondent said "they weigh it". The undercover agent asked the price and gave the respondent the amount, \$80, which the respondent took over to "Jay". The respondent got nothing from the transaction.
- [5] The respondent, who was very familiar with the bar, said that he wanted to help the undercover agent because he looked "brand new" to the bar. He identified the bar (in which he worked part-time) as "primarily a native bar", frequented by a young native gang and with "very few blacks". The undercover agent acknowledged that the respondent was doing him a favour.
- [99] However, Picard J.A. noted (at paragraph 12) that the trial proceeded only on the question of whether Mr. Ross was liable as an accessory under s. 21 of the Criminal Code. The court refused to allow the Crown to raise on appeal for the first time the question of whether Mr. Ross was liable as a principal or whether the trial judge erred in applying the Greyeyes defence to a situation in which Mr. Ross might otherwise be liable as a principal.
- [100] I therefore do not find R. v. Ross of assistance.
- [101] On the evidence, Mr. MacDonald did not initiate any conversation concerning drugs. He did not discuss the type, quantity or price with Constable Dyck. Although Mr. MacDonald identified and found the dealer (Tyson), he never offered to introduce Constable Dyck to Tyson, nor did he ever introduce the two of them. Mr. MacDonald did not ask for anything (apart from, perhaps, friendly recognition) in connection with the transaction. He did not sell drugs to anyone. Rather, Mr. MacDonald saw himself as doing a favour for a new-found friend (i.e., Constable Dyck) and making the purchase that Constable Dyck could not make for himself because Tyson would not sell to a stranger.
- [102] However, in the early morning of March 17, 2013, Mr. MacDonald in fact delivered a package of cocaine to Constable Dyck. That is what he intended to do. That is what he did do. Although certainly at the lower end of trafficking, that constitutes the offence of trafficking at law.

Should the charge be stayed on grounds of entrapment?

[103] Finally, in the event that I concluded the Crown proved all elements of the offence beyond a reasonable doubt, Mr. MacDonald seeks to have the charge stayed based on police entrapment.

[104] The test for entrapment is described in the leading case of *R. v. Mack*, [1988] 2 S.C.R. 903 at page 975 (CanLII paragraphs 118 and 119):

To summarize then, the police must not, and it is entrapment to do so, offer people opportunities to commit crime unless they have a reasonable suspicion that such people are already engaged in criminal activity or, unless such an offer is made in the course of a bona fide investigation. . . .

There is, therefore, entrapment when: (a) the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting mala fides, as explained earlier or, (b) having a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence. . . .

[105] The onus is on the accused to prove on a balance of probabilities that the conduct of the state was an abuse of process, and the defence of entrapment is to be recognized "in the clearest of cases only": see *Mack*, at CanLII paragraph 154.

[106] There was no evidence that, as of March 16, 2013, the police knew anything about Mr. MacDonald at all. He was not in their target book. Constable Bertrand paid no attention to him until after she had been told by Constable Dyck that Mr. MacDonald had given him cocaine. Mr. Davidson argues that, in those circumstances, there is nothing that could have created any reasonable suspicion that Mr. MacDonald was likely to commit a drug-related offence.

[107] However, I find that at the time, the police were engaged in a bona fide investigation of drug activity in two bars in Big White: Raakels and Sam's. The evening before, Constable Dyck had observed a drug transaction between Phil and Cody at Raakels. It is true that, earlier in the evening of March 16, it was quiet at Raakels. But I do not think that means that, later in the evening, the police could not therefore have been engaged in a bona fide investigation in an area where it is reasonably suspected criminal activity is occurring.

[108] When Constable Dyck and Constable Bertrand arrived at Sam's, Constable Dyck was interested in Cody, based on what had happened the night before. Cody, Devon and Mr. MacDonald were all friends, and Mr. MacDonald was present when Constable Dyck carried on the conversation with Cody and Devon about where to find cocaine and was told Raakels. Mr. MacDonald agreed with this. Cody, Devon and Mr. MacDonald then moved over to Raakels, and Cody told Constable Dyck (and Constable Bertrand) to come over, which they did. I do not think there can be much doubt that, by this point, Raakels has been identified as a location where drug activity is occurring or is likely to occur. In those circumstances, the police may present any person associated with Raakels with the opportunity to commit the offence, and it is not entrapment to do so. That describes the events at Raakels so far as they relate to Mr. MacDonald.

[109] Mr. Davidson argues (relying on the discussion in Mack at CanLII paragraphs 122 and following) that Constable Dyck exploited Mr. MacDonald's vulnerabilities - that he had been drinking and also had cognitive impairments that made him particularly susceptible to friendly overtures and to want to be a people-pleaser. Thus, Mr. MacDonald was someone who would be inclined to do something (although it was wrong) because (as Mr. MacDonald described) Constable Dyck put a guilt trip on him and he wanted to please a new friend. Mr. Davidson argues that these factors, even if they were unknown to Constable Dyck, should be taken into account in addressing the defence of entrapment.

[110] I do not agree.

[111] There was nothing to suggest that Constable Dyck singled out Mr. MacDonald as someone who was vulnerable and that Constable Dyck could manipulate into committing a crime. There was nothing to suggest that Constable Dyck perceived Mr. MacDonald to be different in any way from Devon, for example. It was Mr. MacDonald who took the step of involving himself in the drug transaction.

[112] I conclude, therefore, that Mr. MacDonald has failed to make out the defence of entrapment.

### Summary

[113] In summary, I find Mr. MacDonald guilty as charged. The defence of entrapment fails.

[114] That concludes my reasons.

"Adair J."

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