
CANADA / JUDGMENT

R. v. Nguyen

2013 BCSC 950

COURT

Supreme Court of British Columbia

DECIDED

29 May 2013

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2013 BCSC 950 R. v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2013 BCSC 950

Date: 20130529

Docket: X075005

Registry: New Westminster

Regina

v.

An Long Nguyen

Before: The Honourable Mr. Justice Williams

Voir Dire Ruling

Counsel for the Crown:

J.M. Whiting

Counsel for the Accused:

N.L. Cobb and E. Lewis

Place and Date of Trial:

New Westminster, B.C.

October 22, 23, 24, 2012,

January 17 and February 28, 2013

Place and Date of Judgment:

New Westminster, B.C.

May 29, 2013

[1] An Long Nguyen is before the Court facing the following charges:

Count 1

An Long NGUYEN, on or about the 10th day of December, 2008, at or near the City of Surrey, in the Province of British Columbia, did unlawfully produce a controlled substance, to wit: Cannabis (marihuana), contrary to Section 7(1) of the Controlled Drugs and Substances Act.

Count 2

An Long NGUYEN, on or about the 10th day of December, 2008, at or near the City of Surrey, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: Cannabis (marihuana), in an amount exceeding 3 kilograms, for the purpose of trafficking, contrary to Section 5(2) of the Controlled Drugs and Substances Act.

[2] The trial of the matter commenced on October 22, 2012.

[3] The defence has alleged a number of Charter breaches in the course of the investigation. As a consequence, the trial began with a voir dire. That entailed calling of a number of witnesses who were part of the investigation. In fact, a total of nine witnesses were called by the Crown: eight police officers and one civilian who was part of the searches. This is consistent with the common format in such litigation - although the applicant has the onus of proving the allegations, because the relevant witnesses are usually police officers, the Crown makes them available. An agreed Statement of Facts was tendered. The applicant did not testify and did not call any witnesses.

[4] At the conclusion of that phase, I received submissions from both Crown and defence with respect to the allegations of Charter breach. It was agreed that a decision would be rendered, setting out findings as to whether breaches had been proven. In the event there were Charter breaches established, the Court would then hear from counsel as to what effect should result.

[5] This ruling is the Court's findings regarding the allegations of Charter breach.

The Circumstances

[6] The investigation involved two separate searches at two separate dwelling houses located in Surrey, BC. The first was at 8864 - 140B Street; the second was at 15767 - 108 Avenue.

[7] I note that no challenge is made to the warrants that were used to authorize the searches.

- [8] The first search, at the 140B Street address, was conducted on the morning of December 10, 2008. Several RCMP officers attended there, armed with a Criminal Code search warrant to investigate theft of electricity. The house is a modern two-storey home in what appears to be a typical suburban sub-division; there is an attached two vehicle garage.
- [9] At approximately 7:50 a.m., a number of police officers assembled at the front door of the residence. There had been a brief surveillance conducted prior to the execution of the warrant, probably in the order of ten minutes.
- [10] One of the officers in the search party knocked on the front door and announced the police presence. Approximately a minute later, an adult Asian male opened the door from inside. He was dressed in pyjamas. The officers entered the dwelling. The first officer to enter was Cst. Hooker. His testimony is that he gave the man certain directions, but that the male was passively resistant, that is, not compliant with the instructions; as a result Cst. Hooker took the man by the shoulder and directed him to the ground. The man was then handcuffed. A very short while later, custody of the male was given to another officer in the party, Cst. Corcoran.
- [11] Cst. Corcoran testified that he took custody of the man at approximately 7:55 a.m. He advised the man that he was detained in connection with a theft of electricity investigation. Cst. Corcoran remained with that man while the other officers entered and cleared the residence. As I understand from the evidence, that took approximately seven or eight minutes. At 8:02 a.m., Cst. Corcoran was apprised by police radio that a marihuana grow operation and a hydro bypass had been located. He then advised the man that he was under arrest for production of a controlled substance, possession of a controlled substance for the purpose of trafficking, and theft of electricity. Following that, Cst. Corcoran also administered the police caution to the man and advised him of his rights under s. 10 of the Charter. That was at 8:05 am.
- [12] In his dealings with the man, Cst. Corcoran asked if he understood English; he testified that the male responded "yes". Cst. Corcoran also testified that as he advised the man of his rights, the man responded in the affirmative each time he was asked if he understood. In the course of their interaction, Cst. Corcoran states that the male made a number of statements in English, beyond simply responding "yes". It was Cst. Corcoran's evidence that he concluded that the male understood what was being discussed. He stated that he offered the male an interpreter and the male indicated that he would like to have an interpreter provided. The man also indicated that he wanted to speak to a lawyer.
- [13] Cst. Corcoran testified that when he initially asked if the man had a lawyer, the man replied "yup". However, when Cst. Corcoran asked for the lawyer's name, the man replied "I don't have a lawyer, I don't know who." Cst. Corcoran said that he then gave the man the choice of contacting the lawyer of his choice or Legal Aid and the man chose Legal Aid. Cst. Corcoran called the Legal Aid number at 8:18 a.m. while still at the 140B Street residence. No person answered the telephone but there was a voice-mail facility. Cst. Corcoran left a message

advising of the arrest and requesting that a Vietnamese interpreter be provided. He also left his cellular telephone number. He testified that that phone was on and remained on at all times.

- [14] After approximately 15 minutes had passed and there had been no response from the Legal Aid office, Cst. Corcoran transported the male to the RCMP detachment. There he fingerprinted and photographed him in accordance with what he describes as the usual booking procedure. The man subsequently spoke to Legal Aid counsel with the assistance of an interpreter. Following that, the man was asked if he was satisfied with the call and he responded "Yes, I was satisfied."
- [15] One of the other investigators on this matter was Cst. Parslow. She interviewed the man at the police detachment. She testified that he spoke in "broken English" and when at one point he stated that she was speaking quickly, she then began to speak more slowly. She testified that it was her opinion that the man understood what was being said and understood why he had been arrested. She said that the responses he provided were congruent with the questions that she asked.
- [16] Upon making their initial entry to the residence at 140B Street and making their way through the house, the police officers found a substantial marihuana grow operation. In the course of their investigation there, a number of photographs of the scene were taken. They show that the entire upper floor was dedicated to the growth of the plants, together with the attendant paraphernalia that is required for such enterprises. The home has a crawl space under the main floor; that too was fully occupied by growing activities.
- [17] In addition to the many photos that were taken of the house and its contents, one photograph was taken of the male who had been taken into custody at the time of the search. That was in the front foyer of the residence, before he was transported to the police station.
- [18] One of the police officers, in the course of conducting the search at the residence, located a computer in the living room. He testified that the computer was on and that no password was required to make access. He conducted a search of two electronic folders. The officer's evidence was that he was looking for documents relating to residency. He says he found nothing, and that he made no copies and seized nothing from the computer.
- [19] As is normal in such matters, a number of items were seized from the scene and made exhibits by the police. In this case, in addition to the usual plants and paraphernalia, some documents were seized, as was a USB drive.
- [20] As it turns out, the contents of the USB drive were subsequently examined by the police and in the course of that, a number of photographs which were on the drive were printed.
- [21] Because a hydro bypass had been located, the police officer in charge of the search, Cst. Parslow, made a call to request that a qualified electrician attend. She explained that her rationale for that decision was that the police officers on site were not trained to safely deal

with or dismantle that situation. As a consequence, Mr. Waddell, a licensed electrician, attended at the site and removed the hydro bypass. Mr. Waddell was a witness at trial; he testified as to the steps he took there, including that he made observations of the marihuana grow operation equipment.

- [22] In the course of the investigation, the police encountered information which caused them to make application for a search warrant to search another location in Surrey, the dwelling at 15767 - 108 Avenue. The warrant authorized a search for documents relating to the dwelling at 140B Street or relating to marihuana grow operations. That warrant was executed later in the evening of December 10, 2008. In the course of the execution of the warrant, police located and seized a number of documents from that address. They also located a hydro bypass in the garage and so, again, they contacted Mr. Waddell to attend in order to deal with that situation.

The Allegations of Charter Breach

- [23] The applicant takes issue with a number of aspects of the police investigation. For the purpose of examining those in an organized way, I propose to set out two specific heads and examine each:
1. The applicant alleges breaches of his rights under ss. 8, 9 and 10 of the Charter, in respect of the manner in which he was dealt with by police at the scene. Specifically, he says that he was arbitrarily detained or unlawfully arrested; that he was not properly advised of the reason for his arrest or detention; that he was not afforded his right to counsel upon request; and that he was subjected to identification procedures (that is, he was photographed and fingerprinted) prior to a charge being sworn.
 2. The applicant says that his rights under s. 8 of the Charter were breached by the manner in which the police conducted the warranted searches. Specifically he says that the searches exceeded the scope of the authority provided in the warrant. That, in the applicant's submission, includes the improper search of the electronic devices found at the 140B Street site, the fact that an unsupervised civilian (Mr. Waddell) was allowed free access to the residences which were being searched, and that the search conducted at the residence on 108 Avenue substantially exceeded the authorized scope provided by the warrant.

Standing

- [24] The applicant concedes that, while some of the alleged breaches are personal to him, such as the arrest, the provision of rights and the photo and fingerprinting process, a number of them are not. Those are related to the searches which were conducted at the two premises.

[25] Ordinarily, where an applicant alleges breaches of his or her Charter rights, the onus is on that applicant to establish that Charter rights have been infringed and that the evidence obtained by that breach should be excluded, pursuant to s. 24(2). An element of that proof is the requirement that the applicant establish standing as well as the linkage between the obtaining of the evidence and the Charter breaches.

[26] The necessity for standing arises from s. 24(1) of the Charter:

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

[27] The issue was considered in *R. v. Edwards*, [1996] 1 S.C.R. 128. There the appellant argued that his s. 8 Charter rights had been infringed when the police conducted a search at the residence of his girlfriend, a place where he visited; he had a key to the place and kept some personal effects there, but maintained a separate residence. Writing for the majority, Cory J. dealt with the matter of standing. The relevant essence of the ruling is captured in the following extract from a headnote of the case:

Several principles pertain to the s. 8 right to be secure against unreasonable search or seizure. A claim for relief under s. 24(2) of the Charter can only be made by the person whose Charter rights have been infringed. Like all Charter rights, s. 8 is a personal right. It protects people and not places. The right to challenge the legality of a search depends upon whether the accused had a reasonable expectation of privacy, and if so, whether the search by the police was conducted reasonably. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. The factors to be considered may include: (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access; (vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

[28] In this case, the applicant alleges Charter breaches in the course of the investigation, including with respect to police activity that he appears to accept does not fall within the usual proximity that would allow him to establish his standing. Nevertheless, the applicant says that there was present in this investigation a larger pattern of police conduct which demonstrates a blatant disregard for constitutional rights, and that should legitimately concern this Court, such that a remedy should be considered.

[29] The authority which grounds this submission is the decision of *R. v. Lauriente*, 2010 BCCA 72. In that case, there were two defendants tried jointly. In fact, the trial began with three defendants, but, at some point during the trial, the charges against one of them were stayed. Charter breaches were found to have been proven and the trial judge proceeded to the remedy (s. 24(2)) phase of hearing. In the result, the court held that evidence of breaches of

the Charter rights of one defendant were properly taken into account when assessing the effect of other Charter breaches of the other defendant. As well, breaches of the Charter rights of a non-party, that is, the person whose charges were stayed in the middle of the trial and who was, therefore, no longer a party, were held to be valid considerations in the s. 24(2) analysis with respect to breaches of rights of defendants in the trial.

[30] On appeal, the Crown alleged that the trial judge had fallen afoul of a proper application of the principle of standing. The Court of Appeal disagreed, saying:

In this case, both Mr. Lauriente and Mr. Catalano [a co-accused] had standing to seek relief pursuant to s. 24(2) of the Charter based on the infringement of their individual Charter rights. Mr. Lauriente's rights under s. 8, 9, and 10(a) had been infringed; Mr. Catalano's rights under s. 10(b) had been infringed. This was simply not a case of an accused who had no standing seeking to rely on the breach of a third party's Charter rights in order to obtain standing.

[31] The Court of Appeal concluded that the trial judge had quite properly:

... relied on the cumulative effect of the breaches of the rights of Mr. Lauriente and Mr. Catalano (and, to a lesser extent, the breach of Ms. Lauriente's s. 9 Charter right) as evidencing a pattern of disregard of Charter rights by the police during the course of the investigation, and in their execution of the warrant. In that respect, she properly considered the cumulative effect of the breaches as relevant to a determination of the seriousness of the breaches, and in relation to the question of whether the admission of the evidence obtained in relation to those breaches could bring the administration of justice into disrepute.

[32] I do not see anything in that decision which meaningfully changes the necessity for the applicant at bar to prove that he has standing to seek a remedy for the breaches that he alleges. The notion of a cumulative effect of breaches is affirmed, but it seems clear that the breaches which were found there all came before the court in the usual way, that is, at the instance of defendants who had standing to allege them.

[33] Accordingly, it is my conclusion that the requirement as it is described in Edwards remains intact.

[34] The position urged by the applicant would constitute a quite dramatic deviation from the standing requirement. To accept his position would be to essentially change the focus of the Charter inquiry from the protection of individual rights to a more general and at-large inquiry into all aspects of a given police investigation. It seems to me that that is quite strikingly at variance with the established jurisprudence. There is as well the issue of a proper economy of judicial resources. Pursuing a larger and wider approach necessarily requires a substantially greater expenditure of judicial time and energy and detracts from trial focus.

- [35] In my view, there must be a reasonable limit to the extent to which the court will go in deviating from or extending the essential standing model. I see no basis in the circumstances at bar to do so.
- [36] In the result, I find that the applicant does not have standing to challenge the search of either of the residences or the contents (specifically, electronic devices) found at those residences. He does have standing to challenge his detention/arrest and the subsequent dealings he had with the police, namely with respect to compliance with s. 10 of the Charter and the fingerprinting and photographing steps that were taken.

The Breaches Alleged

- [37] At the outset of the analysis, I would observe that the applicant claims that certain of his Charter rights have been infringed; he asks this Court to find those breaches have been established and, if there are such findings, to order appropriate remedies. Accordingly, the onus is on the applicant to prove, on a balance of probabilities, that there have been breaches.

The Detention/Arrest

- [38] The first allegation of Charter breach advanced by the applicant is with respect to what I will call his detention/arrest and the ss. 9 and 10 issues.
- [39] In the applicant's submission, the police arrested him at the initial point of contact when they arrived at the front door of the residence and he met them there.
- [40] A number of officers went into the residence, in accordance with a pre-determined plan. As noted, the applicant was kept in the custody of one of those officers who remained with him at or near the front door.
- [41] The position of the Crown is that, at the point of the initial contact, the applicant was detained: that what occurred was an investigative detention, and that he was not actually arrested until several minutes later, after the officer in whose custody he was had been advised that a marihuana grow operation and hydro bypass were present, once there was clear evidence that an indictable offence was being committed at that time.
- [42] The applicant says that that is not a correct characterization of what actually occurred. Rather, says the applicant, while the police have sought to describe their activities as a "two-stage process", in actual fact, the applicant was subjected to a de facto arrest at the initial point of contact, and so the ss. 9 and 10 issues have to be examined in that particular light. He says that this was a precipitous arrest and that it does not meet the lawful requirements for an arrest without warrant.
- [43] I propose to begin with an analysis of this aspect of the application.

- [44] In support of his position, the applicant relies particularly on the decision of the British Columbia Court of Appeal in *R. v. Orr*, 2010 BCCA 513.
- [45] The facts in that case were not dissimilar to those in the present matter. The police attended at a residence to execute a search warrant. After knocking on the door and announcing themselves, they forced the front door open with the use of a battering ram. At that point, the accused appeared at the front door. He was taken into the custody of one of the officers. The police testimony at trial was to the effect that the accused was advised that he was being detained. A short while later, after certain observations had been made inside the house, he was then told that he was under arrest.
- [46] Notwithstanding the police testimony, the trial judge took the view that what had actually occurred was that the initial taking into custody, although described as an investigative detention, was a *de facto* arrest, and the matter had to be examined in that way.
- [47] Of course, there are significant differences between these two types of events, particularly with respect to the lawful basis necessary to justify the taking into custody and the obligations on the police which are triggered by the action.
- [48] In my view, the application in the present case requires that the circumstances be examined in some detail, with a careful eye to the differences between arrest and investigative detention.
- [49] For many years in Canada, there was no practical distinction between these two concepts because arrest was arrest and the concept of investigative detention was not a recognized part of the criminal law. Matters changed following the advent of the Charter and the jurisprudence that subsequently developed.
- [50] The first mention of the distinction in the reported cases to which I have been referred is in the judgment of Lamer C.J. in *R. v. Latimer*, [1997] 1 S.C.R. 217. There, the police had dealings with Mr. Latimer, a suspect in their investigation. After encountering him at a rural site, police advised him that he was being detained and that he would be taken to the police station in a nearby community, North Battleford, where he would be interviewed by the investigators.
- [51] In considering whether this was a detention (that is, something less than an arrest) or an actual arrest, as Mr. Latimer contended, Lamer C.J. looked at two considerations in particular: what steps or measures were necessary to establish a lawful arrest, and what were the actual circumstances surrounding the event at issue?
- [52] With respect to the former question, he found guidance in the Court's earlier definition of arrest in *R. v. Whitfield*, a decision dating back to 1970.
- [53] It will be helpful to reproduce the relevant paragraphs from *Latimer*:

23 The appellant's strongest argument is that no arrest occurred because the officers deliberately chose not to arrest Mr. Latimer. He points to testimony by officers Lyon and Conlon at trial, in which they indicated that they decided prior to appearing at the farm they did not wish to arrest Mr. Latimer. As well, he also points to the use of the word "detention", instead of the word "arrest", as proof of that intention.

24 However, notwithstanding what the intention of the officers may have been, their conduct had the effect of putting Mr. Latimer under arrest. To understand why, we need only turn to the definition of arrest offered by this Court in *R. v. Whitfield*, [1970] S.C.R. 46. Judson J., speaking for the majority of the Court, held that an arrest consists either of (i) the actual seizure or touching of a person's body with a view to his detention, or (ii) the pronouncing of "words of arrest" to a person who submits to the arresting officer. The term "words of arrest" was not defined in that judgment. However, in my mind we should decline the invitation to adopt the narrow view of that term proposed by the appellant, i.e. that only the word "arrest" will suffice. As this Court has held with respect to s. 10(a) of the Charter (*R. v. Evans*, [1991] 1 S.C.R. 869, at p. 888), what counts is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used. ... The question is ... what the accused was told, viewed reasonably in all the circumstances of the case. ...

25 On the facts of this case, a *de facto* arrest occurred through the use of words that conveyed clearly that Latimer was under arrest, the conduct of the officers, and Mr. Latimer's submission to the authority of officers Conlon and Lyons. Mr. Latimer was told that he was being detained, and that he would be taken back to North Battleford to be interviewed. The police officers informed him of his right to silence and his right to counsel. They accompanied him back into his house while he changed his clothes, telling him that they were doing so because he was now in their custody. Finally, at no point did Mr. Latimer protest or resist the police -- he submitted to the authority of the arresting officers.

[54] In the years that followed, the notion of a particular type of detention, the so-called investigative detention, developed and became a defined and recognized concept. An early and important articulation of the concept was provided by Doherty J.A. in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482, 12 O.R. (3d) 182, 20 C.R. (4th) 1 (C.A.)

[55] After some judicial consternation and considerable analysis, the matter has evolved to its present state, best explained in *R. v. Mann*, 2004 SCC 52. There, the history of the concept was examined in detail and its contours were explained. Writing for the majority, Iacobucci J. stated as follows:

45 To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this

connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case.

[56] In the result, it is clear that the law today recognizes two distinctly different mechanisms whereby the police will be entitled to act (in the absence of an arrest warrant) to suspend or limit the liberty of an individual:

1. An arrest without warrant, in accordance with s. 495 of the Criminal Code:

495. (1) A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- (b) a person whom he finds committing a criminal offence; or
- (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

The key factors will be the necessity for a belief on reasonable grounds: the peace officer must believe that he has reasonable grounds to make the arrest. It must also be shown that a reasonable person in the position of the officer would have believed that reasonable and probable grounds existed to make the arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241. The meaning of "reasonable grounds to believe" has been described in various ways, including "reasonable probability" and "more than mere suspicion but less than proof on the balance of probabilities".

2. Investigative detention is a common law power which provides a peace officer with the authority to detain an individual when he or she has a reasonable ground to suspect in the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances.

It is to be expected the detention will ordinarily be brief in duration. The state of belief necessary to justify the detention is less than what is required for an arrest: that the officer has a reasonable basis to suspect that the person is connected to an offence and that the detention is necessary.

[57] The requirement to comply with s. 10 of the Charter is to be observed for both arrest and investigative detention; the detainee will be advised immediately in clear and simple language of the reasons for the detention and his right to counsel. The immediacy of this obligation is only subject to concern for officer or public safety or reasonable limitations prescribed by law and justified under s. 1 of the Charter: *R. v. Suberu*, 2009 SCC 33.

[58] In fact, from time to time, courts will be presented with situations where, for various reasons, full compliance with s. 10 has not been immediate. My understanding of the decided authorities is that some leeway may be permitted, but that where there is delay, the

court will be vigilant in seeing that it is legitimately related to the concerns described in Suberu and that it is no more than the circumstances necessitate. An example is *R. v. Perjalian*, 2011 BCCA 323, where Neilson J.A. considered a brief delay in providing the accused their 10(b) rights and held that there was nothing "deliberate or flagrant" about the delay that would warrant exclusion under s. 24(2) (para. 62). In that case, the accused was held for about three minutes before the information was provided. The investigation moved swiftly and it was difficult to imagine how an immediate provision of the s. 10 rights would have changed the conduct of the accused in any meaningful way.

- [59] Two points must be made clear. The first is that the police do not have a general or free-standing authority to arrest or detain persons who are found at a location which is to be searched pursuant to a warrant. Any arrest or detention must be justified on the basis of the applicable law, as set out above: see *R. v. Whittaker*, 2008 BCCA 174.
- [60] The second is that whether the detention is an arrest or an investigative detention is a matter for the court to determine in light of the totality of the circumstances. The character of the event will not be decided by the label which the police apply to the event. Thus it is that the courts will find, in appropriate situations, that what the police choose to call a detention is a *de facto* arrest. See for example *Latimer and Orr*.
- [61] With that background, I turn now to the matter at hand.
- [62] Having examined both the authorities and the circumstances carefully, I am unable to accede to the applicant's contention that what occurred was a *de facto* arrest rather than an investigative detention. It is my conclusion that the applicant was initially investigatively detained and was told the reason for that detention. A short time later, Cst. Corcoran was satisfied that he had a proper basis to place the appellant under arrest in accordance with s. 495. He did so, following which he provided the required s. 10 advice and the police warning.
- [63] There was a measure of force used in the initial detention. I do not understand the law to state that force cannot be used or that the use of force will make an arrest out of what would otherwise be an investigative detention. The key will be the necessity consideration. The police may use a reasonable force to effect an investigative detention where the circumstances justify that use.
- [64] In this case, the officers entered a residence. Some of the officers had their sidearms unholstered and in hand. The description in the testimony was that the guns were at the "low ready" position. In the circumstances as described, I find no basis to conclude that that was excessive or unnecessary. The police were entering into an unknown environment for the purpose of investigating a criminal offence. They were entitled to take appropriate precautions. On the totality of the evidence, I am not prepared to say that was inappropriate.

- [65] Additionally, there was nothing in the evidence to suggest that the weapons were brandished about or deployed in any way that would be seen as an improper threatening of the applicant.
- [66] As for the use of physical force, the applicant was pushed to the floor and was handcuffed. The first officer to enter and encounter the applicant testified that directions were given but that the applicant did not comply with those directions; he was described as passively resistant. In the totality of the circumstances, given that this was a dynamic entry into a house where little was known of what was present there, I am unable to find that the force used was either unreasonable or excessive.
- [67] With respect to the duration of the detention, it was apparently in the order of approximately seven minutes. For that time, the applicant was held at the front entryway of the house by Cst. Corcoran while the other officers made their way through the entire house. I accept that process was done in accordance with an established protocol and with a certain measure of caution.
- [68] Until that was completed, it is reasonable to expect that the focus of the police officers present was on that issue.
- [69] Those factors considered, I do not find the time of the detention to have been excessive and find it falls well within a range of what could sensibly be expected.
- [70] I turn now to the matter of the grounds for the detention. The applicant was found at the residence, shortly before 8:00 a.m., wearing pyjamas. It was not unreasonable to conclude that he had some meaningful connection with that house. The analysis must also include that the police had reasonable and probable grounds to believe that a criminal offence was being committed there - that was the basis upon which the warrant was obtained - and so the necessary threshold, that is, reasonable grounds to suspect this person had a connection to the offence believed to be occurring there and that it was reasonably necessary to detain him, was met. Stated slightly differently, at the time the applicant was detained, the police had a reasonable basis to suspect that he was implicated in a criminal offence that they were investigating. At that stage, where entry had just been made and the investigation in the house was just beginning, the extent of the applicant's involvement was not known. It was reasonable to conclude that this person's detention was reasonably necessary.
- [71] A material difference between the circumstances of the present case and others, such as Orr, is that there is no basis to believe that the police had decided at the outset that when they went into the house, this man or anyone who answered the door or who was present would be arrested. It will be recalled that that was a key factor in the Orr case, in leading to the conclusion that what occurred there was in fact an arbitrary arrest. Presumably the trial judge there was of the view that the police were intent upon arresting the accused, regardless of what the circumstances were when they arrived, and the claim of investigative detention was simply a ploy to afford a plausible basis to take him into custody until the search was done and a proper arrest could be justified.

- [72] In this case, at some point, at approximately 8:02 a.m., the status of the investigative detention was changed to an arrest proper.
- [73] Constable Corcoran testified that he had been advised by the searchers that they had located a hydro bypass and a substantial-sized marihuana grow operation.
- [74] The analysis requires that the arrest be examined in terms of the legal requirements, which, as noted, arise from s. 495 of the Criminal Code, set out above. In essence, in order to effect an arrest without warrant, the peace officer must believe, on reasonable grounds, that the subject has committed or is committing an indictable offence. As per Storrey, that belief must be honestly held and must be objectively reasonable.
- [75] In this case, as for the subjective grounds, Cst. Corcoran testified that he considered the applicant to be "connected to the residence" and he knew that the residence was the scene of a marihuana grow operation, which I interpret to mean that he considered the applicant to have some material connection to or involvement in the criminal activity occurring there.
- [76] The reasonableness of that belief must be assessed objectively; that is, would a reasonable person, apprised of the circumstances, believe it likely that this person had committed or was committing a criminal offence.
- [77] As noted, there was no question that a marihuana grow operation of some magnitude had been located in this house. It was also clear that the applicant was the only person present at the site and, given the time and the fact that he was found in his nightclothes, it would be reasonable to infer that his connection with that place was more than fleeting or coincidental.
- [78] In the submission of the applicant, the arrest was precipitous. As I understand the submission, the police ought to have conducted further investigation before making the arrest. For example, the applicant's precise connection to the residence is not known.
- [79] In my respectful view, that type of further investigation, while it might be useful, is not, in the totality of these circumstances, something that necessarily had to be done to enable the situation to rise to the level required by s. 495.
- [80] Compared to Orr, the facts at bar are different. There is the matter of the time and the appearance of the applicant. In the circumstances, it seems a reasonable inference that the applicant had slept at that house, and that represents a greater degree of connection than was present in the Orr case. Circumstances there were, in my view, quite different because the situation in that case was that the accused had answered the door "dressed casually and barefoot" at approximately 5:00 p.m. Those circumstances would seem materially less indicative of a real connection than those in the matter at bar. He was also the only person there and the extent of the grow operation was substantial.

- [81] Reference was made in submissions to the fact that when the police initially detained the applicant, his identification was not known to them. The thrust of the submission as I understood was that this is a factor to be taken into account in assessing the reasonableness of the decision to detain or arrest.
- [82] In my view, where the police have information as to the identity of a party located at the scene of the search, information which would go to establish some linkage between that person and the location or the activities under investigation, that could have impact upon the grounds to justify detention or arrest. However, the absence of such information is by no means necessarily a valid reason to conclude that the detention or arrest was not justified. The reasonableness and the validity of the arrest or detention will fall to be determined on the totality of the surrounding circumstances.
- [83] In the result, I am satisfied that the necessary conditions to permit a lawful arrest without warrant were present and I find the arrest was lawful.

Charter Section 10

- [84] I turn next to the matter of the obligation on the police to comply with the requirements of s. 10 of the Charter.
- [85] The relevant provision of the Charter is this:
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.
- [86] Although it may seem somewhat redundant, I propose to set out in full detail the particulars of the interaction between the applicant and Cst. Corcoran because they are relevant to the analysis.
- [87] Immediately upon the applicant being detained at the front door, he was told by Cst. Corcoran that he was being detained for theft of electricity. The officer asked if the applicant understood and the applicant replied "yes".
- [88] There is no evidence of any further communications between the two until approximately seven minutes later. That was the point at which the applicant was placed under arrest. Cst. Corcoran testified that he asked the applicant if he understood English and the reply was "yes". Cst. Corcoran then advised the applicant that he was under arrest for three offences and articulated what they were. He asked the applicant if he understood and the applicant again replied "yes". Cst. Corcoran then read the s. 10 rights from a card he carried. Following that, he asked the applicant if he understood and again the answer was "yes". Cst. Corcoran then asked if the applicant wanted to call a lawyer and the applicant replied in the

affirmative.

- [89] Following that, Cst. Corcoran read the police warning to the applicant. He then asked him if he had his own lawyer to which the applicant said "yup". Cst. Corcoran asked who the lawyer was; the applicant replied "I don't have a lawyer, I don't know." Cst. Corcoran then asked whether the applicant wished to speak to a lawyer of his choice or Legal Aid; the applicant replied "Legal Aid". Cst. Corcoran testified that he then told the applicant that he could speak to Legal Aid now but it would not be in private or he could wait until they got back, at which time the conversation would be in private. The applicant replied "right now".
- [90] Cst. Corcoran testified that he also offered the applicant access to an interpreter to which the applicant replied that he "would prefer that".
- [91] At 8:18 a.m., Cst. Corcoran placed a telephone call from the site of the search to Legal Aid. There was no answer and a message was left advising that a lawyer should call back and that an interpreter was required. At the point, Cst. Corcoran served a copy of the search warrant upon the applicant.
- [92] Cst. Corcoran asked if the applicant could read English and the reply was "yah". Cst. Corcoran also asked if the applicant understood what was on the warrant and again his evidence was that the answer was "yes".
- [93] No call-back message was received from Legal Aid and at 8:37 a.m., the applicant was escorted from the scene of the search to the police detachment; arrival there was at 8:52 a.m.
- [94] At 8:55 a.m., another call was placed to Legal Aid. Arrangements were made for an interpreter and a lawyer. The applicant was placed in a private booth and was there for 22 minutes, presumably conversing with the lawyer. When he concluded his call and emerged from the booth, he was asked by the officer if he was satisfied. His response was "Yes, I was satisfied."
- [95] At the scene, and before leaving, the officer recorded certain personal information from a driver's licence which had been located in the house. It appears that he asked one question of the applicant at the scene, other than those that I have set out above. He asked the applicant for his telephone number.
- [96] As noted earlier, before the applicant was taken to the police station, the officer who was photographing the scene took a picture of the applicant while he was standing in the front entryway to the residence.
- [97] In cross-examination, Cst. Corcoran was asked whether he had asked the applicant to re-state the warnings and advice in his own words, apparently as a means of measuring his comprehension. Cst. Corcoran advised that he did not do so.

- [98] There are a number of issues to be considered here. One arises from the fact that while the applicant was told at the point of the initial detention why he was being detained, he was not provided with his s. 10(b) rights. That did not occur until the actual arrest was made.
- [99] Another issue is with respect to the adequacy of the officer's actions in an implementational sense: did he take sufficient steps to facilitate the applicant's actual access to legal counsel?
- [100] Finally, and in a related vein, there is the matter of the applicant's ability to communicate in English: did the officer take necessary steps to accommodate those particular circumstances of this detainee?
- [101] Based on all of the evidence, I am satisfied that there was proper compliance and that no Charter infringement has been proven.
- [102] At the point of the initial detention, I accept as reasonable the officer's explanation that he did no more than tell the applicant why he was detained because he was primarily focused upon what was occurring with respect to the search. Once the initial phase of the search had been conducted, that is once the premises had been "cleared", the applicant was arrested and at that point, there was proper compliance with both aspects of the s. 10 requirements.
- [103] At the initial point of contact, the applicant was provided with the reason for his detention; the further information, that is, the right to counsel advice was not provided until the premises had been cleared. I am satisfied that the delay was brief, and that that the officer's justification for not effecting the entire process earlier - because he was focused on what was going on in the house as the other police personnel worked their way from room to room - reflects a legitimate concern for safety issues at the time. My conclusion is informed by the fact that the applicant had been made aware of why he was detained and also that nothing was done to gather evidence from him in that interval, nor was there anything meaningful that he could have done in that short time to access counsel.
- [104] As for the language concern, on the evidence that is before me, I am satisfied that the applicant understood what the officer told him and that the officer's conduct was appropriate in the circumstances. There is nothing in the record to indicate that necessary information was not understood by the applicant or that the officer had a basis to believe something further had to be done to satisfy the substantive requirements of s. 10.
- [105] I also note that, from the time of the initial detention up to the point where the applicant had access to counsel at the police detachment, there were no interactions which occurred between the police officers and the applicant that could be characterized as evidence gathering, with one exception which I will discuss below.
- [106] Finally, the applicant suggests that the officer was not sufficiently diligent in taking steps to enable him to contact counsel in a timely way.

[107] I have examined the evidence of the interaction over the period of time from the point of arrest until the applicant was placed in the telephone booth at the police office where he had his conversation with the lawyer and the interpreter. In my view, conscientious efforts were taken to meaningfully ensure he knew of his rights and to assist him in giving effect to that right. A call was made from the scene to Legal Aid; no one answered the call but a message was left. No improper efforts were made to gather evidence from the applicant in the time before he had contact with counsel. In short, his rights were treated with appropriate respect and concern.

[108] No breach has been made out.

Photo taken at the scene

[109] I described earlier that at some point, after the applicant had been arrested but before he was escorted from the scene to the police detachment, his photograph was taken. That was done by Cst. Ryzuk, who had been assigned to photograph the scene. A number of these photos are in evidence (Exhibit C). It is apparent that the photo of the applicant is "posed" - the applicant is looking toward the photographer, the hand of a police officer can be seen on his shoulder.

[110] The applicant says that the taking of this photograph and the circumstances in which it occurred is a violation of his privacy rights and constitutes a Charter breach - specifically, s. 10(b). The basis of his complaint as I understand is that the police forced him to pose for a photograph in a private residence in the absence of legal advice and informed consent.

[111] I have been referred to the decision of Barrow J. in *R. v. Ly*, 2012 BCSC 504. In that case, an essentially identical fact pattern was before the court, and the same argument was advanced.

[112] The circumstances and the submissions of the applicant were carefully examined by Barrow J., who found no Charter breach. He concluded as follows:

[42] What the police did in this case is record the evidence at the scene of what they believed to be a crime. The appearance and identify of the people found there was recorded as part of that process. In doing so, the police did not violate Mr. Ly's rights as guaranteed by s. 10(b) of the Charter. First, the police are entitled to investigate what they reasonably believe to be a crime. There is no question but that they were entitled to enter on the property that day. Once there, they were entitled to record the scene as they found it. Mr. Ly was part of that scene, as were the other men found there that day. Viewed from this perspective, the police were not attempting to elicit evidence from Mr. Ly, rather they were attempting to record, as accurately as they could, the evidence they already had. ...

[113] That is, in my view, an entirely valid assessment of the issue at bar. It is a considered decision of another justice of this Court. There is no basis upon which to distinguish it and so I consider it binding upon me and dispositive of the applicant's contention: *R. v. Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (BCSC).

[114] I find no Charter breach to have been established.

Photos and fingerprints taken at the police station

[115] The final argument to be examined is the applicant's submission that the process whereby the police took his photograph and fingerprints as part of the booking in procedure at the Surrey detachment was a breach of his Charter rights. It is not disputed that when that occurred, the applicant was in custody but no charges had been sworn.

[116] In fact, given my earlier conclusions, it is fair to say that, at the relevant time, the applicant was in lawful custody.

[117] In the applicant's submission, the Identification of Criminals Act is the controlling consideration. It provides as follows:

2. (1) The following persons may be fingerprinted or photographed or subjected to such other measurements, processes and operations having the object of identifying persons as are approved by order of the Governor in Council:
 - (a) any person who is in lawful custody charged with or convicted of
 - (i) an indictable offence, other than an offence that is designated as a contravention under the Contraventions Act in respect of which the Attorney General, within the meaning of that Act, has made an election under section 50 of that Act, or
 - (ii) an offence under the Security of Information Act;
 - (b) any person who has been apprehended under the Extradition Act;
 - (c) any person alleged to have committed an indictable offence, other than an offence that is designated as a contravention under the Contraventions Act in respect of which the Attorney General, within the meaning of that Act, has made an election under section 50 of that Act, who is required pursuant to subsection 501(3) or 509(5) of the Criminal Code to appear for the purposes of this Act by an appearance notice, promise to appear, recognizance or summons; or
 - (d) any person who is in lawful custody pursuant to section 83.3 of the Criminal Code.

Use of force

- (2) Such force may be used as is necessary to the effectual carrying out and application of the measurements, processes and operations described under subsection (1).

Publication

- (3) The results of the measurements, processes and operations to which a person has been subjected pursuant to subsection (1) may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law.
- [118] The applicant relies upon the decision of the Court of Appeal in *R. v. Connors*, [1998] B.C.J. No. 41. There were in fact three separate opinions in that case; each of the panel members rendered individual decisions; each of those dealt with the issue somewhat differently than did the others.
- [119] The applicant also relies upon two subsequent decisions of this Court; *R. v. Nicholson*, [1999] B.C.J. No. 1330, and *R. v. Nguyen and Dang*, [2001] B.C.J. No. 2986.
- [120] In the former, Boyle J. interpreted *Connors* as establishing that the Identification of Criminals Act "occupied the field" and that there remained no common law authority to fingerprint persons arrested by the police. In *Nguyen and Dang*, Catliff J. concluded that, in accordance with the doctrine of comity, he was obliged to follow *Nicholson* and did so.
- [121] Alas, the issue has continued to be contentious. As Bruce J. recently remarked, "the authorities on this point are confusing and contradictory" (*R. v. Bishop*, 2013 BCSC 522, para. 127).
- [122] A number of decisions of both the Provincial Court and this Court have followed the *Connors* line of analysis. Many have not. See for example three recent decisions of this Court: *R. v. Chau*; *R. v. Bishop*; *R. v. Arthur*.
- [123] Given the state of the authorities, there simply is no clear line of direction to guide resolution of the issue. The principle of comity does not lead to a definitive solution.
- [124] Having examined the authorities with some care, I find myself minded to agree with the analysis and the succinct conclusion reached by Halfyard J. in *R. v. Pelucco*, 2013 BCSC 588. He accepted that the process of taking fingerprints is in fact a search, as established in *R. v. Feeney*, [1997] 2 S.C.R. 13. He also concluded that the police have a common law power to take fingerprints of a person who has been arrested for an indictable offence. He takes the view, persuasively, in my estimation, that *R. v. Connors* decided that the Identification of Criminals Act displaced only the common law police power to fingerprint persons arrested for summary conviction offences, but that the police continue to have the power at common law to fingerprint persons lawfully arrested for indictable offences.
- [125] In the result, I am unable to find that the fingerprinting procedure in this present case constituted an unlawful search or was otherwise unlawful.
- [126] Accordingly, no Charter breach has been proven.

Conclusion

[127] My findings in respect of the applications at bar are as follows:

1. The applicant has the right to challenge his detention and arrest, as well as the police compliance with s. 10 of the Charter and the photographs and fingerprints that were taken.
2. The applicant does not have standing to challenge the police searches or the manner of execution of the warrants at the two residences, 8864 - 140B Street in Surrey and 15767 - 108 Avenue in Surrey.
3. I find that the applicant was lawfully detained by the police upon entry at the 140B Street residence; I find that he was properly arrested under s. 495 of the Criminal Code approximately seven minutes later and that he was lawfully in police custody.
4. I find there was no breach of the applicant's Charter rights with respect to the provision of his s. 10 Charter rights while he was detained and in custody of the police.
5. I find no Charter breach has been made out with respect to the photograph taken of the applicant by the police at the 140B Street address.
6. I find the applicant has not established any Charter breach with respect to the manner in which the police took his fingerprints while he was in custody at the Surrey RCMP facility.

[128] The application stands dismissed.

"The Honourable Mr. Justice Williams"

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Prepared on 26 October 2026 · Esheria