
CANADA / JUDGMENT

R. v. Nguyen

2016 BCSC 2181

COURT

Supreme Court of British Columbia

DECIDED

9 November 2016

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

2016 BCSC 2181 R. v. Nguyen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nguyen,

2016 BCSC 2181

Date: 20161109

Dockets: 78026-3; 78026-4

Registry: New Westminster

Regina

v.

Quang Dong Nguyen

Before: The Honourable Mr. Justice Greyell

Oral Reasons for Judgment

Counsel for the Crown:

J.A. Cramer

P.A. Eccles

E.W. Froess

Counsel for the Accused:

J.R. Ray

Place and Date of Trial/Hearing:

New Westminster, B.C.

November 4, 2016

Place and Date of Judgment:

New Westminster, B.C.

November 9, 2016

Introduction

- [1] Mr. Nguyen is charged on a five count indictment with one count of conspiring to export a controlled substance (methamphetamine) under the Controlled Drugs and Substances Act, S.C. 1996, c.19 [CDSA], one count of conspiring to produce a controlled substance (methamphetamine) between December 10, 2012 and February 25, 2013, and three firearms/prohibited device offenses alleged to have occurred February 25, 2013.
- [2] These reasons concern an application brought by Mr. Nguyen for an order under s. 24 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter] declaring inadmissible all intercepted telephonic, text or email communications (the "intercepts") between Mr. Nguyen and the named co-conspirator, Mr. Hoang which were obtained by the New Zealand Police.
- [3] Mr. Nguyen submits the admission of the intercepts in any form into evidence at his trial would be a violation of his rights under s. 7 (the right to natural justice and fundamental justice); s. 8 (his right to be secure against unreasonable seizure); and ss.11(c) and (d) (his right not to incriminate himself and his right to a fair trial) of the Charter.
- [4] The intercepts form the basis of the Crown's case against Mr. Nguyen.
- [5] Mr. Nguyen seeks an order the court order a voir dire to enable his counsel to cross examine Sgt. Sabo, one of the RCMP officers who were involved in the investigation leading to the charges with a view to establishing the alleged breaches of the Charter.

Background

- [6] The facts outlined below are taken from Admissions made pursuant to s. 655 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [7] On December 11 and 14, 2012 members of the Canada Border Services Agency (the "CBSA") in the Air Cargo Operations section of the Vancouver International Airport inspected and seized an outbound package containing 12 shock absorbers destined to an address and phone number in New Zealand. The shock absorbers were found to contain 2.861 kilograms of methamphetamine. The CBSA advised the RCMP of the seizure and turned the package over to them.

- [8] On December 14, 2012 the CBSA intercepted another package containing 12 shock absorbers destined for New Zealand which contained 3.889 kilograms of methamphetamine. The second package was also turned over to the RCMP.
- [9] The RCMP notified the New Zealand Police on December 12 of the first seizure and again following the second seizure. Both countries initiated separate but cooperative investigations.
- [10] As part of the New Zealand investigation the New Zealand Police focused on the intended recipients of the packages. In doing so the New Zealand Police received authority under the New Zealand Search and Surveillance Act, 2012, initially pursuant to its emergency provisions, and then pursuant to judicially authorized Surveillance Device Warrants, to intercept phone lines used by individuals in New Zealand who were believed to be involved in efforts to import and distribute the methamphetamine contained in the packages seized by the CBSA.
- [11] The communications were intercepted at the Crime Monitoring Centre of the New Zealand Police located in the City of Wellington in New Zealand.
- [12] The New Zealand police officer who was responsible for the day-to-day running of the investigation in New Zealand and whose role it was to identify intercepted communications of evidentiary value, provided the RCMP with intercepted communications he believed may be of evidentiary value to the RCMP's investigation into identifying the individual or individuals in Canada responsible for exporting the methamphetamine.
- [13] The intercepted communications which were provided to the RCMP were from two of the phone lines monitored by the New Zealand Police in New Zealand, one of which was on the waybill of the first package seized by the CBSA and noted as belonging to the intended recipient of that package. Both phone numbers were identified as belonging to Mr. Hoang.
- [14] Mr. Hoang who the Crown says was a resident of Surrey, British Columbia had been in New Zealand on a visitor's visa since March, 2012.
- [15] Mr. Huang was subsequently arrested, tried and convicted in New Zealand of conspiring to import, manufacture and supply methamphetamine.
- [16] The Crown says Mr. Nguyen was the other participant in the intercepted telephone conversations with Mr. Huang.
- [17] The identity of the participants to the intercepted telephone conversations is not admitted in these proceedings.
- [18] The parties have agreed all technical aspects of the interceptions made by the New Zealand Police were properly and correctly handled. Mr. Nguyen, through his counsel, "consents to the admissibility of all of the technical aspects of the intercepts" including:
- the manner of the interception;

- the integrity and accuracy of the original recordings of the calls and text messages;
 - the integrity and accuracy of copies made from the original recordings for evidentiary purposes; and
 - the continuity of the discs containing copies of the calls and text messages.
- [19] The accused also admits he has received reasonable notice of the Crown's intention to adduce evidence of the intercepted communications pursuant to s. 189(5) of the Code, including the receipt of a binder entitled "Transcripts of Intercepted Communications from New Zealand" which has been marked as Exhibit 3 in these proceedings and agrees the intercepts are accurate messages that were intercepted by the New Zealand Police and were provided to the RCMP.
- [20] The English-language translations of Exhibit 3 of phone calls, text messages or portions thereof that took place in a language other than English are not the subject of the Admissions and will need to be proven in court.
- [21] The parties have also agreed the respective participants to the conversations set out in Exhibit 3 were in the following locations at the time of each phone call and text message transmission:

I. The phone using phone numbers 022 - 328 - 1251 and 022 - 365 - 5789 was located in New Zealand; and

II. The phone using phone number 778 - 316 - 5545 was located at or near the City of Surrey British Columbia Canada.

- [22] The parties further agree that the production of methamphetamine is a criminal offence in New Zealand.

The Test the Accused Must Meet to Establish a Right to a Voir Dire

- [23] The issue is whether the court should embark on a voir dire to determine whether Mr. Nguyen's Charter rights have been violated.
- [24] While the accused bears the onus of establishing the court should embark on a voir dire to establish whether his charter rights have been violated the onus is not a heavy one. The accused need only demonstrate a "reasonable basis" upon which the court could find a breach of the Charter: R. v. Mehan, 2014 BCSC 2242 at para. 10.

The Position of Mr. Nguyen

- [25] Mr. Nguyen argues the Charter applies to and protects persons whose communications emanate from within Canada when those communications made within Canada are used to support a criminal prosecution in Canada.

- [26] The applicant submits the intercepts or communications have two separate components: a component emanating from the person outside Canada and a distinct component emanating from the person within Canada and that the latter component, that is, the part of the communication emanating from within Canada is protected by the Charter.
- [27] Mr. Nguyen's counsel relies on *R. v. Vukelich*, 1996, 108 C.C.C. (3d) 193; *R. v. Goldman*, [1980] 1 S.C.R. 976 at p. 992 (for the two components of a "private communication"); *R. v. Stanton*, 2010 BCCA 208 at para 13 (for the same proposition); and *R. v. Duarte*, [1990] 1 S.C.R. 30 at p. 43 (for the danger of electronic surveillance by the state to individual privacy).
- [28] The Crown relies on a number of authorities which I will refer to shortly.
- [29] The question for determination on this application is whether the Charter applies to the actions of the New Zealand police authorities in intercepting phone calls and the other intercepts contained in Exhibit 3.
- [30] I am satisfied from my review of the authorities relied on by the Crown the Charter does not apply in the circumstances of this case and that accordingly, I should not order a voir dire.
- [31] In *R. v. Mehan*, 2014 BCSC 2242, Mr. Justice Josephson considered a similar issue to that before me on this application. In *Mehan*, members of the United States Drug and Enforcement Agency (the "DEA") in California intercepted emails and messages pursuant to judicial authorizations obtained from two Blackberry devices they gave the accused. The intercepts were sent to a DEA Blackberry server in California and were then promptly forwarded to the Combined Forces Special Enforcement Unit (the "CFSEU") in Canada. The CFSEU subsequently applied for judicial authorization to intercept communications of the accused using the DEA intercepted emails and messages as the basis of the application. The accused applied for a voir dire based on an argument his s. 8 Charter had been breached, arguing that "the nearly contemporaneous viewing of intercepted e-mails in Canada of a person residing in Canada forwarded by foreign law enforcement authorities fits the definition of intercept" in s. 183 of the Code and therefor the Canadian officers conducted an unlawful search in viewing the emails without first obtaining prior Part VI authorization.
- [32] Mr. Justice Josephson reviewed the law as stated by the Supreme Court of Canada in *R. v. Hape*, 2007 SCC 26; *R. v. Harrer*, [1995] 3 S. C. R. 562; *R. v. Terry*, [1996] 2 S. C. R. 207; and recently by the British Columbia Court of Appeal in *R. v. Tan*, 2014 BCCA 9 and concluded at para. 14

It is settled law that the Charter does not apply extraterritorially to Canadian authorities and to a foreign investigation

- [33] Mr. Justice Josephson noted at paras. 16-17:

[16] The fact that Canadian peace officers are engaged in a cooperative investigation with foreign law enforcement agencies does not alter this principle. In *Terry* at para. 19, Madam Justice McLachlin, as she then was, states that "any cooperative investigation involving law enforcement agencies of Canada and the United States will be governed by the laws of the jurisdiction in which the activity is undertaken". This deferential approach was similarly echoed in *Hape*, where LeBel J. states at para. 52:

states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. That deference ends where clear violations of international law and fundamental human rights begin. If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international co-operation and the comity of nations. [Emphasis added.]

[17] It is also settled law that foreign obtained evidence is not subject to the Charter. In *Harrer* at para. 15, Lamer C.J. makes the following remarks in this regard:

I see no reason why evidence obtained in other countries in a manner that does not conform to our procedures should be rejected if, in the particular context, its admission would not make the trial unfair. For us to insist that foreign authorities have followed our internal procedures in obtaining evidence as a condition of its admission in evidence in Canada would frustrate the necessary cooperation between the police and prosecutorial authorities among the various states of the world.

[34] Mr. Justice Josephson reviewed *R. v. Della Penna*, 2012 BCCA 3 and *R. v. Anaso*, [1999] O.J. No. 5759 both of which involved foreign wiretaps made by the DEA in the United States which shared those intercepts with Canadian police officers to further the investigation in Canada. The communication in *Della Penna* was a telephone communication between the accused in British Columbia and an informant in Washington. The accused argued his Charter rights were violated. The facts were similar in *Anaso* where again the accused was in Canada. Both courts held that as the intercepts were made in the United States the Charter did not apply.

[35] Mr. Justice Josephson summarized his conclusions at paras. 29-31:

[29] I have concluded that the contemporaneous sharing of foreign lawfully intercepted communications with Canadian peace officers does not constitute an interception within the meaning of s. 183 of the Code. Once the communications were intercepted by the DEA Blackberry server in Los Angeles, they became foreign obtained evidence. The fact that they were shared contemporaneously with the CFSEU in Vancouver does not alter the nature of this evidence. Thus, the viewing of the previously intercepted communications is not an "intercept", but rather the viewing of previously intercepted communications. The CFSEU was not required to obtain Part VI authorization to view the communications disclosed by the DEA, as pursuant to settled legal principles, Canadian law does not apply to foreign

obtained evidence. There was thus no unlawful search, as s. 8 of the Charter does not apply.

- [30] This conclusion makes practical sense. As in Della Pella, it would not have been possible for Canadian investigators to obtain Part VI authorization to intercept communications in a foreign jurisdiction. A Part VI application to simply view judicially authorized interceptions in California would no doubt be met with puzzlement. What standard of review would be applied? What rights are being protected? The defence fairly and properly acknowledged that had the investigating officer travelled to California to view and retrieve the messages, the Charter would not be engaged. The fact that the viewing took place in Canada does not in and of itself engage Charter principles. Prompt sharing in this fashion simply enabled a prompt and appropriate response by police as events unfolded. Such cooperation between foreign investigative agencies is essential to combatting transnational crime and should be encouraged.
- [31] I have concluded the accused have not established that a voir dire will assist in the "proper trial of the real issues". Nor has it shown "a reasonable likelihood that the hearing can assist in determining the issues before the court."
- [36] As I have stated, the facts in Mehan are similar to those before me on this application. I find the law applied in Mehan and Josephson J.'s reasoning to be persuasive and dispositive of the issue before me. Accordingly, I dismiss this application.
- [37] It is not necessary to address the standing issue raised by the Crown as the issue is moot given my conclusion.

"Greyell J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/21/2016BCSC2181.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-nguyen-2016-bcsc-2181>

Prepared on 26 October 2026 · Esheria