

CANADA / JUDGMENT

R. v. Pham

2025 BCCA 324

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 324 R. v. Pham

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pham,

2025 BCCA 324

Date: 20250917

Dockets: CA49722; CA49740

Between:

Rex

Respondent

And

Kien Trung Pham

Appellant

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated

July 31, 2023 (conviction) (R. v. Pham, 2023 BCSC 2079,

Nanaimo Docket 86452-2).

- and -

On appeal from: An order of the Supreme Court of British Columbia, dated
January 16, 2024 (conviction) (R. v. Pham, Nanaimo Docket 87674-2).

Counsel for the Appellant:

T.C. Paisana

S.K. Pringle

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J.R. Lawn

Place and Date of Hearing:

Vancouver, British Columbia

June 4, 2025

Place and Date of Judgment:

Vancouver, British Columbia

September 17, 2025

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Justice Edelmann

Summary:

Following a trial, the appellant was found guilty of multiple drug and firearms offences. He challenged the admissibility of much of the Crown's evidence based on alleged violations of s. 8 of the Canadian Charter of Rights and Freedoms. Among other things, he said the police unlawfully seized and searched packages from a Loomis depot that contained drugs. Those packages were then relied upon to arrest the appellant and to obtain warrants that led to the discovery of other evidence tendered against him. The appellant says all this evidence should have been excluded from his trial and without it, the Crown could not prove its case. **HELD:** Appeal allowed, and a new trial is ordered. The trial judge committed reversible error in his approach to one of the appellant's s. 8 claims, namely, that Loomis employees acted as "state agents" when they set aside packages delivered to them for purposes of police retrieval. The judge applied an incorrect legal test in resolving this issue. He also misapprehended the record by failing to consider relevant evidence about the relationship between the Loomis employees and

the investigating police, including evidence that the employees conducted themselves in the manner and form they did because of instructions provided by the police. This issue requires a full consideration, including the downstream impact of any s. 8 breach on the constitutional validity of other steps taken by the police.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] Following a trial in the British Columbia Supreme Court, the appellant, Kien Trung Pham, was found guilty of ten offences involving illicit drugs and firearms: four counts of trafficking in methamphetamine; two counts of possession for the purpose of trafficking (fentanyl and cocaine, respectively); two counts of possession of a prohibited firearm; and two counts of possession of a firearm without a licence.
- [2] The appellant challenged the admissibility of much of the Crown's evidence against him, seeking its exclusion under s. 24(2) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 [Charter]. He was not successful.
- [3] Mr. Pham alleges several errors in the judge's Charter rulings. He asks us to overturn some of those rulings, exclude all the impugned evidence, and acquit him of the ten offences. Alternatively, he seeks a new trial.

Background

Evidence at trial

- [4] On May 7, 2019, officers with the Canadian Border Services Agency ("CBSA") intercepted two packages at the Vancouver International Airport that were destined for New Zealand and found to contain methamphetamine. Mr. Pham's fingerprint was eventually lifted from a plastic container in one of those packages.
- [5] The CBSA shared the results of its investigation and the intercepted packages with the Royal Canadian Mounted Police ("RCMP") in Nanaimo. The two packages had been shipped from a Loomis Express depot in Nanaimo ("Loomis"). The RCMP made inquiries of employees at the depot and learned that similar packages had previously been shipped from the same location. Most of them were delivered to Loomis by someone named William McGuire. They had been shipped on behalf of Essential Nutrition Wholesale, which was subsequently discovered to be a fictitious company.

- [6] After the police spoke with the Loomis employees, Mr. McGuire delivered further packages on May 15 and 17, 2019. These packages were also destined for New Zealand. They were processed by Loomis employees at the counter in accordance with their usual procedure, but then set aside and seized by the RCMP without a warrant on May 16 and 17, respectively. The packages were subsequently searched with a warrant and found to contain multiple kilograms of methamphetamine.
- [7] After the May 15 delivery, Mr. McGuire was seen by Loomis employees to get into the passenger seat of a Mercedes determined to be registered to the appellant. After the May 17 delivery, he entered the passenger seat of a silver Ford F-150 pickup truck. During surveillance, the RCMP saw the appellant driving the Mercedes, as well as a silver truck consistent with the one entered by Mr. McGuire. The truck was registered to the appellant.
- [8] On May 23, 2019, Mr. McGuire delivered another package to Loomis. It was processed, withheld from the regular mail stream, and provided to a police officer. The RCMP were conducting surveillance from within Loomis at the time. Mr. McGuire left in a silver Ford F-150 driven by the appellant. The RCMP intercepted the vehicle and both men were arrested. The appellant had \$4,750 cash in his possession. An invoice for the package just delivered to Loomis was in his jacket pocket. The truck was searched incident to arrest. Among other things, the RCMP seized: four mobile phones (from which data was later extracted under a warrant); waybills for the two packages seized by the CBSA in Vancouver; waybills for the packages delivered to Loomis on May 17 and 23; other waybills and shipping receipts in the name of Essential Nutrition Wholesale; and keys to a suite at 1805 Summerhill Place in Nanaimo. The package delivered to Loomis on May 23 was seized by police without a warrant. A subsequent warranted search revealed almost two kilograms of methamphetamine.
- [9] After the arrest, the RCMP obtained warrants to search two Nanaimo residences: the suite at 1805 Summerhill Place and the appellant's principal residence. Those searches were conducted on May 24, 2019.
- [10] Police located 177 grams of fentanyl and 28 grams of cocaine at Summerhill Place. The appellant was the registered tenant of the suite. Semi-automatic handguns were found in a kitchen drawer and box above the cupboards. A pump action, pistol grip 12-gauge shotgun was found in a bedroom closet. At trial, the Crown did not tender any items obtained from the principal residence.
- [11] After seizing the mobile phones incident to arrest, the RCMP submitted a Report to Justice as required under s. 490(1) of the Criminal Code, R.S.C. 1985, c. C-46, allowing them to hold the phones for 90 days. The phones were held for more than 90 days without applying for an extension under s. 490(2). An extension was eventually applied for and granted on March 5, 2020, more than six months after expiry. In the interim, the phones were searched pursuant to a warrant (obtained on October 18, 2019). When applying for that warrant, the RCMP did not tell the authorizing justice that its authority to hold the phones had expired. The warrant

included a term requiring the police to file a Report to Justice within seven days of extracting any data from the phones. The RCMP extracted data from the phones on November 10, 17, and 24, 2019. They did not file a Report to Justice as required. Moreover, the warrant contained a time limit for extraction. Three of the phones were searched and data was extracted past the end date.

- [12] The extension to hold the phones (as well as other exhibits) obtained on March 5, 2020, did not apply to the extracted data. Furthermore, the order expired on May 6, 2020, and no further extensions were obtained. The police continued to detain the phones without judicial authorization after this date. The appellant was not charged with his offences until September 2020.

Charter applications

- [13] The appellant challenged the evidence seized by the RCMP on various grounds. The judge held four admissibility hearings (commonly referred to as "voir dire"), including one under s. 24(2) of the Charter to determine whether evidence should be excluded because of found breaches.
- [14] The judge dismissed most of the appellant's Charter challenges. He found one breach of the appellant's right to counsel (s. 10(b)) during the May 23 arrest (a police officer asked an investigative question before the appellant was given an opportunity to speak with a lawyer). The judge also concluded that not seeking timely detention orders and extracting data from the phones beyond the terms of the authorizing warrant violated s. 8 of the Charter. The Crown conceded all these breaches.
- [15] However, the judge declined to exclude the related evidence (phone data), applying the analytical framework established for s. 24(2) in *R. v. Grant*, 2009 SCC 32. That framework requires a judge to consider three distinct issues: a) the seriousness of the state's Charter infringing conduct; b) the impact of any found breaches on the Charter-protected interests of the accused; and c) society's interest in an adjudication on the merits.
- [16] Under the first of the *Grant* inquiries (seriousness of the Charter infringing conduct), the judge found that the failure to apply for extensions was neither wilful nor intentional. Instead, it "was merely an oversight": 2023 BCSC 1491 at para. 30. Extracting data past the warrant deadline was not done with "subversive intention or wilful disregard of lawful requirements": at para. 33. The failure to file a Report to Justice specific to the extracted data resulted from a mistaken understanding that it was unnecessary because of other steps taken: at para. 34. Consequently, these breaches were at the "lower end of the culpability scale".

- [17] Specific to the impact of the breaches on the appellant's Charter-protected interests (the second Grant inquiry), the judge found that in the circumstances of this case, the appellant's expectation of privacy in the phone data was "much reduced". As such, the impact did not weigh in favour of exclusion: at para. 43.
- [18] Finally, on society's interest in an adjudication on the merits (the third Grant inquiry), the judge found that the charges against Mr. Pham were serious: "[p]ublic concern about the prevalence of drug trafficking is widespread and substantial". The evidence the appellant sought to have excluded carried probative value, was reliable, and formed a "key component of the Crown's case": at para. 44. From the judge's perspective, the result of the third inquiry "decisively tip[ped] the balance in favour of inclusion of the evidence": at para. 46.
- [19] Accordingly, he dismissed the application to exclude evidence. He did not address the s. 10(b) Charter breach in his s. 24(2) analysis. However, in his ruling on the voir dire in which that issue was raised, he described the breach as a "minor mistake": 2023 BCSC 2487 at paras. 14-15.

Trial outcome

- [20] Based on the evidence admitted at trial, the judge was:
- [48] left with no doubt whatsoever that Mr. Pham was running a mid- to high-level volume drug trafficking business specialising in methamphetamine, fentanyl, and cocaine
- [49] On the totality of the evidence, I find beyond a reasonable doubt that Mr. Pham was intimately involved in the shipment of each of the five packages seized by the CBSA and the RCMP. The evidence persuades me to the level of perfect certainty that these packages were prepared for distribution in [redacted for privacy], 1805 Summerhill Place, and that Mr. Pham had rented the place for that very purpose and no other
- [52] I have concluded that Mr. Pham was in charge of the whole operation and the person responsible for everything that went on inside [redacted for privacy], 1805 Summerhill place including the acquisition of the substances that he or his helpers packaged within it
- [53] Finally, with respect to the firearms, I do not for a second accept that Mr. Pham was unaware of their presence in [redacted for privacy]. I repeat that he was the master of the operation and all of its constituent elements

[R. v. Pham, 2023 BCSC 2079.]

Issues on Appeal

- [21] The lawfulness of the CBSA interception and scan of the first two packages containing drugs was not challenged at trial. The appellant accepted that the CBSA had statutory authority to engage with those packages under s. 99(1)(c) of the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.).

- [22] However, the ensuing investigation by the RCMP was challenged, including searching the packages after receipt from the CBSA without a warrant. The appellant alleged various Charter infringements with a view to having all five packages that were delivered to Loomis, the drugs and firearms seized from Summerhill Place, and any extracted phone data excluded from evidence under s. 24(2) on the basis that these items had been obtained in a manner that infringed his constitutional rights.
- [23] On appeal, the appellant has slightly shifted his focus. He no longer takes issue with the conclusion that the RCMP were lawfully entitled to receive the first two packages from the CBSA and to search them without a warrant. However, he continues to challenge the constitutionality of many investigative steps that occurred after that point, arguing that if this Court agrees with his claims of reversible error, the first two packages fall subject to exclusion under s. 24(2) in any event because of their contextual connection to the other three. The appellant says that because of the contextual connection, the CBSA packages were "obtained in a manner" that violated his s. 8 guarantee and open to exclusion under s. 24(2).
- [24] The appellant advances five errors on appeal. He says the judge:
- a) Erred in finding he had no reasonable expectation of privacy in the packages delivered to Loomis on May 15, 17, and 23.
 - b) Erred in finding that the Loomis employees did not act as "state agents" when the third, fourth, and fifth packages were set aside for a subsequent warrantless seizure by the police.
 - c) Erred in finding that RCMP officers lawfully seized the May 15, 17, and 23 packages under s. 489(2) of the Criminal Code, which allows for a warrantless seizure in the lawful execution of police duties.
 - d) Erred in upholding the warrant allowing for a search of the appellant's principal residence because there were insufficient grounds.
 - e) Brought a legally flawed reasoning process to his s. 24(2) analysis.
- [25] Mr. Pham says these errors should result in us overturning most of the judge's Charter findings, reassessing admissibility under s. 24(2), and excluding all the impugned evidence. In turn, this would justify overturning the ten convictions and entering acquittals. He explains the proposed remedial path this way in his factum:
99. The Loomis packages [all five of them], as well as the derivative evidence, including surveillance, evidence seized incident to arrest (including the devices), and evidence gathered from 1805 Summerhill Place, were obtained in a manner that violated the Charter. When this evidence is accounted for, paras. 21-28 and 40-68 of the ITO for both residences must be excised. Without those paragraphs, neither residence search can be justified.

100. Where there are multiple, discrete Charter breaches, the s. 24(2) analysis must assess the breaches cumulatively
101. The police misconduct in this case is serious and infected the investigation from start to finish
102. Further, the impact of the breaches was significant - including not only misconduct with respect to Mr. Pham's phone data, but also an unjustified search of his family home
103. Where, as here, the first two lines of inquiry make a strong case for exclusion, the third line "will seldom tip the scale in favour of admissibility".

[Footnotes omitted.]

[26] In the alternative, Mr. Pham seeks a new trial.

Discussion

[27] I will address each ground of appeal separately and only to the extent necessary.

First ground - reasonable expectations of privacy

- [28] The appellant says the judge erred in finding he had no reasonable expectation of privacy in the packages delivered to Loomis on May 15, 17, and 23. This issue arose in the first admissibility voir dire, in which the appellant challenged the warrantless seizure and subsequent search of all five packages under s. 8 of the Charter: 2023 BCSC 2485.
- [29] In rejecting the s. 8 challenge, the judge held that the CBSA had statutory authority to intercept and scan the first two packages under the Customs Act. He found that pursuant to this scheme, seized goods are "deemed forfeited by operation of law at the time of a contravention of the Act": at para. 16. The judge concluded that the "contravention" occurred "when the process of exporting the illegal goods from Canada got started, which in the bargain formed part of a series of acts prohibited by the [Controlled Drugs and Substances Act, S.C. 1996, c. 19]": at para. 17, emphasis added. Consequently, "nobody involved in the preparation and delivery of these packages, including Mr. Pham, had any ownership or privacy in them": at para. 18. The judge also concluded that the CBSA officers were "perfectly entitled" to transfer the intercepted packages to the RCMP who are deemed to be CBSA officers under s. 2 of the Customs Act: at para. 18.
- [30] The appellant has interpreted the judge's comments about the absence of "ownership or privacy" to apply to all five packages delivered to Loomis and says the judge erred in law in holding that as soon as someone mails or ships an illicit substance, they forfeit any reasonable expectation of privacy in that package. The appellant submits this reasoning does not accord with the content neutral approach to reasonable expectations of privacy endorsed by the Supreme Court of Canada in cases such as *R. v. Patrick*, 2009 SCC 17 at para. 32 and *R. v. Marakah*, 2017 SCC 59.

- [31] In my view, the appellant has misread the admissibility ruling on the first voir dire. The judge did not rule that the appellant had no reasonable expectation of privacy in the packages delivered on May 15, 17, and 23. I agree with the Crown that his comments about having forfeited "ownership or privacy" when the "process of exporting the illegal goods from Canada got started" applied only to the packages intercepted by the CBSA. That much is clear from para. 19 of his reasons. There, the judge moved from his discussion of the CBSA packages to the three packages delivered on May 15, 17, and 23. He proceeded to assess the merits of the appellant's assertions that the Loomis employees acted as state agents in relation to the latter three packages, and alternatively, that the record did not support a finding those packages were seized relying on s. 489(2) of the Criminal Code. There would have been no need for the judge to resolve these issues had he concluded the appellant had no reasonable expectation of privacy in any of the packages.
- [32] To the contrary, his analysis of the appellant's s. 8 challenges to the May 15, 17, and 23 packages assumed that Mr. Pham had standing to advance a Charter claim. At para. 23 of his ruling, the judge made specific note of the fact that the Crown asserted a lack of standing; however, he declined to deal with that submission on grounds that it did not matter because, from his view, the s. 8 challenge failed on the merits.
- [33] Accordingly, I would not accede to this first ground of appeal.
- [34] I previously noted the appellant did not challenge the lawfulness of the CBSA's conduct at trial. Nor did he challenge the constitutionality of the Customs Act. He has maintained that position on appeal. Contrary to the position taken at trial, the appellant also does not challenge on appeal the lawfulness of the RCMP taking possession of the CBSA packages and searching them without a warrant. Consequently, it is not necessary for us to determine whether the judge erred in his s. 8 analysis specific to the first two packages and their transfer to and search by the RCMP. Nothing said in these reasons should be interpreted as having reviewed and endorsed the merits of the judge's reasoning specific to the CBSA packages.

Second ground - Loomis employees as state agents

- [35] The second ground of appeal focuses on the interaction between the RCMP and the Loomis employees when those employees set aside packages that were delivered by Mr. McGuire on May 15, 17, and 23. These packages were later seized by the police and their contents were adduced as evidence at trial.

Judge's conclusion re: agency relationship

- [36] In the first voir dire, the judge declined to find an agency relationship between the police and the Loomis employees, concluding that "at most", the RCMP asked the employees to "temporarily hold back the packages" that the police had authority to seize under s. 489(2) of the Criminal Code:

- [19] As for the May 15, 17 and 23, 2019 packages, there is nothing at all wrong or unconstitutional with the police enlisting the assistance of members of the public in the investigation, detection and prevention of crime. As I conceive it, all the police did in this case was to communicate to Loomis employees that their service was being abused by criminals to send highly illegal narcotic drugs across the world. The Loomis employees were understandably concerned by this news and motivated to put a stop to it. The RCMP asked the Loomis employees to notify them if "William" returned with more "Essential Nutrition Wholesale" packages, to process each transaction as usual, and to set aside such packages for RCMP retrieval.
- [20] In my view, there is nothing wrong with any of this. By the time of this request for assistance, after all, the police were justified in thinking that the shipper of the packages was trafficking in serious drugs in large amounts. Their seizure was justified under s. 489(2) (c) of the Criminal Code, R.S.C. 1985, c. C-46, which permits a peace officer to seize anything that he or she believes on reasonable grounds will afford evidence in respect of an offence under that statute or any other act of Parliament. This includes, of course, the CDSA. The most the RCMP asked of the Loomis employees was to temporarily hold back the packages for their seizure in accordance with this provision in the Criminal Code.
- [21] I conclude that the Loomis employees were simply going about their normal business, which included, of course, refusing to ship illegal goods once they became aware of the likelihood that they had been doing so unwittingly by processing these "Essential Nutrition Wholesale" packages. The police had explained to them what was going on and they were rightly upset that their business was being used as a conduit for illegal activity. The defence argument is that they were conscripted as state agents. I do not agree. In holding back these packages and calling the police to come and get them, the Loomis employees were merely acting as reasonable, responsible and self-interested corporate citizens.
- [22] As I have said, there is nothing remotely wrong, let alone unconstitutional, with the police enlisting the assistance of private citizens in helping them to enforce the law. This is all that the Loomis employees did in this case. Their actions were not only unobjectionable, but public-spirited and commendable. The seizure of each of the May 15, 17 and 23 packages was authorised by law, the law itself was not challenged, and the manner of search was perfectly reasonable in every instance. The packages were taken back to the RCMP detachment and later searched on authority of a valid warrant sought and granted in the ordinary course of things.
- [2023 BCSC 2485, emphasis added.]
- [37] I note parenthetically that contrary to para. 20 of this excerpted ruling, the RCMP did not testify that they seized the fifth package (May 23) relying on s. 489(2) of the Criminal Code. Rather, they said they seized that package incident to the appellant's arrest. Before us, the Crown acknowledged that the evidence on the first voir dire did not align with the judge's s. 489(2) finding specific to the fifth package.

Parties' positions on appeal

[38] The appellant contends the judge's reasoning process on state agency does not reflect the proper legal test and is grounded in a misapprehension of the evidence. He says a proper analysis would have resulted in a finding that the Loomis employees acted as state agents. If the employees were state agents when they set the May 15, 17, and 23 packages aside for police retrieval, the constitutional standard for a seizure established in *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, 1984 CanLII 33 (S.C.C.), applied and the warrantless withholding of those packages was presumptively unreasonable: *R. v. R.M.J.T.*, 2014 MBCA 36 at para. 72 ("R.M.J.T."); *R. v. McGregor*, 2023 SCC 4 at para. 26. Moreover, the appellant says this presumption could not be rebutted by the Crown pointing to s. 489(2) of the Criminal Code. This was the provision the judge found applied to the police seizure of the packages from Loomis; however, the appellant contends it cannot be invoked by state agents. For s. 489(2) to apply, the seizure must be executed by a peace officer:

- (2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
 - (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
 - (b) has been used in the commission of an offence against this or any other Act of Parliament; or
 - (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[Emphasis added.]

The Crown does not argue otherwise in its factum.

[39] Citing *R. v. Broyles*, [1991] 3 S.C.R. 595, 1991 CanLII 15 (S.C.C.), the appellant submits the judge did not ask himself the correct question in deciding whether the Loomis employees acted as state agents, namely: would packages three, four, and five have been set aside in the form and manner they were but for the intervention of the state? The appellant accepts that mere cooperation with the police will not meet the threshold for an agency relationship (citing *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, 1998 CanLII 770 (S.C.C.) ("*M. (M.R.)*"). However, he says the evidence on the first voir dire went well beyond cooperation. The Loomis employees only paid attention to Mr. McGuire's deliveries because the RCMP first alerted them to the possibility of illegal conduct. Once made aware of those concerns, the employees proceeded to take steps they would not ordinarily have taken, including removing and withholding packages from the regular mail stream, developing code words to avoid raising suspicion, providing the RCMP with customer descriptions and information about previous shipments that would otherwise have remained private, and covertly

photographing Mr. McGuire and the vehicle driven by the appellant.

- [40] The judge stated in his reasons that a Loomis employee "volunteered" to hold the packages for police: at 2023 BCSC 2485 at para. 10. The appellant says that if this was an actual finding (as opposed to a mere recitation of the evidence), it is not supported by the record. The operations supervisor who interacted with the RCMP on May 15, and testified that he then gave instructions to other employees, was unequivocal that the police told him to set the packages aside.
- [41] The Crown says there was no error here. What the appellant really takes issue with is the judge's interpretation of the relevant evidence and his findings of fact. Those findings cannot be interfered with unless the appellant demonstrates palpable and overriding error: *R. v. Fan*, 2017 BCCA 99 at paras. 47-49. A deferential standard of review applies.
- [42] From the Crown's perspective, the judge's finding that the Loomis employees independently and voluntarily assisted the police and, importantly, were keen to do so reflects a full appreciation of the legal test for state agency and is entirely consistent with the evidence. The Loomis employees had an interest in ensuring their business was not used for shipping illicit drugs. They did not seize packages on behalf of the RCMP. Rather, they did what they would ordinarily do--set packages aside that they had reason to believe were problematic and non-shippable.

Evidence on the voir dire

- [43] To resolve this ground of appeal, it is necessary to review some of the evidence on the first voir dire, beginning with the Loomis employees. The excerpts are lengthy, but necessary to fully appreciate the factual context for the judge's ruling.

Loomis employees

- [44] Three Loomis employees testified: Sean Roden, Robert Leyland, and Margo Erhart.
- [45] Mr. Roden was an operations supervisor. He said two RCMP officers came to Loomis on May 15 and informed them that a package with "contraband" from the Nanaimo location had been intercepted in Richmond. The police told Mr. Roden to "watch for those customers". If they came back and shipped another package, the employees were to notify the police and the police "would instruct [them] what to do". Mr. Roden testified they were told to accept the package and to "do things as per normal". In other words: accept payment for the shipment, process the shipment, create a label, and scan it. Mr. Roden said the police told them to "possibly get photographs, if [they] could, but obviously to do that in a lowkey way". They were also told to "try to get a licence plate number of the vehicle, if possible".
- [46] As a result of this conversation, Mr. Roden told Ms. Erhart (who worked the front counter) that if she saw the customer in question, she should call Mr. Roden and say, "the package for Roden is in holds". He would understand this to mean the customer was present because there would never be a package for him in "holds", an area used for undelivered freight. Mr.

Roden said he gave these instructions to Ms. Erhart because it would allow her to notify him of the customer's presence in a "way that would not be obvious to the customer". Mr. Roden subsequently phoned a supervisor in Surrey and let him know what was happening. He was told to "cooperate with whatever the RCMP was asking" and to "do [their] usual thing".

- [47] Mr. Roden testified that in the past, if Loomis employees suspected a package contained illicit drugs (for example, they could smell marihuana), they did not open the package. Rather, they would notify the RCMP. The police would then take possession of the package. He remembered a case in which the RCMP allowed the package to be shipped because the police wanted to see who picked it up on the other end.
- [48] Approximately one hour after this conversation with the RCMP, Mr. Roden received a call from Ms. Erhart telling him the "package for Roden is in holds". He called the police to let them know the customer had returned. An officer said he was not sure the police could return that day as this was a "new" investigation and they "hadn't determined jurisdiction yet". Mr. Roden said he was instructed to "hold the package overnight, and to not send it out". The newly delivered package was scanned with a "depart scan because that's what [Loomis] would normally do", but not sent out. Mr. Roden put the package in his office because that was "one of the few places that could be locked up".
- [49] Mr. Roden was asked why he held the package rather than ship it. He said because the "RCMP asked [them] to hold it". The police "asked [them] to not ship it out" (emphasis added). Ordinarily, if not aware a particular package might contain drugs, they would ship it out "because it's just a box". If they were aware of the possibility of drugs, they would have contacted the RCMP.
- [50] Mr. Roden called his supervisor again, letting him know the customer had returned. He was told to "do whatever the RCMP had asked [them] to do". The "level of cooperation with the RCMP" was "high" because Loomis did not want to ship things it should not ship and there was "no reason for [them] to go against what the RCMP [was] asking [them] to do".
- [51] The RCMP arrived the next morning to collect the package and take statements from the Loomis employees (May 16). The employees were told to "do the same thing" if another package arrived. Mr. Roden recalled a discussion about the RCMP possibly "[putting] surveillance in the building". He had no issue with that because "that's what the RCMP had requested [them] to do, and [they] wanted to comply with them" as "it's the right thing to do".
- [52] At the end of his direct examination, Mr. Roden was asked about general practices at Loomis if made aware a package may contain illegal goods:

A Well, we would always report it to the RCMP, like I said it's a pretty rare occurrence because we don't inspect the inside of the boxes, and to be honest, we wouldn't know the majority of the time if there was anything in them. On the -- on the couple of occasions that we did discover something it was only because we could smell it.

[53] In cross-examination, Mr. Roden provided further details about what the police asked of the Loomis employees and the surreptitious nature of the steps they took:

Q Now, in that conversation the police officers told you to keep an eye out for those same people, right?

A Yes.

Q They told you if they come in again not to give it up that RCMP were investigating, right?

A Correct.

Q They wanted you if they came in again to notify RCMP as soon as possible, right?

A Correct.

Q Without clueing in the suspects, correct?

A Correct.

Q They also asked you to obtain the description of the vehicle they arrived in?

A Correct.

Q And try and get descriptions of the people, right?

A Yes.

Q All of this while not clueing them in that police were investigating?

A Correct.

Q They also instructed you to hold the packages, right?

A Correct.

Q And when I say "hold", that means to take it out of the mail stream, right?

A Yes.

Q And put it somewhere where it wouldn't get shipped, right?

A Correct.

Q These are things that are all outside of your regular job description, right?

A I would think so, yes, certainly.

[Emphasis added.]

[54] Mr. Roden was also asked these questions:

Q Okay. If RCMP didn't have that meeting with you that afternoon prior you would not have had any suspicion?

A Correct.

Q There was no irregular smell, for example?

A No, correct.

Q If RCMP didn't get involved that day you wouldn't -- let me put it this way, if RCMP didn't have that meeting with you you wouldn't have taken this package out of the mail stream?

A Correct.

Q It was because of the RCMP's instruction that you took this package out of the mail stream?

A Correct.

Q A package for hold. And that was code language developed between yourself and Ms. Erhart, right?

A Correct.

Q And that's to make sure that you didn't tip off that these people were being investigated?

A Correct.

Q And here you were following the RCMP's instruction to make sure you're not tipping it off that they're being investigated?

A Correct.

Q And that's why you developed that code word, right?

A Correct.

Q So if there wasn't RCMP intervention that package that we're talking about would have went out that day?

A Correct.

[Emphasis added.]

[55] Mr. Roden acknowledged that after letting the RCMP know about the May 15 package, he tried to observe the person who delivered the package:

Q Okay. You went up to that -- and it's a window in the mezzanine outside your office?

A Correct.

Q Okay. And you went out to that window to make observations so that the suspects wouldn't see you?

A Correct.

Q Okay. And you did that because the officers told you he didn't want -- they didn't want the suspects to be clued in, right?

A Correct, yes.

[Emphasis added.]

[56] As noted, Margo Erhart worked the front counter at Loomis. She had a poor memory of the events in question. She recalled one or two conversations with police officers during which they asked whether she "knew a particular customer". After one conversation, that customer, "William", arrived at Loomis to ship a parcel. Ms. Erhart said a police officer was upstairs at the time. Ms. Erhart let the officer know of William's presence and proceeded to "ship the shipment". She denied she had been told anything about William's packages by the police.

[57] In cross-examination, Ms. Erhart was asked whether she would have done anything out of the ordinary with William's packages in the absence of police involvement. She said no:

Q All right, I'm going to circle back to that. These -- now, William dropped off some packages to your branch, do you remember that?

A On a few occasions, yes.

Q Okay. I want to ask you about the packages themselves. The outwards appearance, it appeared normal, a cardboard box, right?

A Looking at the pictures, yes.

Q Okay. You don't remember any --

A No.

Q Okay. Nothing jumped out at you about those packages --

A No.

Q -- is that fair to say?

A No, I wouldn't have questioned him at all.

Q And with respect to those packages, if the police hadn't got involved, they would have remained in the mail stream, is that fair?

A I'm sorry, they would have?

Q Remained in the mail stream.

A Yes.

[58] Specific to one of the three packages set aside, Ms. Erhart said:

Q The officer told you to process the transaction as normal, right?

A Correct, yeah.

Q To take the individual's money for the transaction, and let him leave?

A Yes.

Q And to not tip off that this individual was being investigated?

A Yes.

Q And you followed those directions?

A Yes.

Q Okay. And again, because the police told you to do that, right?

A Yeah.

Q Now, that package, the same day it was taken -- packages regularly go to the warehouse I think you said to my friend's questions, right?

A Yeah, correct.

Q This package didn't go to the warehouse?

A No, it went upstairs.

Q To the police officer?

A That's correct.

Q And that's because the police officer asked you to do that?

A That's correct.

[Emphasis added.]

[59] Ms. Erhart was asked whether she would ordinarily divulge information about a customer's transactions to someone outside Loomis. She said no:

Q Okay. A police officer asked you to look for past transactions associated to William?

A Correct.

Q These are things that you normally don't divulge because of privacy, is that right?

A I would say so, yes.

Q But you did because it was a police officer?

A Yes.

Q Okay. And those sorts of details aren't things you would normally divulge, is that fair?

A It's never come up in 45 years, so yes, I would say that's fair.

Q And when I say "those kind of details", I mean information about a customer, right?

A Yes.

Q And information about their packages, right?

A Yes.

Q And these are things that you divulged because the police asked?

A That's correct.

[Emphasis added.]

[60] Robert Leyland was also an operations supervisor at Loomis. Like Ms. Erhart, his memory of the details surrounding the packages was poor.

[61] He testified that the Loomis employees had "every right to inspect" a package before it was shipped from their location to "make sure it [didn't] contain certain items particularly on international shipments". They had lists of proscribed items to work from and were entitled to ensure the product being shipped was not on those lists:

Q If contraband is if you have any information that contraband is being shipped, either using Loomis or DHL, what would you normally do in that scenario?

A Absolutely call the RCMP. Any time we think -- this is not the first incident of -- where we've called the RCMP and turned over illicit product. We had an incident where again our -- the guy that used to work for us, he worked for us for several years, Constable Ian Stanford, we turned over a shipment of -- of marihuana, when it was still illegal, to him at one time coming -- a shipment coming from Ontario and going to somewhere on the island. I forget where.

We -- and then we had a couple incidences in our Courtenay office where we -- we caught a fellow shipping medicated cannabis gummy bears outside of the country, and -- and actually domestically as well, he was shipping gummy bears to Ontario and -- and to the United States that were not legal. We confiscated those and turned those over to the RCMP as well.

Q And why were you turning those over to the RCMP?

A Illegal product, so it's product we don't -- as a company we don't ship marihuana or -- even now, even now that it's legal we still don't ship marihuana. The company just has a policy against shipping drugs, other than pharmaceuticals destined for pharmacies and hospitals. Other than -- than licensed drugs, we don't ship any -- any of the side product.

[62] Specific to the events in question, Mr. Leyland said Loomis employees thought there was "something wrong with [a] shipment" and although he was not "absolutely a hundred percent" certain, he remembered the employees opening one of the boxes, seeing "powder", and contacting the RCMP. He testified that Loomis offered to hold the package:

A You know what, I think we did. I think we advised him that we would hold the boxes and contact the RCMP when we received them, and if they could come in and inspect the shipment. To see what they were actually. I'm pretty sure that's what we did.

Q Okay, and why would you be holding those boxes?

A Just to find out what was in them basically. We wanted to -- we -- I didn't want to be part of any part of some drug trafficking system that would get our people into trouble.

Q Do you remember who brought up the idea of holding the boxes?

A I did. I think I -- I'm pretty sure I did. I said I'd hold them and contact the RCMP before we

Q Do you remember if the RCMP came in to obtain boxes at any point?

A Yes, I think they did. I'm pretty sure they did. As a matter of fact, I remember one time a female RCMP officer came and picked up some, and there was another incident where two officers came together, and -- but I don't recall either -- any of their names, but they -- they all picked up product that we had inbound.

Q Sorry, when you say inbound, that's -- that's --

A Coming in. Coming into the island.

Q Did you have any other discussion with the police about what to do if the person that was shipping these packages came back?

A Nothing to do with people at all. We just remained neutral as far as the shipper and the receivers were concerned. We tried not to let them know that we were doing anything other than what normal process would be.

Q Did you have any instructions from the police about how to act if these shippers came in?

A No. Not -- nothing specific, no.

[Emphasis added.]

[63] Mr. Leyland said that on May 15, he received a call from Margo Erhart and was told that the "young fellow we suspected [was] shipping out illicit product" had returned to Loomis. He went outside and took photographs of a "silver car" that individual was travelling in. He tried to capture the licence plate and driver of the vehicle (an "Asian gentleman") but was not able to do so. Mr. Leyland emailed the photographs to the RCMP.

[64] Mr. Leyland was asked what "prompted" him to take these photographs. He said he did it "on [his] own":

Q What prompted you to take these photographs?

A Just trying to get -- trying to get a licence plate number on the car. I -- we thought that that car was being used to transport drugs, and I wanted to get a plate number.

Q Had someone from the RCMP asked you to take these photographs?

A No. No, I did that on my own.

Q Had the RCMP asked you to get a licence plate number?

A No. No. I did that on my own too.

Q Do you remember providing any other information to the RCMP?

A Actually, I think I did There was a time later on I took some pictures from the upstairs office, unfortunately the phone that I used at that time ended up -- ended up in the bottom of the Alberni Inlet in 275 feet of water, so I don't have access to those pictures, but I remember taking pictures from the upstairs window of the same -- the person we refer to as Kenny, and -- and the young fellow who dropped off the box on the 23rd, I remember taking pictures of a Ford F150 silver pickup from the upstairs office window, and I also emailed those or -- or I might have emailed them to Sean and Sean emailed them to the RCMP. But I know we forwarded some pictures of a -- of a Ford pickup, a silver Ford pickup that I took from upstairs. And I can't even remember the timeline on that, it was a week or ten days, could have been two weeks later, I'm not sure.

[65] In cross-examination, Mr. Leyland changed his evidence and confirmed that his suspicions about packages delivered by Mr. McGuire originated from a conversation he had with Mr. Roden, not from the packages themselves:

Q Okay. Now, I want to focus you, as best as you can, Mr. Leyland, on your memory of that conversation when Mr. Roden was advising you of what was occurring on May 15th. Now, Mr. Roden advised you that there were suspected contraband coming through your branch, is that right?

A That's correct.

Q Okay. And Mr. Roden advised you that the police came and spoke to Mr. -- Mr. Roden and Ms. Erhart to your branch, is that correct?

A Yeah.

Q Okay. And you knew that the police were trying to identify the suspects, right?

A Yes.

Q Mr. Leyland, you knew that if those people were to drop off a package that the Loomis employees were to take that package out of the mail stream, right?

A Correct. Yeah.

Q the reason you went out and took photos from your vehicle was you knew the police wanted to get descriptors of the suspects, right?

A Yes.

Q And you wanted to help the police, right?

A I did, yes.

Q You wouldn't have gone out to your vehicle and taken those photos if you hadn't received the information you did from Mr. Roden, is that correct?

A Perhaps. I'm not totally convinced that I wouldn't have taken photos anyway.

Q Okay.

A As soon as I knew there was suspicion, whether it came from Margo, Ms. Erhart, or Sean [Roden], I would have -- I would have tried to take pictures anyway.

[Emphasis added.]

[66] In cross-examination, Mr. Leyland also pulled back from his earlier testimony about having opened one of the packages and observing "powder":

Q Now, Mr. Leyland, in my friend's questions you described potentially opening up one of the packages and seeing a substance in it, do you recall giving that answer?

A You know, I'm trying to remember exactly how that happened, but I remember there being one box that we opened -- I think -- I can't remember who even opened it, whether I did or Sean did or Margo did, I can't -- but I recall one package containing powder. But now I -- the more I think about it, the more I'm not even sure that I saw that package or that I heard about it.

[Emphasis added.]

[67] Mr. Leyland was asked about efforts to avoid "tipping off" the shippers:

Q Mr. Leyland, in my friend's questions you stated that you were to remain neutral and try not to let them know we were doing anything other than the normal process. Do you remember giving that evidence?

A Yeah, I do.

Q Okay. And what you meant, Mr. Leyland, is you didn't want to tip off to the shippers that they were being investigated by police, right?

A Correct.

Q And that was because of the conversation you had with Mr. Roden on May 15th, 2019, right?

A Correct, yeah.

Q That was the plan that yourself, Mr. Roden, and Ms. Erhart kind of came up with, right?

A Yeah. Yeah.

Q To notify the RCMP as soon as possible so that they -- without tipping these shippers off, right?

A That's correct, yeah.

Q And to take whatever they dropped off out of the mail stream, right?

A Correct.

[Emphasis added.]

Police officers

[68] Constable Cathro and Cpl. Lloyd testified that they went to Loomis on May 15 and spoke with Mr. Roden and Ms. Erhart.

[69] Although he could not remember all the details, Cst. Cathro said that after the Loomis employees were told about the CBSA interception, he advised them the police would return to the detachment, decide who would take responsibility for the investigation, and get back in touch. Not long after doing so, Mr. Roden phoned and said the person who delivered the suspect packages had returned. Cst. Cathro then received text messages from Mr. Roden attaching photographs. He called Mr. Roden. Mr. Roden said the "same male responsible for shipping previous packages to New Zealand had arrived again, dropped off a package again to be shipped to New Zealand, paid in cash, and that they left as the passenger in a silver Mercedes". Mr. Roden said the package had been put aside. The officer denied asking Mr. Roden to take photographs. He could not "recall specifically" asking for descriptions of individuals or vehicles. He remembered being told the package had been set aside, rather than directing that it be done. Cst. Cathro described his attendance at Loomis as "reactive versus proactive".

[70] The next day (May 16), Cst. Cathro made inquiries based on the photographs. He then twice phoned Mr. Roden. He said he did not provide Mr. Roden with directions. Rather, he simply let him know the police would be back in touch. His notes from that day stated: "[Mr.] Roden confirmed the package had been put aside awaiting police action".

[71] In cross-examination, Cst. Cathro said he did not recall telling Loomis employees to watch for the suspected shipper. He did not remember telling them to not "give up that the police were investigating [the shipper]". Nor did he have any notes of a conversation to that effect. He did not recall telling the Loomis employees that if the shippers dropped another package, they should take it out of the mail stream, get descriptions of the shippers, or take photographs. Again, he did not have any notes to that effect.

[72] Cpl. Lloyd testified that when she arrived at Loomis on May 15, she first spoke with Ms. Erhart. The RCMP told Ms. Erhart about the intercepted packages and the fact that they contained controlled substances. Ms. Erhart "immediately was quite animated [and] volunteered quite a bit of information at that time". This included a description of the individual who dropped off the packages. Ms. Erhart retrieved information from a Loomis computer and relayed the dates on which she had witnessed similar packages being shipped

under the name of what was later learned to be a fictitious company. At some point, Mr. Roden joined the conversation.

[73] Cpl. Lloyd said she was asked what the employees should do if another package arrived:

A They asked, you know, if this happens again what should we do? So knowing that I didn't want to -- to make this individual an agent, I told her not to do anything she wouldn't normally do in the process of dealing with -- with clients.

Q What do you mean by make this person an agent?

A Well, I don't deal with witnesses as much anymore, but in dealing with confidential informers, I know that collecting information from somebody as a witness is just that, we should be asking questions and collecting information, not directing them to do anything in particular. If direction is given with regards to trying to get them to do something for us that would be considered an agent, and . . . usually with a witness we would rather them be a witness.

Q Was there any discussion about what to do with packages if more packages arrived?

A Yes, in my mind, with the totality of everything I knew, I believed that if another package was to arrive that I had reasonable grounds to believe that they would likely contain -- or they would contain controlled substances as well. Due to that, I asked that if another package was delivered or was dropped off by this individual that they call the police afterwards. I did give my business card, I believe Constable Cathro gave his as well.

Q Did you give anyone at Loomis any specific instructions about what to do with the physical package if it arrived?

A No, I did not.

Q Do you know if Constable Cathro gave any of the Loomis staff members any instructions on what to do?

A I don't believe so. I think -- I was the primary person that the employees were speaking with. Not to say he didn't say anything, but I was definitely the person that was interacting the most with -- with Margo.

[Emphasis added.]

[74] In cross-examination, Cpl. Lloyd reiterated her concern about providing directions that might render the Loomis employees police agents and denied doing so:

Q And an agent is when the police get a citizen to do something for them, that's the distinction you drew?

A Yes, if you're asking them to take action on your behalf then that would be something that would be under the agent --

Q Okay --

A -- definition versus [indiscernible/voices overlapping] --

Q -- and as I understand your evidence, Corporal Lloyd, you didn't give the Loomis employees any direction?

A I actually advised her -- she asked me what -- what they should do, and I advised her to not change anything that they would normally do.

Q Did you say anything else to them, or give them any other direction?

A I did say that if there was another package that they could call the police.

Q Anything else?

A No.

[75] Cpl. Nguyen also interacted with the Loomis employees. Among other things, he attended Loomis on May 16 and took statements from Mr. Roden, Ms. Erhart, and Mr. Leyland. By this time, the jurisdictional concerns had been worked out and Cpl. Nguyen was assigned to the police file. He was asked whether he provided the Loomis employees with instructions on what to do in the future:

A I said if -- if -- I don't know if I actually give instruction. I think it was more like a conversation as -- more so than anything else, that if -- if they do encounter similar product packages being sent by the same shipper, and to give us a call, and we will do the rest.

Q Did you discuss with them what to do with -- with packages if -- if there's similar product in the future?

A All I said to do -- do what you do normally in your business practice, and we'll do the rest.

Q Do you recall any discussion with them about making observations of people or -- or vehicles?

A Yes, I said whatever you see, observe or hear, I will ask you about those things.

Q What -- what did you mean by that?

A So whatever they witnessed that day with regards to whoever is shipping, whatever they observed in and around their business in the normal day of doing business, those are the type of information I would seek from them. That I would ask of them later on.

[Emphasis added.]

[76] On May 17, Cpl. Nguyen received a call from Mr. Roden advising that another package had been delivered. He did not provide Mr. Roden with instructions about what to do with the package. Mr. Roden had already told him that he set the May 15 package aside and Cpl. Nguyen "told him do what you do normally, and we do the rest".

[77] Cpl. Nguyen took another statement from Ms. Erhart on May 21 and assisted with surveillance on May 23, but could not recall further interaction with the Loomis employees.

[78] In cross-examination, he acknowledged that in setting aside the May 15 package, the Loomis employees did so "for police action". He could not speak to any conversations that occurred between Mr. Roden, Ms. Erhart, and the first two officers who attended Loomis on May 15, but "whatever happened the package was held for [the police]". He did not know if Mr. Roden had been directed to hold the package, however:

A Let me put it this way, I think it's common sense that, you know, when people think that there is something the people looking into, they know because -- they know to just keep it aside or keep it so that the police look at it. So I don't know if this is him doing it or there was some sort of communication, I have no idea, but it seemed to me that he knew what he was doing, and that he -- I mean, he's in the business of -- of sending things out, and if the -- the -- there's a police investigation, I think it was just more like he knew that he's going to keep it there until the police arrive to look at it.

A He was cooperative, and I think he was told to do what is normal in his business, line of business, whatever he does, and not to change it.

Q So you did tell them to observe who was in the parking lot if these suspects arrive, correct?

A Sure, of who was sending this shipment, yeah, for sure.

Q Okay. And you also told them to note what vehicles were in the parking lot, is that fair?

A Probably, yeah.

Q So here you're looking for the description of individuals and vehicles, right?

A Yes.

Q And what you're looking to gather from the Loomis employees is identity evidence, right?

A If they can, yeah. Description of the person and description of the vehicle.

Q In your communications with Loomis employees, Officer, you conveyed to them that you didn't want these suspects to be tipped off that they were being surveilled or investigated, right?

A I don't think I say anything to that effect. I mean, it's so obvious that when there's investigation, I don't think I can just say those things -- I don't remember saying those things.

[Emphasis added.]

Submissions on first voir dire

[79] At trial, counsel for Mr. Pham submitted that in deciding whether the Loomis employees acted as police agents, the judge was obliged to ask: "Would the Loomis [employees] do what they did but for police intervention?". If the answer was no, an agency relationship existed and removing the third, fourth, and fifth packages from the mail stream after being processed for shipment amounted to a state seizure within the meaning of s. 8 of the Charter:

The police wouldn't have gotten that material but for the actions of the Loomis employees and they said they would not have done that but for the police direction to do so, but for the police direction to engage in that seizure ...

[80] The Crown argued there was no agency relationship, but even if there were (allowing otherwise unavailable access to the packages and shipper), it mattered not because the police had lawful authority to subsequently seize the packages in any event:

even if they're assessed as stage agents by putting the package aside, the whole point of state agency is that the agents are doing something that the police wouldn't otherwise be able to do.

[the Loomis employees] indicated that they're not taking contraband, and so if they've been informed that there's potential contraband, they're going to act on it. Whether they're acting on behalf of the police or on their own accord, either way the police are going to get involved and take that package.

[Emphasis added.]

[81] In written submissions filed by the Crown on the issue of state agency, the Crown argued that:

86. even though the police [have] interacted with a private entity, asked for information, as they would do with any witness, that does not make the individual a state agent. Taken to its logical conclusion, if the police asking for information makes someone a state agent, then any time someone provides information to the police, they have become state agents. It is not surprising that the police ask individuals to be aware of crime, and to contact them should they observe crimes. But providing information to the police about crimes observed cannot in itself constitute an agency relationship.

87. From the Crown's perspective, Ms. Erhart, Mr. Roden, and Mr. Leyland were co-operative, as some witnesses are, but co-operation does not create agency. They were acting as any other witness would by providing information that they observed. Confidential informers can similarly provide information they observe without becoming agents. It is only when the exchange with the accused is materially different. The staff may have taken additional steps to gain extra information through photographs, but there is no indication that changed how they actually interacted with the shipper.

[Italics in original.]

Judge's findings

[82] The judge delivered his ruling on the first voir dire immediately after the parties' submissions, with reasons to follow. In those reasons, he found as a fact that the RCMP asked the Loomis employees to: (a) notify them if "William" returned with more packages; (b) process each transaction "as usual"; and (c) "set aside such packages for RCMP retrieval": at para. 19, emphasis added. The last of these steps was described as "temporarily hold[ing]"

back the packages for their seizure" by police pursuant to s. 489(2) of the Criminal Code: at para. 20, emphasis added. However, the judge found that in removing packages from the mail stream, the Loomis employees "were simply going about their normal business, which included, of course, refusing to ship illegal goods once they became aware of the likelihood that they had been doing so unwittingly by processing these "Essential Nutrition Wholesale" packages": at para. 21.

- [83] In assessing the claim of state agency, the judge did not mention or analyze in any detail the evidence of Mr. Roden, Ms. Erhart, or Mr. Leyland, including their testimony about covertly gathering information about the shipper while he was on the premises, the vehicle he arrived in, and its driver at the request of the police. As the judge himself acknowledged in a discussion with counsel during the voir dire, in its cumulative effect, this evidence could support an inference that the Loomis employees acted "in a way in which they ordinarily wouldn't because the police asked them to" (emphasis added).

Legal principles on state agency

- [84] The Supreme Court of Canada's decision in *R. v. Buhay*, 2003 SCC 30, is a leading authority on the legal test for state agency for purposes of a s. 8 Charter analysis. In that case, a private security guard smelled a strong odour of marijuana coming from a bus depot locker. An employee of the bus line opened the locker. The guard removed a duffel bag, opened it, and found marijuana. The items were placed back in the locker and the police were called. The bus line had a policy authorizing locker entry if an employee believed the locker contained something dangerous or was "giving off a bad odour or something like that": at para. 8.
- [85] Two police officers responded to the call and were directed to the locker. They too smelled marijuana. The bus line employee opened the locker for them. One of the officers seized the marijuana and placed it in the back of his police vehicle. He did not have a warrant.
- [86] The admissibility of the marijuana was challenged at trial and on appeal. One of the issues before the Supreme Court was whether the Charter applied to the security guards when they first entered the locker. The Court noted the Charter would apply if the security guards met the test for state agents. To determine the existence of an agency, a court must ask: "would the exchange between the accused and the [alleged agent] have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?": at para. 25, emphasis added, citing *Broyles*.
- [87] In *Buhay*, the private security guards did not meet the test for state agents. The evidence was clear that they "acted totally independently of the police in their initial search". Their relationship with the police developed after they searched the locker. They "started an investigation on their own initiative, without any instructions or directions from the police": at para. 29, emphasis added. The Supreme Court went on to hold that:

30 Volunteer participation in the detection of crime by private actors, or general encouragements by the police authorities to citizens to participate in the detection of crime, will not usually be sufficient direction by the police to trigger the application of the Charter. Rather, the intervention of the police must be specific to the case being investigated. In the case at bar, there is nothing in the evidence which supports the view that the police instructed the security guards to search locker 135 and therefore the security guards cannot be considered state agents.

[Emphasis added, internal citations omitted.]

See also *R. v. Johal*, 2015 BCCA 246 at paras. 37, 41.

[88] *M. (M.R.)*, cited earlier, is another Supreme Court of Canada decision commonly referred to on the issue of state agency. In that case, the Court considered whether a high school vice-principal acted as a state agent when he searched a 13-year-old student and found marijuana in his possession.

[89] The vice-principal was told a particular student was selling drugs on school property. He saw the student at a school dance and called the police, asking that an officer come to the school. He then asked the student and a friend to come to his office. They were each asked if they possessed drugs and the vice-principal said he was going to search them. At this point, the police officer arrived. He spoke with the vice-principal, identified himself to the students, and sat down. The vice-principal conducted the search. He discovered marijuana on one of the students and gave it to the officer, who promptly told the student he was under arrest: at para. 6.

[90] A Supreme Court majority found that the vice-principal did not act as a state agent when he searched the student. The vice-principal knew that if drugs were found, it would be a criminal matter. He called the police before he engaged in the search, and he allowed an officer to be present while the search unfolded. When drugs were located, they were immediately handed over to the police. The vice-principal had clearly "cooperated" with the police: at para. 27. However:

28 The mere fact that there was cooperation between the vice-principal and the police and that an officer was present during the search is not sufficient to indicate that the vice-principal was acting as an agent of the police. The trial judge stated that there was an "agreed strategy" between [the vice-principal] and [the police] that resulted in [him] acting as a police agent. With respect, there is no evidence to support this conclusion. There is no evidence of an agreement or of police instructions to [the vice-principal] that could create an agency relationship.

29 it must be determined whether the search of the appellant would have taken place, in the form and in the manner in which it did, but for the involvement of the police. The evidence, in my opinion, demonstrates that it would have taken place and was not materially different than it would have been if there had been no police involvement. Although [the vice-principal] knew that criminal charges might result, the primary motive for the search was the enforcement of school discipline, for which he was responsible. There is nothing in the evidence to suggest that

the vice-principal initiated the search or conducted it differently because of police intervention. It is thus apparent that the vice-principal was not acting as an agent of the police.

[Emphasis added.]

[91] R. v. Dorfer, 104 C.C.C. (3d) 528, 1996 CanLII 10214 (B.C.C.A.), a decision from this Court, offers an example of when a state agency has been found to exist. In Dorfer, the appellant was convicted of two incidents of breaking and entering. The investigating police were in search of DNA evidence that would connect him to one or both scenes. The appellant was in custody and the police became aware he needed dental care. They decided to obtain dental material that would allow for forensic analysis: at para. 8. Writing for this Court, Justice Macfarlane explained what happened next:

[9] The police approached the deputy director of the prison where the appellant was being held and asked for information concerning his dental treatment. The appellant had already been to the dentist to have a preliminary examination and had made a further appointment. The prison official reluctantly informed the police of the time and place where the appellant would have further dental treatment. The appellant was unaware that this information had been provided to the police.

[10] The dental appointment was scheduled for September 20, 1993. Before the appointment the police met with the dentist and his assistant, and arranged that the dentist and his assistant would set aside any material with Dorfer's bodily substances on it. The police instructed the dentist and his assistant that otherwise the dental procedure should be conducted in a normal fashion.

[11] After having made these arrangements the police applied for and obtained a search warrant.

[12] During the dental procedure on September 20, 1993, the dentist and his assistant set aside material which contained blood and saliva residue.

[13] The blood and saliva was examined and compared with the semen sample taken from [one of the victims]. The samples were matched

[Emphasis added.]

[92] The trial judge in Dorfer concluded that the dentist and his assistant acted as state agents in setting aside material containing the appellant's bodily substances. This Court agreed: at para. 30. The Court went on to hold that the "warrantless seizure" of bodily substances by the dentist could not be "converted into a lawful seizure by obtaining a warrant after having made arrangements with state actors to acquire possession of material so it can be seized under a warrant": at para. 34, emphasis added. As per Justice Macfarlane:

[39] Is it reasonable for a patient to expect that his dentist will not collaborate with or assist the police in taking possession of blood, saliva or other bodily substances taken from him during dental treatment? I am persuaded that in the unusual circumstances of this case the answer must be yes. It was reasonable for the appellant to expect that his bodily substances would not fall into the hands of the police in that manner.

[40] In my opinion, the preservation of the dental residue by state actors for law enforcement purposes and the seizure of the residue by the police violated the rights of the appellant under s. 8 of the Charter.

[Emphasis added.]

[93] Dorfer preceded the Supreme Court's decisions in Buhay and M. (M.R.). However, in upholding a state agency, this Court did what those decisions oblige a trial judge to do when faced with a claim of this nature: examine the entirety of the interaction between the police and the alleged agent, including any "arrangements" to assist with law enforcement, and determine whether the action said to have violated the Charter would have occurred "in the form and manner in which it did take place, but for the intervention of the state or its agents": Buhay at para. 25, citing Broyles. As aptly noted in R. v. Norgan, 2024 BCPC 187, relevant factors to consider may include:

[36] i) whether there was a causal connection between the actions of the police and the actions of the third party; ii) whether the third party was acting under their own independent authority or initiative; iii) the degree and nature of any collaboration and cooperation between the police and third party; iv) whether there were direct or implied instructions provided by the police to the third party; and v) the motives of the police and the third party.

This is not an exhaustive list. The state agent inquiry is individualized and fact intensive.

Application of principles to this case

[94] I appreciate reasons for judgment are to be read as a whole, functionally, and in the context of the record. When engaged in appellate review, we are not to finely parse judgments in a search for error: R. v. G.F., 2021 SCC 20: at paras. 69-70.

[95] Nor is a judge obliged to lay out every piece of evidence they have considered in arriving at a particular conclusion, identify and explain non-controversial legal propositions, or detail the minutiae of their reasoning process. This principle is also well-established: R. v. R.E.M., 2008 SCC 51 at paras. 19-20, 45.

[96] However, having considered the judge's reasons on the first voir dire as a whole and in context, I am persuaded he committed material errors in his response to the agency claim.

[97] First, I agree with the appellant that the judge did not make the legal inquiry mandated of him in assessing whether the Loomis employees were state agents. Rather than ask whether the employees would have conducted themselves the way they did but for the involvement of

the police, the judge asked whether there is anything wrong (generally) with the police "enlisting the assistance of members of the public in the investigation, detection and prevention of crime": at paras. 19, 20, 22. That is not the proper focus of a state agency analysis, which must examine the entirety of the circumstances surrounding the interaction between the police, alleged agent(s), and the suspect, as borne out by the evidence, and then apply the Buhay and M. (M.R.) legal framework to the assessed facts. The judge's admissibility ruling contains no consideration of Buhay, M. (M.R.), or the analytical framework that emerges from those and other state agency cases. The Crown says the applicable law was not in dispute and in that context, it is not surprising the ruling makes no mention of it. That may be the case; however, it is not the absence of an explicit reference that raises concerns here. It is the fact that on their face, the reasons reveal the application of an approach to the agency issue that does not align with the proper legal test. A failure to identify and apply the right legal test to the underlying facts is an error of law and reviewed on a standard of correctness: *R. v. Crocker*, 2009 BCCA 388 at para. 55, citing *R. v. Shepherd*, 2009 SCC 35 at para. 20.

- [98] Second, and more critically, I also agree with the appellant that the judge misapprehended the record by failing to consider evidence relevant to the agency issue: *R. v. Morrissey*, 22 O.R. (3d) 514, 1995 CanLII 3498 (O.N.C.A.); *R. v. Osinde*, 2021 BCCA 124 at para. 17. This evidence was material to resolving the agency claim under s. 8, which formed an integral part of the overall Charter challenge to critical parts of the evidentiary foundation underlying the Crown's case.
- [99] For purposes of the agency analysis, the judge found as a fact that the RCMP asked the Loomis employees to "set aside" packages delivered by Mr. McGuire under the name of Essential Nutrition Wholesale "for RCMP retrieval": at paras. 19, 20. On appeal, the Crown accepts that such is the case and says this finding was "reasonable on the facts" (respondent's factum at paras. 53-54). To make this finding, the judge must have rejected the evidence of Cst. Cathro and Cpl. Lloyd, both of whom testified that they made no such request.
- [100] Having reached this conclusion (consistent with the evidence of Mr. Roden and Ms. Erhart), there were other parts of the employees' testimony that were highly relevant to the agency issue and required close judicial analysis to fully assess whether what occurred in this case was "[v]olunteer participation in the detection of crime by private actors" or "sufficient direction by the police to trigger the application of the Charter": Buhay at para. 30, emphasis added.
- [101] For example, as set out above, Mr. Roden testified that not only were the Loomis employees asked to withhold packages delivered by Mr. McGuire and to notify the police, but they were also asked to take photographs and obtain a vehicle licence number and told to conduct themselves in a way that would not raise Mr. McGuire's suspicion. Mr. Roden said they did all these things because the police asked them to. He also testified that these things were "outside [their] regular job description" (emphasis added). He said the cooperation between

Loomis and the RCMP was "high", at least in part, because there was "no reason for [Loomis] to go against what the RCMP [was] asking [the employees] to do" (emphasis added).

- [102] Ms. Erhart similarly testified that but for the involvement of the RCMP, the packages delivered by Mr. McGuire would have remained in the mail stream. Furthermore, she would not have divulged details about past shipments. Mr. Leyland initially had a different version of events, testifying that the Loomis employees independently became suspicious about the packages after opening one of them and that he was the individual who suggested the packages be held back. He also said he took photographs of his own accord. However, his suggestion that the Loomis employees opened one or more of the packages found no support elsewhere in the evidence. In cross-examination, Mr. Leyland acknowledged that the things he did in relation to this matter likely took place after he had spoken to Mr. Roden. It was Mr. Roden who interacted with the RCMP on May 15, and he testified that he gave instructions to the other employees.
- [103] I take no issue with the judge's finding that, having learned of the content of the packages intercepted by the CBSA, the Loomis employees were "concerned by this news and motivated to put a stop to it": at para. 19. However, his finding that in conducting themselves as they did, the employees "were simply going about their normal business, which included, of course, refusing to ship illegal goods" (at para. 21), fails to account for their evidence that but for the involvement of the RCMP they would not have refused to ship the packages delivered by Mr. McGuire, developed a plan to covertly intercept and retain those packages for police retrieval, divulged otherwise private information about previous shipments, attempted to make observations that would assist the police with identifying the shipper(s), or had police surveillance operating from within the depot.
- [104] Unlike the situation in Buhay, the evidence in this case was not that the Loomis employees acted completely independently from the police. Nor did their relationship with the police develop after they had already started withholding packages. Until their interaction with the RCMP on May 15, they were processing Mr. McGuire's packages in the ordinary course. In Buhay, the private security guards began an "investigation on their own initiative, without any instructions or directions from the police": at para. 29. On the face of it, the same cannot be said here.
- [105] This case also appears to be materially different from M. (M.R.). There, the Supreme Court found "no evidence of an agreement or of police instructions to [the vice-principal] that could create an agency relationship": at para. 28. There was no evidence the vice-principal "initiated the search" of the accused student or "conducted it differently because of police intervention": at para. 29. Again, on the testimony of the Loomis employees in this case (not rejected by the judge), the same cannot be said here.

- [106] In my view, the evidentiary record before us is arguably more closely aligned to the circumstances in *Dorfer*, in which the police arranged with the dentist and his assistant beforehand to set aside material that might contain the suspect's bodily substances, but to otherwise conduct themselves in a "normal fashion": at para. 10. In *Dorfer*, this Court found the dentist and his assistant were state agents.
- [107] From my reading of evidence on the first voir dire, this case called out for a close analysis of the state agency assertion. Given Mr. Roden and Ms. Erhart's testimony and the described links between what they did, how they did it, and requests made by the police, it was not a far-fetched proposition. The RCMP denied providing instructions; however, the judge clearly did not accept the whole of their evidence given his finding that they asked Loomis to set packages aside. There is no indication the judge rejected the evidence of Mr. Roden or Ms. Erhart or found it non-credible or unreliable. They both drew a causal nexus between the steps they took and requests made of them by the police. They testified that they put the packages aside for the police. Retrieval by the police for purposes of a specific ongoing investigation appears to have been the employees' primary motivation. Not only did the judge ask himself the wrong legal question when analyzing this part of the appellant's s. 8 application on the first voir dire, his reasons demonstrate a lack of consideration of relevant evidence and importantly, its implications for a finding of state agency.
- [108] The evidentiary foundation relevant to the agency issue was one that had to be grappled with. There were inconsistencies between the testimony of the Loomis employees, inconsistencies between the testimony of the police officers, and these two groups of witnesses had profoundly different perspectives on the nature of their interaction and the extent to which police instructions formed part of that interaction. Without assessing the whole of this evidence and making the necessary findings, I fail to see how it could be determined whether the withholding of packages from shipment for subsequent seizure by the RCMP and providing police with additional information that assisted in their investigation "would have taken place, in the form and in the manner which it did, but for the involvement of the police": *M. (M.R.)* at para. 29.
- [109] Accordingly, I would accede to the appellant's second ground of appeal.

Third, fourth, and fifth grounds of appeal

- [110] Given this conclusion, it is not necessary to address the appellant's challenges to the findings that the police were lawfully entitled to seize packages three, four, and five without a warrant under s. 489(2) of the Criminal Code; the sufficiency of grounds for the warrant to search the appellant's principal residence; and the judge's reasoning on the s. 24(2) analysis.
- [111] This is because a finding of state agency on the first voir dire would have carried the realistic potential of a downstream (derivative) impact on any Charter assessments that came after that. As such, the judge's errors in his agency determination were material. Indeed, in responding to the appeal, the Crown has not sought to invoke the curative

proviso under s. 686(1)(b)(iii) of the Criminal Code. From this, I infer a recognition on the Crown's part that the error alleged in the second ground of appeal cannot reasonably be characterized as harmless or negligible.

[112] If the Loomis employees withheld and took possession of the third, fourth, and fifth packages as state agents, s. 8 of the Charter was engaged, and the judge would have had to determine whether those seizures were authorized by law. If s. 489(2) of the Criminal Code is not available to a state agent (as the parties appear to agree), the appellant says the resulting Charter infringement could have affected:

- the validity of any warrant(s) obtained to search those packages. Unconstitutionally obtained evidence cannot support a warrant and must be excised in deciding whether the warrant could have issued: *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CanLII 52 (S.C.C.); *R. v. Araujo*, 2000 SCC 65; *R. v. Morelli*, 2010 SCC 8;
- the lawfulness of the appellant's arrest. Unconstitutionally obtained evidence cannot be relied upon as grounds for arrest: *R. v. Zacharias*, 2023 SCC 30 at paras. 2, 26, 30, 107. The police relied on one or more of the impugned packages as grounds for the appellant's arrest on May 23: 2023 BCSC 2487 at para. 2;
- the admissibility of evidence seized incident to the arrest, including the mobile devices. If an arrest is not lawful, evidence seized incident to that arrest is open to exclusion under s. 24(2): *Zacharias* at para. 31;
- the warrants to search the suite at Summerhill Place and the appellant's principal residence. The Information to Obtain in support of those warrants referred to the May 15 and 17 packages and the fact that they contained drugs: 2023 BCSC 2488 at para. 7. In assessing the validity of these warrants, the judge took account of the fact that packages one through four were found to contain drugs: at para. 9; and,
- the s. 24(2) analysis. The only Charter breaches considered by the judge involved the detention and search of the mobile devices: 2023 BCSC 1491. Additional breaches, individually and in their cumulative effect, could affect the assessment of seriousness and impact on Charter-protected interests: *Grant* at para. 75; *Zacharias* at para. 49; *R. v. Khamvongsa*, 2025 BCCA 33 at paras. 47-48, 63, 66.

[113] Before us, the parties submitted that if this Court were to find the judge erred as alleged by the appellant, we should decide whether one or more additional Charter breaches occurred, make the necessary findings of fact, and conduct a fresh admissibility assessment under s. 24(2). In my view, given the nature of the errors established under the second ground of appeal (an incorrect legal test and misapprehension of the record); the potential downstream impact of a state agency finding; and the fact that the issue of the appellant's standing was left unresolved, it would not be appropriate for this Court to engage with the record as suggested by counsel.

[114] Instead, the appropriate remedy is to order a new trial so that a trial judge can assess standing, make any necessary findings, bring the proper legal framework to bear on those findings specific to an alleged state agency or otherwise, and then assess what, if any, impact those conclusions carry for the constitutionality of next steps taken in the police investigation, including subsequent searches and seizures. Ultimately, the entirety of any findings, including findings of unconstitutional conduct, would need to inform the s. 24(2) analysis: Khamvongsa at paras. 64-66.

Disposition

[115] For the reasons provided, I would allow the appeal in CA49722 and CA49740 and order a new trial in each based on reversible error in the judge's analysis of whether the Loomis employees were state agents for purposes of challenging evidence under ss. 8 and 24(2) of the Charter.

[116] Appeal file CA49740 involves an appeal from four convictions for firearm offences that arose out of the same circumstances at issue in the trial underlying CA49722. The appellant was found guilty of the additional four offences based on the factual findings reached in that trial. The two appeal files are inextricably linked; consequently, the same result must ensue for both.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Justice Edelmann"

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