

CANADA / JUDGMENT

R. v. Regis

2024 BCSC 7

COURT

Supreme Court of British Columbia

DECIDED

2 January 2024

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

2024 BCSC 7 R. v. Regis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Regis,

2024 BCSC 7

Date: 20240102

Docket: X084327

Registry: New Westminster

Rex

v.

Obnes Regis

Before: The Honourable Justice Devlin

Reasons for Judgment re: Voir Dire #1

Counsel for the Crown:

C.P. Pike

C. Cromlish

Counsel for the Accused:

A. Vo

M. Beckett

S. Head

E. Logue, Articled Student

Place and Dates of Voir Dire:

New Westminster, B.C.

October 17-20, 2023

October 23-26, 2023

November 1-3, 2023

November 21, 23 and 28, 2023

Place and Date of Ruling given to Parties with Reasons to Follow:

New Westminster, BC

December 6, 2023

Place and Date of Judgment:

New Westminster, B.C.

January 2, 2024

Introduction

- [1] The accused, Obnes Regis, is charged with the manslaughter of Naomi Onotera, contrary to s. 236(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], and indignity to human remains, contrary to s. 182(b) of the Code. Ms. Onotera was the spouse of Mr. Regis and mother to their young daughter. They resided together at a residence in Langley, BC.
- [2] On August 29, 2021, members of the Langley RCMP responded to a 911 call regarding a missing woman, Naomi Onotera. Beginning on the evening of August 29, 2021, and continuing the next day, various members of the RCMP attended the residence of Mr. Regis and Ms. Onotera, located at 20010 50th Avenue, Langley, BC ("the residence"). Relying on exigent circumstances, several police officers entered the residence to search for anything that would assist in locating Ms. Onotera.
- [3] Between August 29, 2021, and September 13, 2021, the police conducted a missing persons investigation into the whereabouts of Ms. Onotera. Their investigation included speaking with Mr. Regis at the RCMP detachment, a consent search of the residence on August 30, 2021, and a subsequent consent search of the residence, using a cadaver dog, on September 13, 2021.
- [4] On this application, Mr. Regis alleges breaches of his rights under sections 8, 9 and 10(b) of the Canadian Charter of Rights and Freedoms [Charter]. Specifically, Mr. Regis submits the following Charter infringements:

Section 8 -- Exigent circumstances did not exist to justify the warrantless entry into his residence beginning on August 29, 2021, and continuing to August 30, 2021. Therefore, the search was not justified and breached his right to be secure against unreasonable search and seizure pursuant to s.8 of the Charter.

Section 9 and 10(b) -- The detention of Mr. Regis upon his return to his residence on August 30, 2021, was arbitrary and therefore in breach of s.9 of the Charter. Further, this unlawful detention continued throughout his dealings on August 30, 2021, with the police outside his residence and at the detachment. In addition, the failure of the police to provide Mr. Regis access to counsel immediately upon his detention breached his s.10(b) Charter rights.

Section 8 -- Mr. Regis submits the consent searches of his residence on August 30, 2021, and September 13, 2021, were not valid; thus, both searches breached his s.8 Charter rights.

- [5] The Crown relies on exigent circumstances and the legal principles established in *R. v. Godoy*, [1999] 1 S.C.R. 311, 1999 CanLII 709 [Godoy] to justify the initial warrantless entry that began on the evening of August 29, 2021, and continued into the early morning hours of August 30, 2021. However, they concede that the warrantless entry into the residence around 8 a.m. on August 30, 2021, breached Mr. Regis's s.8 Charter rights.
- [6] The Crown also concedes a breach of Mr. Regis's s. 9 Charter rights when he was detained outside the residence on August 30, 2021. However, they submit that detention was of a short duration and did not continue during his attendance at the RCMP detachment. The Crown also submits there was no breach of Mr. Regis's s. 10(b) Charter rights during his brief detention at the residence.
- [7] Finally, with respect to validity of the two consent searches of the residence, the Crown submits that Mr. Regis gave voluntary and informed consent on both occasions.
- [8] On December 6, 2023, I advised the parties of the results of the voir dire with reasons to follow. These are those reasons.
- [9] I will begin these reasons with a brief overview of the evidence heard on the voir dire. I do so to provide context for my analysis of the issues raised on this application. I will then consider the alleged Charter violations, the governing legal principles and the positions of the parties. At that stage, I will canvass the relevant evidence in greater detail.

Background Facts

- [10] On August 29, 2021, at 6:51 p.m., Maureen Onotera, Ms. Onotera's mother, called 911 to report to the police that her daughter was missing. In response to that call, at approximately 10 p.m. that evening, two members of the Langley RCMP, Cst. Sahota and Cst. Newman, were dispatched to Ms. Onotera's residence in Langley, BC. When they arrived, they spoke to Ms. Onotera's sister, Kirsten Kerr, and Ms. Kerr's spouse. Ms. Kerr advised them that she had been inside the residence and had not located Ms. Onotera or anyone else. After speaking with Ms. Kerr, the police officers decided to enter the residence to determine for themselves

if anyone was inside. They located no one. Other police officers, attending the residence that evening and early the next morning, also entered the residence to conduct a search. The Crown submits the warrantless entries were justified due to exigent circumstances.

- [11] After the police had conducted the searches of the residence, they decided to secure the residence as part of their missing person investigation. On the morning of August 30, 2021, Cst. Pooni and Cst. Leith were conducting scene security at the residence. At 6:29 a.m. Mr. Regis walked up to the residence carrying his young daughter. Cst. Pooni immediately detained, searched, handcuffed and placed Mr. Regis inside a police vehicle. Mr. Regis confirmed he wished to speak to a lawyer but was not provided an opportunity to do so. Approximately 15 minutes later, Cpl. Manning arrived at the residence and directed that Mr. Regis be removed from the police car, as he was not a suspect or accused. After speaking to Cpl. Manning on the street outside the residence, Mr. Regis was driven by Cst. Pooni to the RCMP detachment to continue speaking to the police.
- [12] At the Langley RCMP detachment, Cst. McNutt escorted Mr. Regis to an interview room. There, Mr. Regis provided a lengthy statement lasting over five hours. Upon completion of the interview Mr. Regis left the detachment. Later that afternoon, Cst. McNutt spoke with Mr. Regis and obtained his consent to search the residence. Once the search was completed, Mr. Regis was permitted to return to his residence.
- [13] Between September 1 and 13, 2021, Mr. Regis was frequently in contact with Cst. McNutt regarding the investigation into Ms. Onotera's whereabouts. On September 13, 2021, Cst. Wilson obtained Mr. Regis's consent to search the residence with a police service dog. Two days later Mr. Regis was advised that his status had changed: he was now considered a suspect in the death of Ms. Onotera.
- [14] In addition to the testimony of various police witnesses, the Crown also filed Admissions of Fact. Mr. Regis did not testify, nor did the defence call other evidence on the voir dire.
- [15] I will now proceed to consider the issues raised on the voir dire.

Issue 1: Were the warrantless entries into the residence on August 29 and 30, 2021 justified based on exigent circumstances?

Governing Legal Principles

- [16] I begin with a consideration of the legal principles that govern a warrantless entry into a residence in response to a 911 call.
- [17] The parties agree that a warrantless entry into a residence must be considered presumptively unreasonable, and that the Crown bears the burden of demonstrating that it was authorized by reasonable law and carried out in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278, 1987 CanLII 84.

- [18] The parties also agree that Godoy is the leading authority when dealing with searches based on exigent circumstances. In Godoy, the Supreme Court of Canada affirmed that the police have a common law duty to protect life and safety. While the public interest in maintaining an effective emergency response system permits some intrusions in one's privacy interest, that intrusion "must be limited to the protection of life and liberty": Godoy at para. 22. For the intrusion to be justifiable, the underlying principle is that "the interference with liberty must be necessary for carrying out the police duty and it must be reasonable (emphasis in original)": Godoy at para. 22.
- [19] Justice Riley, in *R. v. Hogan*, 2023 BCSC 733, recently summarized the principles underlining Godoy and warrantless entries into a residence in response to a 911 call, as follows:
- [60] Lamer C.J.C. explained that such a 911 call is a "cry for help", and when the call is disconnected and the nature of the distress is unknown, it is reasonable and imperative that the police assume the caller is in distress and requires immediate assistance: Godoy at para. 16. To proceed otherwise would seriously impair the effectiveness of the 911 emergency response system. The police duty to protect life is engaged whenever it can be inferred that the caller is in some form of distress. In such circumstances, the police have the authority and indeed the obligation to identify the caller and ascertain if he or she is in need of assistance. The police cannot simply accept the word of the person who answers the door without properly investigating the call, which generally if not invariably involves speaking directly with the caller: Godoy at para. 20.

[]

- [62] However, even though the police may be authorized to effect a warrantless entry into a residence in response to a dropped 911 call, the extent of intrusion must be limited to that which is necessary to protect life and safety. The police have authority to investigate the 911 call, locate the caller, ascertain his or her reasons for making the call, and render such assistance as may be required. The police authority ends there: Godoy at para. 22. This manifestation of the ancillary powers doctrine does not authorize the police to conduct a complete search or otherwise intrude upon the reasonable expectation of privacy of the occupants, beyond that which is necessary to respond to the 911 call. Further, the scope of police authority will depend on all the surrounding circumstances. Thus, for example, if the police are able to locate the 911 caller, speak with him or her, and ascertain the nature of the concern without forcibly entering the premises, such a course of action is mandated: Godoy at para. 22.

[Emphasis added.]

- [20] The parties also referred to a number of cases which apply the Godoy principles. While I have read and considered all those cases, I will not detail them all in these reasons. However, as I will discuss, I found the decision of *R. v. Jones*, 2013 BCCA 345 [Jones] of particular assistance in my analysis.

Evidence on the Voir Dire

- [21] I will canvass the evidence on the voir dire that pertains to the search of the residence on the evening of August 29, 2021, through to the morning of August 30, 2021. In doing so, I will rely on witness testimony, the Admissions of Fact, and other exhibits filed on the voir dire. As I set out the evidence, I will make certain findings that will govern my analysis.
- [22] On August 29, 2021, at 6:51 p.m., Maureen Onotera, the mother of Ms. Onotera, called 911 to report that her daughter was missing. Maureen Onotera reported that Ms. Onotera had not been seen or heard from since 10:00 p.m. on August 28, 2021.
- [23] At approximately 9:30 p.m. on August 29, 2021, Langley RCMP officers Cst. Sahota and Cst. Newman received a report from dispatch regarding Maureen Onotera's missing person 911 call. Cst. Sahota then read a report on the police CAD database. He learned that Maureen had reported it was out of character for her daughter to not be in contact, and she did not know why Mr. Regis had not reported Ms. Onotera missing. Prior to arriving at the residence, Cst. Sahota spoke to Maureen Onotera on the phone and learned the following:
- She had not been able to contact Ms. Onotera since the previous day, which was unusual.
 - Prior to making the 911 call, she had been at the residence and saw Mr. Regis leaving with his daughter. Mr. Regis told her he was going to get ice cream and minutes for his cell phone. Mr. Regis did not have a car and was not using a baby stroller.
 - She entered the house and saw that Ms. Onotera's purse, key and cell phone were still there.
 - She had not been able to get in contact with Mr. Regis since she saw him leaving the house.
- [24] In cross-examination, Cst. Sahota also acknowledged that Maureen Onotera had said that she went back to the residence at 8 p.m., but did not locate Ms. Onotera. However, Cst. Sahota could not recall if Maureen Onotera had said she entered the residence.
- [25] After receiving the dispatch, Cst. Newman made several inquiries and determined that Ms. Onotera had not been admitted to any hospital in the surrounding area. A phone ping of Ms. Onotera's cell phone indicated it was in the area of 198th Street and 56th Avenue in Langley.
- [26] Prior to attending at the residence, Cst. Sahota and Cst. Newman also looked for Ms. Onotera by conducting patrols in the area near the residence. At one location, Cst. Newman entered a liquor store, looking to see if she could locate Ms. Onotera as well as Mr. Regis and the child.
- [27] At approximately 9:55 p.m., several hours after the call from Maureen Onotera, Cst. Sahota and Cst. Newman arrived at the residence. There, they met Ms. Onotera's sister, Kirsten Kerr, along with Ms. Kerr's husband and some others. Ms. Kerr told Cst. Sahota she had gone inside the residence but did not locate her sister. She also said that the house was messy, the stove was on and the fridge was open. Ms. Kerr reported this was odd as Ms. Onotera was meticulously clean.

- [28] Ms. Kerr provided Cst. Sahota and Cst. Newman entry into the residence. Cst. Sahota testified that he considered it necessary to enter the residence because he could not rely on information from the family members regarding what they observed inside the house. As described by Cst. Sahota, he and Cst. Newman conducted a cursory walkthrough of the entire house, including both floors, attic and basement. He said they were looking for Ms. Onotera or some indication of where she might be. Cst. Sahota took photographs of the bedrooms of the house and a bottle of bleach in the hallway. In his testimony, he explained that he thought the photographs might assist with the investigation.
- [29] After they had walked through the house, Cst. Newman took a statement from Ms. Kerr inside the kitchen of the residence. Cst. Newman testified that statement ended at 10:44 p.m.
- [30] Neither Cst. Sahota nor Cst. Newman could provide exact times as to when they entered the residence, how long their search lasted, or when Sgt. Cheung, Cst. Price and other investigators arrived.
- [31] Sgt. Cheung testified he arrived at the residence around 10 p.m. After speaking with Cst. Sahota and Cst. Newman, he felt the situation was suspicious and believed they were obligated to search the residence to ensure Ms. Onotera was not injured or being held against her will. I note that by the time Sgt. Cheung arrived, a search of the residence had already taken place and family members had advised Ms. Onotera was not inside the residence.
- [32] At 10:37 p.m., after Sgt. Cheung had been in the residence, he spoke to the Watch Commander. It was decided that the missing person investigation would be assigned to the General Investigative Section (GIS). At 10:52 p.m. Sgt. Cheung spoke to GIS team member Cpl. Sangha and briefed him on the investigation. Cpl. Sangha and Cst. Sergeyeva arrived at the residence at approximately 11:35 p.m. Sgt. Cheung testified he walked through the residence with Cpl. Sangha and Cst. Sergeyeva in order to acclimate them to the situation at the residence.
- [33] Cst. Sergeyeva observed a purse near the entrance to the front door and a cell phone on the kitchen counter. She seized both items for "safe keeping and future information". Cst. Sergeyeva also took photographs of some of the bank cards located inside the purse and sent them to Cst. Wood for further investigation.
- [34] Cpl. Sangha testified that when he arrived at the residence, he spoke with Sgt. Cheung, Cst. Price and Cst. Amjad. He was advised they had searched the residence but not the rental suite. Cpl. Sangha decided they should also search the rental suite by entering through a door located in the storage room of the residence. Cpl. Sangha requested that a police service dog attend to search the property and surrounding area. As set out in the Agreed Statement of Facts filed as Exhibit #14, Cst. Gimmer and his police service dog conducted a search of the area in the early morning hours of August 30, 2021. Cst. Gimmer did not enter the residence.

- [35] At 12:55 a.m. on August 30, 2021, after searching the residence, Cpl. Sangha took a statement from Ms. Poy, a friend of Ms. Onotera, who was outside the residence. The statement ended at 1:11 a.m. At 1:30 a.m. Cpl. Sangha decided to secure the residence as a possible crime scene. Cst. Sahota, Cst. Newman, and Sgt. Cheung maintained scene security to ensure no one entered the residence. Sgt. Cheung left the area at 3:29 a.m.; Cst. Sahota and Cst. Newman remained until they were relieved by Cst. Pooni and Cst. Leith at 6:10 a.m.
- [36] On August 30, 2021, Cpl. Manning and Cst. MacPherson arrived at the residence. At approximately 8 a.m., they entered the residence and conducted a further search. The Crown concedes this entry was in breach of Mr. Regis's s. 8 Charter rights.
- [37] In sum, beginning at approximately 10 p.m. on August 29, 2021, and lasting to approximately 1:30 a.m. on August 30, 2021, the residence was searched multiple times by various members of the Langley RCMP.

Position of the Parties

- [38] The Crown submits that the initial search was necessary and reasonable in the circumstances. The Crown further submits that Godoy requires the court to balance Mr. Regis' privacy interest against the interests of the 911 caller (Maureen), her family, and Ms. Onotera and the child. Because he shared the residence with Ms. Onotera, Mr. Regis had a diminished expectation of privacy. It was necessary for the police to enter and search the residence as they did in order to investigate the 911 call, and the disappearance of the three people, in a way that fulfilled their duty to ensure everyone's safety. There was an urgent duty to find three missing people (Ms. Onotera, Mr. Regis and their child), and the police also had an urgent duty to search for any clues relating to their location.
- [39] Counsel for Mr. Regis argues that the police's conduct of entering the residence was an unjustifiable use of their powers in the circumstances. They concede that the police were acting under a common law duty to respond to 911 calls; however, given the information the police had upon arriving at the residence, it was unnecessary for the police to enter the house in order to ensure Ms. Onotera's safety or locate evidence that would assist in finding her. Given the almost three-hour delay between the initial call to the RCMP and police attendance at the residence, in addition to the information from people at the residence, there was no objective basis to believe exigent circumstances existed. Rather, they submit, the police should have considered investigative alternatives before entering the residence.

Analysis

- [40] In Godoy, the Supreme Court of Canada affirmed that the police have a common law duty to protect life and safety. While the public interest in maintaining an effective emergency system permits some intrusion into one's privacy interest, that intrusion "must be limited to the protection of life and liberty": Godoy at para. 22. In other words, the intrusion must be necessary for protecting life and liberty, as well as reasonable in the circumstances.

- [41] The issue to be determined in this case is whether there was an objective basis to support the officers' subjective belief that it was necessary to enter the residence to search for Ms. Onotera. As stated in *Godoy*, the police have authority to investigate 911 calls, but the scope of the police authority will depend on all the surrounding circumstances. Although there were numerous entries into the residence, I will focus my analysis on what Cst. Sahota and Cst. Newman knew at the time they decided to enter the residence, as that will inform the rest of my analysis.
- [42] Before arriving at the residence, Cst. Sahota had information from dispatch about Maureen Onotera's 911 call, and he had also spoken directly with Maureen Onotera. Upon his arrival at the residence, Cst. Sahota also spoke to Ms. Kerr and obtained further information. Cst. Sahota knew that both Maureen Onotera and Ms. Kerr had entered the residence at different times on August 29, 2021, and neither had located Ms. Onotera inside. Other than the house being messy, the fridge being open and the stove being on, there was nothing unusual inside the residence. There were no signs of a forced entry; no sign of a struggle or an altercation; no weapons; no evidence of criminal activity; and no indication that there was anyone inside the residence. In addition, neither Maureen Onotera or Ms. Kerr reported any marital conflict between Ms. Onotera and Mr. Regis. There was no indication that Ms. Onotera had any mental health issues.
- [43] In summary, based on all of the information he had obtained, all Cst. Sahota knew was that Ms. Onotera had not been in contact with her family for over a day, and neither she, nor Mr. Regis or their daughter, were inside the residence. Cst. Sahota had no information that Ms. Onotera was at risk.
- [44] I find the analysis in *Jones* instructive. In *Jones*, an officer responded to Ms. Jones's 911 call requesting an ambulance to remove her daughter, Rachelle, from her house. He was aware this was a "mental health issue between a daughter and a mother" and that Rachelle was "freaking out" upstairs: at para. 6. Ms. Jones allowed the officer to enter her residence only for the purpose of removing her daughter. The officer waited five minutes for back-up, then went inside after there was no indication of untoward activity in the house. Once inside, he found Rachelle, who was passive and cooperative. He asked her to leave the residence, which she did without incident. He asked her if anyone else was in the house and she said no. When she realized he wanted to search the house, she told him her mother would not want him to do that and he should ask her permission. The officer proceeded to search the house anyway, and found a marijuana grow operation.
- [45] The Court of Appeal held there was no objective basis to support the trial judge's conclusion that the search was reasonable. The 911 call, which requested an ambulance, did not suggest any criminal activity. There was no evidence, based on the information given to the officer by Ms. Jones and Rachelle, that anyone else was in the house; and there was nothing to suggest that Rachelle or Ms. Jones were at risk of harm, or that there were any emergent hazards in the house: *Jones* at para. 33.

- [46] I find that Cst. Sahota and Cst. Newman should have reasonably known, from the information given by Ms. Onotera's family, that no one was in the house and there was nothing to indicate a crime. Further, I cannot find support for Cst. Sahota's disregard of the information from the family members. There were no indicators that the family members were either mistaken or dishonest; I would distinguish this from para. 20 of Godoy, where Lamer C.J.C. stated that the court "cannot accept that the police should simply take the word of the person who answers the door that there is 'no problem' inside". Chief Justice Lamer was discussing an example in which the person who answers the door might be the intruder in a burglary.
- [47] Additionally, that the police might have been able to find more evidence, had they entered, does not constitute reasonable grounds. It was speculative that they would find evidence inside the house that was indicative of Ms. Onotera's location, given the family members' information. Cst. Sahota also did not have grounds to believe Ms. Onotera would be hiding from her family members, or that she had a mental health issue that would have put her in danger.
- [48] Importantly, the above factors distinguish the circumstances from the Godoy scenario where there is a sense of urgency in entering the house because the police believe a person is actually in danger inside.
- [49] Further, in Jones, the Court of Appeal emphasized that police should look to "alternative investigative methods before embarking on an unauthorized search of private premises to protect public safety": Jones at para. 37. The Court referred to its previous decision in R. v. Larson, 2011 BCCA 454 [Larson], which "affirmed the necessity of considering investigative alternatives before embarking on a warrantless search, even in cases where the police apprehend a threat to life or public safety": Jones at para. 38.
- [50] With respect to a consideration of reasonable alternatives to entering the house, the Crown took the position that there was no reasonable alternative to entry for the police. They rely on Godoy, in which Lamer C.J.C. found that it was necessary for the officers to enter the accused's apartment in order to determine the nature of the distress call. In Godoy, they had no reasonable alternative for ensuring the disconnected caller received assistance in a timely manner: at para. 18.
- [51] In this case, there were other reasonable alternatives available to the police with respect to their missing person search: for example, they could have requested footage from any nearby cameras, such as CCTV; they could also have continued to search the surrounding areas, including local hotels, given they knew Ms. Onotera was not in the house at the time. Further, they could have availed themselves of provisions in the Missing Persons Act, S.B.C. 2014, c. 2 [Missing Persons Act] to obtain Ms. Onotera's phone records. All of these investigative avenues were available to them before they entered the residence.

- [52] I am guided by the findings in Jones that "not every 9-1-1 call engages issues of public protection, and the requirement that a search be both reasonable and necessary does not constitute an unwarranted interference with the duty of police to protect the public": at para. 42.
- [53] In my view, based on a consideration of all of the evidence, I am not satisfied that Cst. Sahota and Cst. Newman had an objective basis to justify entrance into the residence. By the time they decided to enter the residence, they knew that they were dealing with a missing person situation and that both Maureen Onotera and Ms. Kerr had advised Ms. Onotera was not inside the residence. There was nothing in the 911 call or subsequent information to indicate that it was necessary to enter the residence in order to protect or otherwise assist Ms. Onotera, nor was it necessary to enter in order to investigate her disappearance.
- [54] Having considered all of the circumstances, I find that the search of the residence by Cst. Sahota and Cst. Newman was in violation of Mr. Regis's s. 8 Charter rights. Accordingly, it follows that the subsequent entries by the RCMP investigators were also unjustified and constitute a further breach of Mr. Regis's s. 8 Charter rights.

Issue 2: When did Mr. Regis's detention end?

Governing Legal Principles

- [55] Section 9 of the Charter provides: "Everyone has the right not be arbitrarily detained or imprisoned".
- [56] In *R. v. Grant*, 2009 SCC 32 [Grant] the Supreme Court of Canada revised the analytical framework for determining whether a person has been detained for Charter purposes. Detention includes both physical and psychological detention. For Charter purposes, the fundamental general principle determining detention is that a person is detained when he or she submits to a deprivation of liberty and reasonably believes that there is no choice but to comply with that deprivation: at paras. 28-30. At para. 44, the Court summarized the test for determining whether there has been a detention for the purposes of ss. 9 and 10 of the Charter:
1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:

- (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[57] In *Grant*, the police acknowledged that they did not have legal grounds or reasonable suspicion to detain the accused prior to his incriminating statements. In finding that Mr. Grant's detention was arbitrary and in breach of s. 9, the Court clarified what constitutes arbitrary detention at para. 54:

Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s.9 (*Mann*, at para. 20), unless the law authorizing the detention itself is arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s.9.

[Emphasis added.]

[58] In the companion case of *R. v. Suberu*, 2009 SCC 33 [*Suberu*], Chief Justice McLachlin and Justice Charron found that the appellant was not detained by virtue of being momentarily delayed by a police request to speak to him. The officer had told him "I need to talk to you", but he did not attempt to block the appellant's movement. The Court emphasized that not every interaction with police will amount to a detention for the purposes of the Charter, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police: *Suberu* at para. 23.

[59] According to *Suberu* at para. 28:

The onus is on the applicant to show that in the circumstances he or she was effectively deprived of his or her liberty of choice. The test is an objective one and the failure of the applicant to testify as to his or her perceptions of the encounter is not fatal to the application. However, the applicant's contention that the police by their conduct effected a significant deprivation of his or her liberty must find support in the evidence.

[Emphasis added.]

[60] The "liberty of choice" on which the analysis centers is broad, although it generally refers to the freedom to choose whether to comply with a request or demand to physically do something, such as remain in a certain place, and/or answer questions or engage in a conversation with the police. Although the test is objective (whether a reasonable person in the individual's circumstances would conclude that he or she had no choice but to comply

with the alleged deprivation of his or her liberty of choice), the court may consider the particular circumstances of the individual bringing the application: Grant at para. 32.

- [61] Where the police take control of a situation in order to help people or gather information, such as when responding to a medical emergency, they may effectively interfere with an individual's freedom of movement without then detaining that individual. This is because such interference carries no legal consequence for the individual whose freedom of movement is being impacted: Grant at para. 36. Further, general inquiries precipitated by community-oriented concerns usually do not threaten individuals' liberty of choice: Grant at para. 41. However, when the basis for an inquiry shifts towards focused suspicion of a particular individual, the courts must scrutinize whether the police's words or actions would cause a reasonable person in the suspected individual's position to conclude that "he or she [was] not free to choose to walk away or decline to answer questions": Grant at para. 41.
- [62] In this regard, it is important to recall that the police's subjective intentions are not determinative; rather, the question is whether the police have done anything to provide an objective basis on which the individual could conclude that he or she was deprived of the ability to choose whether to cooperate: Grant at para. 32.
- [63] Further, the subjective intent of an officer to detain an individual cannot in itself result in a finding of unconstitutionality; "[i]t is not until that subjective intent is accompanied by actual conduct that it becomes relevant": *R. v. Clayton*, 2007 SCC 32 at para. 48 [Clayton]. In *R. v. Reid*, 2019 ONCA 32 [Reid], Justice Fairburn, discussing Clayton, stated that "[w]hat might have happened had events unfolded differently does not inform the legal character of what did happen": at para. 44.
- [64] Ultimately, the test involves a "realistic appraisal of the entire interaction, as it developed, not a minute parsing of words and movements": Grant at para. 32.
- [65] More recently, in *R. v. Lafrance*, 2022 SCC 32 [Lafrance], the Supreme Court of Canada affirmed the principles of psychological detention as set out in Grant. In Lafrance, the accused was a young Indigenous man whom the police suspected had been involved with the death of an individual. While he was asleep in the early morning, a team of armed police officers entered his home to execute a search warrant. The police ordered him to dress and leave his house, and was then led to Sgt. Eros, who asked him to identify himself and come to the police station to provide a statement about the alleged murder: at para. 2. Sgt. Eros said that giving a statement would be a "completely voluntary" choice: at para. 10.
- [66] Two police officers drove Mr. Lafrance to the police station, after he chose to ride with the police over taking public transit because he could not afford the fare: at para. 11. Sgt. Eros interviewed him for approximately three-and-a-half hours, in an interview room located at the back of the station. In order to access the interview room, it was necessary to go through two controlled access key-carded doors: at para. 12. During his first 17 minutes there, Mr. Lafrance was left alone and not told that the door was unlocked. His visit to the washroom was escorted by Sgt. Eros.

- [67] During the interview, Sgt. Eros told Mr. Lafrance that he did not need to speak to him, that the door was unlocked and that he could leave at any time: at para. 13. However, he also said that this was a "secure environment" and that Mr. Lafrance would have to inform Sgt. Eros if he wished to leave the room.
- [68] Justice Brown, applying Grant, found that Mr. Lafrance was detained from the moment the police interacted with him at his house, up until the conclusion of the interview. All three Grant steps weighed toward this conclusion: at para. 63.
- [69] Under the first step of Grant, Brown J. noted that the analysis "properly begins at the moment the encounter itself begins", that is, when the police arrived at Mr. Lafrance's house in the early morning: at para. 31. He concluded that a reasonable person in Mr. Lafrance's shoes would immediately understand that they were being singled out for investigation: at para. 32.
- [70] Under the second step of Grant, Brown J. found that despite Sgt. Eros's statements to Mr. Lafrance that he was free to leave, other circumstances supported the opposite conclusion. The circumstances of the police's arrival and the nature of the interview room, as well as the police's conduct during the interview, would have led a reasonable person in Mr. Lafrance's position to feel compelled to comply and unfree to leave: at para. 40. Justice Brown also found that the presence of multiple armed officers, all physically larger than Mr. Lafrance, would have contributed to the perception of a reasonable person that they were not free to decline to speak or to leave: at para. 43.
- [71] Further, the place and duration of the encounter also supported a finding of detention; the initial early morning encounter occurred inside Mr. Lafrance's home, and *R. v. Le*, 2019 SCC 34 [Le] recognized that police intrusion into a home "is reasonably experienced as more forceful, coercive and threatening than when similar state action occurs in public": Lafrance at para. 46, referring to *Le* at para. 51. The encounter persisted through the interview, with Brown J. recognizing the "security" of the environment as another factor that would lead a reasonable person to conclude that they were not free to leave at will: at para. 50.
- [72] Under the third step of Grant, Brown J. acknowledged Mr. Lafrance's youth as well as his Indigenous background. He noted that the latter consideration "will often weigh in favour of finding a detention, but not invariably": at para. 58. Further, Mr. Lafrance lacked experience with police and was unfamiliar with his Charter rights: at para. 62.

Evidence on the Voir Dire

Cst. Leith and Cst. Pooni encounter Mr. Regis at the residence

- [73] At approximately 6 a.m. on August 30, 2021, Cst. Leith and Cst. Pooni began scene security outside the residence. At approximately 6:29 a.m. they observed Mr. Regis walking towards the residence, carrying his daughter. This was unexpected: at the time, the police did not know the location of Mr. Regis, Ms. Onotera or their child. Cst. Leith broadcast on the police

radio that Mr. Regis had returned to the residence and the officers received directions to ensure Mr. Regis did not leave. As both Cst. Leith and Cst. Pooni approached Mr. Regis, Cst. Leith called out "stop, police". Cst. Pooni took the child from Mr. Regis and gave her to Cst. Leith, who then proceeded to check on the well-being of the child.

- [74] Cst. Pooni dealt directly with Mr. Regis. He told Mr. Regis he was being detained for investigation into his missing wife. He then did a pat-down search of Mr. Regis, handcuffed him and placed him inside his police car. Cst. Pooni then read Mr. Regis his Charter rights from his card and gave him the police caution. Mr. Regis confirmed he understood and said he wanted to speak to a lawyer. Cst. Pooni took no steps to facilitate Mr. Regis's request to speak to a lawyer, although he testified that on other occasions, he had facilitated roadside contact with counsel through his own cell phone.
- [75] As stated earlier, the Crown concedes that Mr. Regis was arbitrarily detained in breach of his s. 9 Charter rights.

Cpl. Manning arrives and speaks to Mr. Regis outside the residence

- [76] Cpl. Manning testified that on the morning of August 30, 2021, he was in a meeting at the detachment. At 6:32 a.m., he heard over the radio that Mr. Regis had returned to the residence. He responded that Mr. Regis should not be allowed to leave, stating "detain him if necessary". However, he did not believe Mr. Regis to be a suspect in any crime; instead, Cpl. Manning considered it important to the investigation to speak to Mr. Regis to determine if he could assist in locating Ms. Onotera. At 6:46 a.m. Cpl. Manning arrived at the scene, along with Cst. McPherson. By this time Mr. Regis had been detained in the back of a police car for approximately 12 minutes.
- [77] Upon arrival, Cpl. Manning was shocked to see Mr. Regis sitting in the police car and immediately directed that he be released and his handcuffs removed. At the time, Cst. Leith was still dealing with the child and an ambulance had been called.
- [78] Cpl. Manning audio recorded his 26-minute encounter with Mr. Regis and this was played during the voir dire. Cpl. Manning explained to Mr. Regis that he had been in handcuffs because the police didn't want him to go anywhere, stating "there's mixed reports about that you and the daughter being missing and your wife being missing so - ". Mr. Regis responded "Oh, me and my daughter not, not missing" and then proceeded to explain to Cpl. Manning what had occurred over the past few days.
- [79] Cpl. Manning managed to interrupt Mr. Regis to ask if he had any idea where Ms. Onotera was. Mr. Regis said he didn't. Cpl. Manning then asked if Mr. Regis was willing to go to the detachment to speak to investigators. From the exchange it was clear Cpl. Manning was referring to speaking to investigators about the whereabouts of Ms. Onotera. The following exchange then occurred:

Cpl. Manning: Okay. Uh, are you willing to go to the detachment and talk to one of our investigators there?

Mr. Regis: Yeah.

Cpl. Manning: It's just a better environment, it's for you to-

Mr. Regis: Yeah, because this is-

Cpl. Manning: -talk. We'll uh, what's your-

Mr. Regis: (indecipherable)

Cpl. Manning: Do you prefer to speak in English or French or?

Mr. Regis: English.

[80] After this exchange, Mr. Regis continued to talk and told Cpl. Manning that he was anxious, which I understood to be in reference to Ms. Onotera being missing. Mr. Regis told Cpl. Manning personal details about Ms. Onotera, including that she was a teacher and was worried about going back to school because of COVID.

[81] Cpl. Manning interrupted him again to ask if he would go with Cst. Pooni to the detachment, describing it as a "friendly drive" so they could have a conversation with him. The exchange was as follows:

Cpl. Manning: -you're not under arrest or anything like that right now.

Mr. Regis: Okay.

Cpl. Manning: We just wanna have that conversation with you.

Mr. Regis: Yeah, yeah, yeah.

Cpl. Manning: So initially like you were, you were held here because we didn't, we, we didn't know where the hell you were, right so we were worried.

Mr. Regis: (indecipherable) no, no I will, I will tell you.

Cpl. Manning: And we're like okay just detain him, keep him there.

Mr. Regis: The most, the most, the most-

Cpl. Manning: But you're not, you're not uh, in any trouble right now.

Mr. Regis: The most, no the most important thing to tell you, I didn't tell you yet. When her mom came and (indecipherable) I was going to your house to find out where Naomi is because when she said that (indecipherable) out -

- [82] As this exchange illustrates, Cpl. Manning clarified that Mr. Regis was neither in trouble or under arrest. Rather, the police wanted to speak to him about the missing Ms. Onotera. Mr. Regis immediately continued to speak to Cpl. Manning, describing the conversation he had with Maureen Onotera. Mr. Regis explained that he had told Maureen Onotera why he did not want to call the police: the last time Ms. Onotera went missing, he did call the police and Ms. Onotera was mad at him for doing so.
- [83] Cpl. Manning told Mr. Regis that an ambulance would take the child to the hospital to have her checked out while he went to the detachment to speak to investigators. Cpl. Manning said "and then we'll let you know what's happening after that". Mr. Regis said okay and then provided a lengthy explanation about what happened overnight, including his efforts to get minutes added to his phone. During that portion of the conversation, Mr. Regis showed Cpl. Manning the most recent contact he had had with his wife on the phone. Cpl. Manning told Mr. Regis that he was going to keep the phone because it might help the police locate her. Mr. Regis was at first reluctant because he needed the phone himself, but Cpl. Manning said they could talk about his phone upon meeting the investigator at the detachment. Mr. Regis continued to tell Cpl. Manning about getting minutes on his phone. The Crown concedes the seizure of Mr. Regis's phone was in breach of his s. 8 Charter rights.
- [84] After discussing various topics and ensuring that the diaper bag went with the child in the ambulance, Cpl. Manning asked Mr. Regis if he still wished to speak to a lawyer. Mr. Regis said no. Cpl. Manning told him "right now you're not in trouble", to which Mr. Regis replied "No, I'm not missing". In cross-examination Cpl. Manning testified that he did not provide Mr. Regis with a further warning because he did not consider Mr. Regis a suspect in a criminal investigation. Cpl. Manning also agreed in cross-examination that it was a "big ask" to have Mr. Regis go to the detachment to speak to the police after he had been out all night, but that it was also important the police determine the whereabouts of Ms. Onotera.
- [85] As Mr. Regis was being placed inside Cst. Pooni's police vehicle, Cpl. Manning told Cst. Pooni "just stay with him, stay with him. Yeah. And if he tries to leave detain him again". Cpl. Manning told Cst. Pooni "we're not going to let him wander - off again until we have all the answers we need". There is no evidence to suggest that Mr. Regis heard the exchange between Cpl. Manning and Cst. Pooni.

Mr. Regis arrives at the Langley RCMP detachment with Cst. Pooni

- [86] At 7:17 a.m. Cst. Pooni transported Mr. Regis to the Langley RCMP detachment, where they arrived at 7:25 a.m. Upon arrival, Cst. Pooni sat with Mr. Regis in the public area of the detachment until Cst. McNutt came to meet with Mr. Regis. By 8:10 a.m. Cst. Pooni was back at the residence doing scene security.

Mr. Regis's interview with Cst. McNutt

- [87] Cst. McNutt was a member of the Langley RCMP Serious Crime Unit, working with Cpl. Manning and others. He attended a meeting at 6 a.m. on August 30, 2021, where he learned that Ms. Onotera had been reported missing since the evening of August 28, 2021. At some point that morning, he learned that Mr. Regis had returned to the house and he was subsequently assigned to take a statement from Mr. Regis.
- [88] Just prior to 8 a.m. on August 30, 2021, Cst. McNutt met Mr. Regis in the lobby of the Langley RCMP detachment. The interaction between Cst. McNutt and Mr. Regis was audio recorded. They were also video recorded while in the interview room. The recordings were played during Cst. McNutt's testimony. The entire interaction lasted 5-and-a-half hours, resulting in a 196-page transcript.
- [89] At the beginning of their encounter, Cst. McNutt carefully explained to Mr. Regis that the police were investigating the report of a missing person, Ms. Onotera. Cst. McNutt considered Mr. Regis a witness; he took steps to ensure Mr. Regis understood that he was not a suspect, did not have to speak to the police and could leave the detachment at any time. Cst. McNutt explained to Mr. Regis that their discussion was audio and video recorded and that the police were looking into a missing person. Cst. McNutt confirmed with Mr. Regis that he understood he was not detained and that his attendance at the detachment was to help the police out with their missing person investigation. Cst. McNutt showed Mr. Regis the door to the interview room was unlocked and informed him that he could leave at any time. Cst. McNutt assured Mr. Regis he would show him the way out.
- [90] Cst. McNutt also informed Mr. Regis that he did not have to speak to him, but anything that he did say could be used as evidence in court. Mr. Regis's responses demonstrated that he understood that he was not detained, was free to leave and that he was there to help the police in locating his wife.
- [91] After Cst. McNutt finished explaining to Mr. Regis why he was at the detachment, Mr. Regis proceeded to explain in substantial detail what had occurred since Saturday night, including the various steps he took throughout the night to find a location to add minutes to his phone. While the encounter was lengthy, the majority of time consisted of Mr. Regis speaking and Cst. McNutt asking a few clarifying questions. Indeed, the exchange could be described as a monologue by Mr. Regis, rather than a dialogue between the two. Occasionally, Cst. McNutt asked Mr. Regis if he needed something to eat or drink, or had to use the washroom. Mr. Regis also said he was not tired even though he had not slept the night before. When Cst. McNutt told Mr. Regis he didn't want to keep him all day, Mr. Regis replied "I like talking to you we have so much in common".
- [92] At the end of the interview Mr. Regis asked about his daughter. Cst. McNutt took Mr. Regis to a meeting room near the lobby entrance where Mr. Regis met with representatives from the Ministry of Children and Family Development ("MCFD") to discuss his daughter. There were no police officers inside the meeting room and Mr. Regis was free to leave at any time. After

that meeting, Cst. McNutt met with Mr. Regis and then contacted MCFD again to provide some clarification. After that, Mr. Regis let the detachment on his own to go see his daughter in the hospital. By that point Cpl. Manning had returned his phone.

Position of the Parties

- [93] The Crown concedes that the initial interaction with Cst. Pooni was a breach of Mr. Regis's s. 9 Charter rights, but submits the detention terminated once Cpl. Manning arrived and removed Mr. Regis from the police car. Rather, Mr. Regis willingly spoke to the police, both outside the residence and at the detachment, in order to assist them in their missing person investigation. The Crown also submits that Mr. Regis was never considered a suspect at the relevant time, nor was there a criminal investigation.
- [94] In addition to Grant and Suberu, the Crown refers to Reid and R. v. Folker, 2016 NLCA 1 [Folker]. I will briefly discuss those cases as they assist in my analysis. In Reid, Mr. Reid was a 36-year-old Black man. His stature was such that it took a number of officers to arrest him: at para. 29. His encounter with the police began with him and a friend walking at a very slow pace toward a group of officers, who were speaking with some children. They began chatting; the police did not order him to approach them or tell him to say where he was: at para. 32. The officers chatting with Mr. Reid described him as "cool", polite and forthcoming: at para. 33. Their conversation was pleasant, and Mr. Reid was cooperative when an officer asked him questions about why he was there. It was only when an officer performed a record check on his radio about Mr. Reid that Mr. Reid ran away and discarded a firearm. The Court held that he was not detained during his conversation with the police.
- [95] In Folker, Mr. Folker gave several statements to the police, three of which were not cautioned. The police initially contacted him for an interview because he was the last person known to have seen his partner, Ms. Shirran, alive, and he had been the one to file the missing person report. As the purpose of the first interview was to follow up on the missing person report, the Court determined that a reasonable person would not have felt they had no choice but to go to police headquarters and answer the police's questions.
- [96] Later on, the police put Mr. Folker on surveillance part way through the second interview, but the nature of the interview remained general and investigative: the questioning "focussed on the interaction between Mr. Folker and Ms. Shirran before she left their residence on July 18, and information about their personal lives and Ms. Shirran's habits and friends": at para. 27. Mr. Folker was "very forthcoming with information and entirely cooperative": at para. 27. The Court found that the police had treated him as a bereaved family member; they continued to investigate alleged sightings of Ms. Shirran, and Mr. Folker voluntarily contacted the police to provide information: at para. 28.

[97] Counsel for Mr. Regis, relying on Lafrance, submit that under the Grant test, Mr. Regis was detained from the moment he encountered police outside his residence on the morning of August 30, 2021. The detention continued throughout his dealings with the police, until after he finished speaking to Cst. McNutt at the detachment. In particular, they submit Mr. Regis was psychologically detained throughout the encounter. I discuss Lafrance further during my analysis.

Analysis

[98] As Grant instructs, in order to determine whether there is a detention, a court must conduct a "realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements": Grant at para. 32. The inquiry is fact-specific and context-sensitive. I will proceed with my analysis applying the framework set out in Grant and Suberu.

The encounter with Cpl. Manning on August 30, 2021

[99] Since the Crown has conceded Mr. Regis was detained by Cst. Pooni upon his arrival at the residence, my analysis will focus on what transpired after Cpl. Manning arrived.

[100] I turn to the first Grant category, the circumstances giving rise to the encounter. After the brief physical detention and the arrival of Cpl. Manning, the police engaged with Mr. Regis as a reasonable person would expect them to do when speaking with a missing person's spouse who appeared eager to help. It is evident from the audio recording that Mr. Regis spontaneously began speaking to Cpl. Manning, explaining where he had been and what had occurred over the past few days with Ms. Onotera. In response to what Mr. Regis was saying, Cpl. Manning asked clarifying questions in an effort to ascertain the possible whereabouts of Ms. Onotera.

[101] Because Mr. Regis was loquacious, it was difficult for Cpl. Manning to interrupt him to explain that he was not under arrest, not in any trouble and that the police wanted to speak to him at the detachment, which was "a better environment". I agree that Cpl. Manning's explanation ("you are not in under arrest" and "you are not in any trouble right now") did not explicitly inform Mr. Regis he was not detained. However, I find a reasonable person who was in the midst of speaking to the police about the whereabouts of his missing spouse would understand from what he was told that he was not being detained, but rather were assisting the police in their efforts to locate his spouse.

[102] At one point, Mr. Regis showed Cpl. Manning recent contact he had had with his spouse on his phone. It was then that Cpl. Manning told Mr. Regis he would keep the phone, as it could assist with the investigation. While I acknowledge Mr. Regis expressed some reluctance, he ultimately agreed for Cpl. Manning to take his phone in order to assist the investigation. The Crown concedes the seizure of Mr. Regis's phone was a breach of s. 8 of the Charter.

- [103] With respect to the second category in Grant, the nature of the police conduct, the defence argues that the police never provided Mr. Regis with any options throughout their encounter at the residence. They note that the police took his daughter away from him, seized his phone, blocked his access to his own residence and placed him inside a police car. The defence also relies on alleged similarities to Lafrance to argue that the nature of the police conduct supports a finding of detention. In the defence's submission, these facts illustrate that at all times, the police were essentially maintaining control over Mr. Regis, whom they also considered a suspect. I disagree.
- [104] In my view, there are significant distinguishing factors between Lafrance and the circumstances of Mr. Regis. Mr. Lafrance was a young Indigenous man whom the police suspected had been involved in a murder. He was awoken in his bed by a team of armed police officers who entered his home to execute a warrant. He agreed to a ride to the police detachment because he could not afford public transit.
- [105] In contrast, Cpl. Manning dealt with Mr. Regis as the concerned spouse to a missing person. He spoke to Mr. Regis in a polite, non-adversarial manner. Mr. Regis was not a suspect; he was a valuable source of information for the police regarding his missing wife, and was treated as such. It would have been apparent to a person in Mr. Regis's situation that the police were not attempting to further detain him, but rather obtain information from him to assist in their missing person investigation. As well, the offer to drive Mr. Regis to the police detachment would reasonably be viewed as an effort to facilitate further discussion in a more comfortable setting.
- [106] Turning to the third Grant category, the particular characteristics or circumstances of Mr. Regis, I have considered the fact that Mr. Regis is of Haitian descent. There is nothing to suggest his minority status was a factor at play during his encounter with the police. Indeed, Mr. Regis told Cpl. Manning that on a previous occasion when he dealt with the police, they were "like two brothers to [him]". This previous positive experience with the police informs my assessment of his encounter with Cpl. Manning, as well as with Cst. McNutt and the other police officers. Neither Mr. Regis's background, nor his interactions with any of the police officers, suggest that a reasonable person in the same circumstances would conclude they were not free to leave. As in Reid, I find that in these circumstances, Mr. Regis's race was not material to a consideration of whether he was detained.
- [107] Further, unlike the youthful, unsophisticated accused in Lafrance, Mr. Regis is an adult married man and a father. At the time of the encounter, he was self-employed. The Admissions of Fact, filed as Exhibit #1 on the voir dire, establish that he was contracted to work as a court-certified interpreter for the Court Services Branch between November 2012 and June 2013. While Mr. Regis's first language is French and he spoke with a heavy French accent, there is no evidence to suggest he did not fully comprehend what was said to him. In fact, he told Cpl. Manning he preferred to speak in English.

[108] In my view, a reasonable person imbued with the experience of Mr. Regis's particular circumstances would conclude that he was free to stop speaking to the police.

Mr. Regis's transport to the detachment and encounter with Cst. McNutt

[109] Before Cst. Pooni drove Mr. Regis to the detachment, Cpl. Manning directed him to stay with him at the detachment "and if he tries to leave detain him again". The defence argues that this statement is further evidence that Mr. Regis was subject to ongoing detention. I disagree and see no merit in this submission. As stated in Reid, "what might have happened had events unfolded differently does not inform the legal character of what did happen": Reid at para. 44. The transport of Mr. Regis to the detachment, and the short period Cst. Pooni sat with Mr. Regis in the public lobby of the detachment, was friendly and uneventful.

[110] As I detailed earlier in these reasons, at the beginning of his dealings with Mr. Regis, Cst. McNutt ensured that Mr. Regis understood he was not detained, he was not arrested, he was not a suspect, he did not have to speak to the police and he was free to leave. While the interview was particularly lengthy, the majority of the time consisted of Mr. Regis speaking about a variety of things, including his efforts overnight to obtain minutes for his phone, his relationship with Ms. Onotera and some of the struggles they had in their relationship. As Cpl. Manning had done before, Cst. McNutt periodically interrupted Mr. Regis to clarify something he said or to ask if he needed food or a break. Having had the opportunity to review the recording of Mr. Regis's dealings with Cst. McNutt, I am satisfied that a person in Mr. Regis's situation would reasonably perceive that he was free to leave.

[111] Here, defence reliance on Lafrance is also not persuasive. I accept that like Mr. Lafrance, Mr. Regis was driven to the detachment by the police, placed in an interview room within the non-public area of the detachment, and told the door was unlocked and he was free to leave. However, that is where the similarities between the cases end. As I have already discussed, Mr. Regis was an adult husband and father who was voluntarily assisting the police in their investigation into the whereabouts of his missing spouse, Ms. Onotera.

[112] In my view, the circumstances of this case are similar to those in Folker. Both Mr. Regis and Mr. Folker were the spouse of a missing person. Both appeared anxious to assist the police in their missing person investigation. Both were forthcoming with information and entirely cooperative. As well, during the relevant time, the police had no body and no grounds to suspect that the missing spouse had been the victim of a crime.

[113] As stated in Reid, each case is unique and must be assessed on its own facts: at para. 37. I agree with the Crown that when all of the circumstances are considered, a reasonable person in Mr. Regis's situation would understand that he was under no obligation to speak to the police and was free to leave.

[114] I find that after the initial detention by Cst. Pooni, Mr. Regis was no longer detained.

Issue 3: Did the police violate Mr. Regis's s.10(b) Charter right?

Governing Legal Principles

- [115] Section 10(b) of the Charter provides that "[e]veryone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right".
- [116] Section 10(b) imposes both informational and implementational duties on the police. First, it obliges the police to advise a detained person of the right to retain and instruct counsel without delay (the informational duty). If the detained person requests to exercise their right to counsel, the police must then provide the detainee with a reasonable opportunity to speak with counsel (the implementational duty). The police must refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to speak with a lawyer, or has unequivocally waived the right to do so: see *R. v. Bartle*, [1994] 3 S.C.R. 173 at 191-192, 1994 CanLII 64.
- [117] The Court in *R. v. Suberu*, 2009 SCC 33 [Suberu], held that "without delay" means "immediately", and reasoned as follows:
- [40] any interpretation of the phrase "without delay" must be consistent with a purposive understanding of the Charter provision in which it occurs. [T]he purpose of s. 10(b) is to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy. Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.
- [41] A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that results from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.
- [42] The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police. In our view, the words "without delay" mean "immediately" for the purposes of s. 10(b). Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right

immediately upon detention.

[118] To that end, in *R. v. Fan*, 2017 BCCA 99 [Fan], our Court of Appeal examined the practical meaning of the term 'immediately' as used in *Suberu*. The court held that:

[53] "immediate" is not necessarily synonymous with "instantaneous". Sometimes practical considerations play a role in what is immediate for purposes of s. 10(b), particularly with respect to the implementational duty.

[54] A police officer's duty is to facilitate access to counsel upon a detainee's request at the first reasonably available opportunity. If a telephone is available and the detainee asks to speak with counsel, the duty to facilitate access may be engaged.

[55] Where a telephone is available and a detainee asks to speak with counsel, police must grant the request if it would be reasonable to do so. A lack of privacy for the call will not necessarily justify refusal of such a request: *R. v. Luu*, 2006 BCCA 73 at para. 30. On the contrary, failure to give a detainee the option of contacting counsel without privacy may amount to an infringement of s. 10(b), as occurred in *R. v. Bui*, 2005 BCCA 482. The touchstone is reasonableness, given all of the circumstances of the case.

[Emphasis in the original.]

[119] Whether delay in implementing the right to counsel violates s. 10(b) is a factual inquiry; the burden rests on the Crown to show the delay was reasonable in the circumstances: *R. v. Taylor*, 2014 SCC 50 at para. 24 [Taylor], referring to *R. v. Luong*, 2000 ABCA 301 at para. 12.

[120] Once detention ends, the underlying rationale for providing s. 10 rights is no longer present; "when the basis for a brief physical detention is gone, the police should release the detainee, not continue with what would be an unlawful detention for the purposes of advising the detainee of his s. 10 Charter right": *R. v. Corner*, 2023 ONCA 509 [Corner] at paras. 74 and 78.

[121] I will return to a consideration of these legal principles later in my analysis.

Evidence on the Voir Dire

[122] On August 30, 2021, Cst. Pooni detained Mr. Regis at 6:29 a.m. and informed him of his Charter rights at 6:34 a.m. Mr. Regis indicated that he wished to speak to counsel. Following his request, Mr. Regis remained handcuffed in a police car for approximately 12 minutes until Cpl. Manning arrived and directed he be removed. While Mr. Regis was inside the police car, Cst. Pooni took no steps to facilitate a call with counsel.

[123] Cst. Pooni testified that he had a cell phone but was aware that any phone call in the back of his police car would not be private. However, he also testified that he was aware it was possible for Mr. Regis to call a lawyer in the back of a police car, and that he had facilitated such calls when dealing with other detainees.

Position of the Parties

- [124] The Crown submits that given the rapidly unfolding circumstances upon Mr. Regis's unexpected return to the residence, it was reasonable for Cst. Pooni not to provide Mr. Regis with a phone call from the back seat of the police car.
- [125] The defence submits that Cst. Pooni's failure to provide Mr. Regis access to counsel constituted a breach of his s. 10(b) Charter right. Further, they argue the police failure to implement access to counsel was ongoing, as they submit Mr. Regis was detained throughout his encounter with the police until he left the detachment in the afternoon of August 30, 2021.

Analysis

- [126] I have found that Mr. Regis was detained for a short duration, beginning at 6:29 a.m. when Cst. Leith and Cst. Pooni first dealt with him, until he was removed from the police car at Cpl. Manning's direction at 6:46 a.m. The evidence has established that in those 17 minutes, Cst. Pooni took no steps to facilitate Mr. Regis's access to counsel.
- [127] As stated in *Fan*, "immediate is not necessarily synonymous with instantaneous" and practical considerations can factor into what is reasonably available. I am mindful that a police officer's implementation duties are "necessarily limited in urgent or dangerous circumstances": *R. v. Patrick*, 2017 BCCA 57 at para. 112, citing *Taylor* at para. 31. However, as Justice Doherty stated in *R. v. Rover*, 2018 ONCA 745 at para. 33, "the police must actually turn their mind to the specific circumstances of the case" in order for delay to be justified. The difficulty I have with Cst. Pooni's evidence is that it is apparent he never considered how he might facilitate a lawyer call from his police car, despite his testimony that he had done so in other circumstances.
- [128] I cannot agree with the Crown that the dynamics of the situation made it unreasonable for Cst. Pooni to facilitate access to counsel. Cst. Pooni had the situation under control. He had secured Mr. Regis inside his police car, Cst. Leith was attending to the child and senior investigators were en route to the scene. In other words, for those approximately 17 minutes, Cst. Pooni was not occupied with other practical considerations. While Cst. Pooni fulfilled the informational component of s. 10(b), he took no reasonable steps to fulfill the implementational component. I find he never turned his mind to the specific circumstances of the case and why they made it impractical to facilitate a call from the police car. Thus, I find that Cst. Pooni's inaction resulted in a breach of Mr. Regis's s. 10(b) Charter right.
- [129] However, as stated in *Corner*, once detention ends, the underlying rationale for providing s. 10 rights is no longer present. Thus, having found that Mr. Regis's detention ended when Cpl. Manning arrived at the residence, I find that so too did the obligation on the police to facilitate Mr. Regis's access to counsel.

[130] Therefore, I find there was a breach of Mr. Regis's s. 10(b) right to counsel while he sat handcuffed in the back of a police car. I also find that the obligation on the police to facilitate Mr. Regis's access to counsel was brief, and terminated when Cpl. Manning arrived at the scene.

Issue 4: Did Mr. Regis give voluntary and informed consents for both consent searches of the residence?

Governing Legal Principles

[131] Section 8 of the Charter states that "[e]veryone has the right to be secure against unreasonable search or seizure." It protects individuals against unwarranted state intrusions upon their privacy interests.

[132] As stated earlier, a warrantless search is presumed to be unreasonable. The burden is on the Crown to demonstrate on a balance of probabilities that the search was authorized by a reasonable law and carried out in a reasonable manner.

[133] The leading case on the requirements for informed consent to a search is *R. v. Borden*, [1994] 3 S.C.R. 145, 1994 CanLII 63 (SCC) [Borden]. Adopting the framework established by Doherty J.A. in *R. v. Wills*, 7 O.R. (3d) 337, 1992 CanLII 2780 (ON CA) [Wills], Justice Iacobucci described the requirements at 162:

In order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. This is equally true whether the individual is choosing to forego consultation with counsel or choosing to relinquish to the police something which they otherwise have no right to take.

[134] As stated by Doherty J.A. in *Wills*, to establish a valid consent the Crown is required to prove the following six factors on a balance of probabilities:

- (i) there was a consent, express or implied;
- (ii) the giver of the consent had the authority to give the consent in question;
- (iii) the consent was voluntary in the sense that that word is used in *Goldman*, supra, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
- (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

(vi) the giver of the consent was aware of the potential consequences of giving the consent.

Wills at 29.

[135] Justice Doherty explained that the consenting party must be aware of their general role in the investigation, as part of their understanding of the potential consequences of giving consent -- the sixth factor. For instance, they should know whether they are being considered as an accused, suspect or target of the investigation, or simply an innocent bystander. If they are being considered as an accused, suspect or target of the investigation, they must also know the general nature of the charge they may be facing: Wills at 30.

[136] In sum, based on the Wills framework, in order for consent to be valid the Crown must establish, on a balance of probabilities, that the consent was both voluntary and informed. The validity of a waiver is a fact-bound inquiry.

Evidence on the Voir Dire

(i) The August 30, 2021 Search

[137] After the police had searched the residence on the night of August 29, 2021, and the early morning of August 30, 2021, they decided to secure the house for further investigation. During his conversation with Mr. Regis at the detachment, Cst. McNutt told him that he could not return to the house because the police were holding it as part of their investigation. While Mr. Regis expressed concern about not being able to return home, it was evident from the exchange that he understood it was a temporary situation.

[138] After Mr. Regis finished speaking with Cst. McNutt, he left the detachment and Cst. McNutt spoke to his Serious Crime team colleagues about next steps. At that meeting, Cst. McNutt testified, the police determined that they could not continue to hold the residence as they had no evidence of a criminal offence. A decision was made to have Cst. McNutt ask Mr. Regis if he would provide his consent for the police to conduct a search.

[139] Cst. McNutt contacted Mr. Regis by text message and a copy of those text messages is filed as Exhibit #8 on the voir dire. At 4:57 p.m. Cst. McNutt sent a text to Mr. Regis requesting to meet with him so that he could provide him with more information. At 5:16 p.m. Mr. Regis replied to the text, advising he was just leaving the mall after paying for his phone. Mr. Regis then spoke to Cst. McNutt on the phone and agreed to return to the detachment.

[140] At 5:28 p.m. Cst. McNutt met with Mr. Regis in an interview room located in the lobby of the detachment. The audio recording and corresponding transcript of the meeting was marked as Exhibit 9 and 9A. As the meeting began, Mr. Regis provided Cst. McNutt an update on his situation and that of his child. Cst. McNutt told Mr. Regis that he wanted to talk to him about the house and how he could get Mr. Regis back into his house. At page 6 of the transcript Cst. McNutt explained:

Cst. McNutt: Yes. So what we wanna do is we want to search the house and we want your permission so that we can search it.

Mr. Regis: Yeah, yeah.

Cst. McNutt: And look evidence for, for Naomi's sake. To see if there is anything there that might help us -

Mr. Regis: (indecipherable)

Cst. McNutt: -give us information to locate her.

Mr. Regis: Let's go right now.

[141] Cst. McNutt then proceeded to carefully read the consent form to Mr. Regis, ensuring that Mr. Regis understood what each section meant. Cst. McNutt explained "what we are looking for is anything that may assist in locating Naomi Onotera". Cst. McNutt told Mr. Regis that he did not have to provide his consent and the following exchange took place:

Cst. McNutt: Okay? And the thing you have to understand is um, so for you uh, you understand that I, that you are voluntarily giving consent to the police and that it is your right not to have uh, a search conducted by the police

Mr. Regis: Yeah, yeah, yeah.

Cst. McNutt: Of the above noted premises without a search warrant. Does that make sense?

Mr. Regis: That makes sense.

[142] Mr. Regis confirmed that he understood his consent could be withdrawn at any time. Cst. McNutt also explained that the police were looking for evidence that could help them locate Ms. Onotera, but that they might also find something putting Mr. Regis in "an incriminating circumstance". Mr. Regis confirmed he understood and replied "Yeah, let's go to my house". Based on my review of the audio recording of the encounter between Mr. Regis and Cst. McNutt, I am satisfied that Mr. Regis understood the nature of the search, which was to involve the police searching his residence, and his consent was voluntary.

[143] Cst. McNutt then explained to Mr. Regis how the search would take place. He said that the police had a forensics team standing by who would "do some work in your house". Once they were done, Mr. Regis could have his house back. Cst. McNutt stressed that Mr. Regis did not need to consent to the search in order to get his house back. Cst. McNutt stated "I wanna make sure that you understand that um, even if you don't give us that permission, we are gonna give you the house back". When Mr. Regis asked if he could just "skip it", Cst. McNutt again explained "Well, what we are saying is uh, you don't. You can refuse to have police at your house". Cst. McNutt then provided further clarification:

Cst. McNutt: So, so what we are saying is, is I know that we are holding your place but right now there's no uh, nothing to say that a crime has been committed.

Mr. Regis: Yeah, yeah, yeah.

Cst. McNutt: So instead of writing a search warrant for your house. We are just basically saying hey, instead of writing a search warrant, we just wanna have a look in your house to see if we can find anything that's gonna help us locate your wife".

Mr. Regis: Yeah, yeah, yeah.

- [144] As they were talking, Cst. McNutt reviewed each section of the consent form with Mr. Regis to ensure he understood what the implications were. When Mr. Regis indicated that he would return to the house, Cst. McNutt explained to him that the police could not prevent him from doing so, but it would be better for the investigation if he did not enter the house until after the search was conducted. Mr. Regis stated "yeah, yeah, I'm okay with that".
- [145] The meeting ended at 5:56 p.m. Afterwards, Mr. Regis waited in the lobby while Cst. McNutt went to see when the team would be ready. A few minutes later, Cst. McNutt returned and informed Mr. Regis the team would take about an hour to be ready. At that point Mr. Regis decided to leave the detachment and wait to hear when the police were ready, so that he could be at the house for the search.
- [146] Cst. Wood and Cst. Sergeyeva attended at the residence just before 7:00 p.m. to meet with Mr. Regis and attend the search. Also present were Sgt. Burwell and S/Sgt. Cameron of the Forensic Identification Section (FIS). They waited outside the residence for Mr. Regis to arrive.
- [147] At 7:15 p.m. Cst. Wood sent a text message to Mr. Regis asking if he was near the house. At 7:23 p.m. Cst. McNutt sent a text to Mr. Regis advising him the search team was waiting for him outside his house; Mr. Regis responded he would be there in 10 minutes. At 8:05 p.m. Mr. Regis sent the same reply to Cst. Wood.
- [148] Cst. Wood was briefly called away from the residence. When he returned at 8:27 p.m. Mr. Regis had arrived. Cst. Wood was aware that Mr. Regis had signed a consent form, but he reminded him that he could stop the search at any point if he wanted. Mr. Regis acknowledged that he understood he could stop the search and thanked the police for their efforts. While Sgt. Burwell was taking pictures around the yard, Mr. Regis spoke at length with Cst. Wood describing his efforts to add minutes to his phone. Cst. Wood did not enter the residence. Cst. Wood described Mr. Regis as polite, talkative and interested in finding his wife.
- [149] After Sgt. Burwell took photos of the outside of the residence, she entered the residence together with Cst. Sergeyeva. Sgt. Burwell used a flashlight, or "white light", to conduct her visual search of the residence. She explained the "white light" assisted her in locating evidence of blood or biological material. She tested a small red substance on the kitchen sink which indicated negative for blood.

[150] Cst. Sergeyeva seized a silver laptop and an iPad from what she believed to be the master bedroom. As she left the residence, Cst. Sergeyeva confirmed with Mr. Regis that both items belonged to Ms. Onotera.

[151] The search ended at 9:58 p.m. when the police departed the area, leaving Mr. Regis at the residence.

Police contact with Mr. Regis after the August 30, 2021 Search

[152] Mr. Regis remained in contact with Cst. McNutt and other police officers between September 1, 2021 and September 13, 2021. It is evident from the exchanges between Mr. Regis and Cst. McNutt that Mr. Regis was comfortable speaking to the police and assisting them with their investigation. As I will detail, there is nothing to support the suggestion that the police considered Mr. Regis a suspect. The police were continuing a missing person investigation, not a criminal investigation, and Mr. Regis was viewed as a valuable source of information. Mr. Regis continued to be forthcoming with information and entirely cooperative.

[153] On September 1, 2021, Mr. Regis called Cst. McNutt to provide information he had obtained from Ms. Onotera's school. At 7:00 p.m. that evening, Cst. McNutt and another officer spoke to Mr. Regis at his residence regarding the investigation. Mr. Regis signed a consent form to permit the police to search Ms. Onotera's vehicle. Before the vehicle was towed off the property Mr. Regis took photos of the interior. Mr. Regis also gave Cst. McNutt a hairbrush and toothbrush belonging to Ms. Onotera to assist with obtaining a DNA sample. Cst. McNutt also spoke to Mr. Regis about the availability of victim services and a safety plan with respect to some negative online comments posted about Mr. Regis.

[154] On September 2, 2021, Cst. McNutt and Cst. Wilson attended at the residence as Ms. Onotera's car was returned. During that encounter Mr. Regis agreed to the search of the two other vehicles located on the property. Mr. Regis also discussed his general well-being with Cst. McNutt. The next day, on September 3, 2021, Mr. Regis called Cst. McNutt to ask if there were any updates in the investigation.

[155] On September 5, 2021, Mr. Regis called Cst. McNutt seeking advice about attending a candlelight vigil for Ms. Onotera, given concern over comments on social media. Cst. McNutt advised Mr. Regis the police were not aware of any concerns for his safety. Also on September 5, 2021, Cst. Wilson contacted Mr. Regis to discuss obtaining the records for both his and Ms. Onotera's phones. Cst. Wilson was drafting an application under the Missing Persons Act to obtain phone records. Cst. Wilson testified Mr. Regis said he wanted to find his wife and consented to police obtaining the records. Mr. Regis was friendly and co-operative during his discussion with Cst. Wilson.

- [156] On September 6, 2021, Cst. McNutt and Cst. Wood went to the residence at 3 p.m. to ask if Mr. Regis would assist their search by taking them to the walking routes Ms. Onotera would have taken. Mr. Regis was willing to assist but said it would have to be the next day as he had an appointment to see his daughter. They arranged to meet the next day at 8:00 a.m.
- [157] On September 7, 2021, Mr. Regis called Cst. McNutt to reschedule the meeting till 11:00 a.m. that morning. At 10:40 a.m. Mr. Regis sent Cst. McNutt a text stating he was getting ready for their 11 a.m. meeting. At 11:15 a.m. Cst. McNutt and Cst. Wood arrived at the residence. After they spoke to Mr. Regis about how he was doing, they went for a walk through different neighbourhoods in the area. During their walk, Mr. Regis was talkative and friendly. When they returned to the residence, Mr. Regis continued to chat, repeating his description about what he did on the night of August 29, 2021. Later that evening, Cst. McNutt and Mr. Regis exchanged some further text messages regarding the status of Ms. Onotera's passport.

Cst. McNutt and Mr. Regis discuss a second search using a police dog

- [158] On September 9, 2021, Cst. McNutt called Mr. Regis to ask if he would consent to a search of the residence with a police dog. Cst. McNutt explained that Mr. Regis did not have to provide consent, and if he did, he could stop the search anytime. Cst. McNutt told Mr. Regis the dog would be looking for anything that could help the police find Ms. Onotera. Cst. McNutt testified that Mr. Regis seemed "open" to the search, but was concerned about timing because of his work and a scheduled visit with his daughter on September 10, 2021. Cst. McNutt told Mr. Regis he would follow up about scheduling the search.
- [159] On September 10, 2021, at 11:51 a.m. Mr. Regis called Cst. McNutt and they discussed scheduling the search, which was then arranged for September 13, 2021. Cst. McNutt explained that another officer would review the consent form with him, just as they had done before the search of the residence and of Ms. Onotera's vehicle. He reminded Mr. Regis that he could always cancel the search anytime. Throughout their discussions Mr. Regis was friendly, talkative and personable. Cst. McNutt testified that he did not recall explicitly stating the search would be conducted by a cadaver dog and Mr. Regis did not ask any questions.

(ii) September 13, 2021 consent search with the cadaver dog

- [160] In preparation for the anticipated search of the residence and the basement suite, Cst. Wilson prepared consent to search forms. At 11:21 a.m. Cst. Wilson called Mr. Regis and confirmed that he was still consenting to the search that was scheduled for 2:00 p.m. At 1:47 p.m. Cst. Wilson and Cst. Wood arrived at the residence and walked up the driveway. Cst. Wilson saw Mr. Regis in the yard, watering the grass. Mr. Regis immediately walked over to greet Cst. Wilson and Cst. Wood, and they had a brief chat. Mr. Regis appeared emotional and cried a bit as he spoke to the officers about his missing wife.

[161] At 1:53 p.m. Cst. Wilson began to review the consent to search form with Mr. Regis as they stood in the driveway. Cst. Wilson and Mr. Regis both looked at the form as Cst. Wilson reviewed each entry word for word with him. The form stated that Mr. Regis was voluntarily consenting and authorizing the RCMP to search "the house (premises), outbuildings, sheds, lockers, and yard (visually with a Police Service Dog). The goods/items identified were "anything that may assist in locating Naomi Onotera".

[162] The form then stated the following:

I give my consent to this search knowing that:

1. I am under no obligation to consent to this search;
2. If I consent to the search, I maintain my ability to withdraw that consent at any time during the search.

And then:

I fully understand that if any of the goods listed above are found, or if anything else is found that could produce evidence of a criminal, federal or provincial offence, that the items may be subject to seizure, and I may be arrested, charged and prosecuted.

I give this consent voluntarily and have not been coerced, threatened, or promised any advantage by the police of anyone else.

[163] As Mr. Regis read the form, Cst. Wilson asked him if he had any questions. Mr. Regis asked what the word "coerced" meant and Cst. Wilson explained it meant being tricked or persuaded to do something he did not want to do. Mr. Regis said he understood. Cst. Wilson testified that, in addition to reading the words on the form, he also explained to Mr. Regis that the police service dog was a special dog trained to look for human remains. Mr. Regis asked no further questions and he signed the consent form at 1:58 p.m.

[164] During cross-examination Cst. Wilson was vigorously challenged on this aspect of his evidence. When it was suggested to him that he never told Mr. Regis anything about the cadaver dog, Cst. Wilson disagreed. Cst. Wilson acknowledged that he had not noted down the details of what was said anywhere in his notes or reports, but he was adamant that he had informed Mr. Regis about the nature of the search.

[165] Cst. Wood was also challenged on his evidence. He recalled Cst. Wilson reviewing the consent form with Mr. Regis but did not specifically recall a discussion about the cadaver dog. Given that Cst. Wood was not dealing directly with Mr. Regis, I do not consider his evidence as supportive of the defence argument that Cst. Wilson never discussed the matter with Mr. Regis.

- [166] After the form was signed, Mr. Regis, together with Cst. Wilson and Cst. Wood, entered the residence to conduct a dog safety check at the request of the dog handler. After they completed that brief walk through, Cst. Wilson and Cst. Wood exited the residence. Mr. Regis remained inside where he was cooking food.
- [167] Cst. Wilson then proceeded to speak to the basement suite tenant, Mr. Brewer, and obtained a signed consent form from him. Mr. Brewer requested they search his suite first as he was expecting a Telus employee to attend his suite that afternoon.
- [168] Between 2:15 and 2:30 p.m. Cst. Wilson and Cst. Wood waited outside the residence for the police dog service members to arrive. At one point Mr. Regis invited them to wait inside but they declined.
- [169] At 2:31 p.m. S/Sgt. King, Sgt. Whelan and their two police service dogs (PSD Kimber and PSD Kitt) arrived at the residence. Both dogs were cadaver dogs, specifically trained to indicate human remains detection (HRD). S/Sgt. King explained that PSD Kimber indicates olfactory detection of human remains by laying down, with feet front and low posture, as close to the article as she can. S/Sgt. King, Sgt. Whelan, Cst. Wood and Cst. Wilson had a brief discussion outside the residence; they decided that S/Sgt. King and PSD Kimber would remain with Cst. Wilson, while Sgt. Whelan and PSD Kitt would go search nearby parks with Cst. Wood, as the police had received reports from the public that dogs were acting strange in a nearby park.
- [170] S/Sgt. King deployed PSD Kimber onto the property, beginning with the basement suite and then moving into the yard of the residence. Cst. Wilson followed behind S/Sgt. King as PSD Kimber searched through the yard. In the northwest corner of the yard, near a collection of children's toys, there was an electric mitre saw on the grass, plugged in via a cord to the house. PSD Kimber made an indication near the saw. S/Sgt. King looked in the area but did not see anything, so he continued with the search. However, PSD Kimber returned to the area of the saw and gave another indication. S/Sgt. King waived Cst. Wilson over to the area, which was covered in grass and leaves. Cst. Wilson picked up an item near the mitre saw, which he described as some form of material resembling mould. When he examined it more closely he saw that there were strands of hair on the item. Cst. Wilson immediately wondered if it was Ms. Onotera and told S/Sgt. King he thought it was Ms. Onotera or a piece of her skin. During this portion of his testimony Cst. Wilson was visibly upset, and I accept that the discovery of the human remains has had a significant impact on him.
- [171] As S/Sgt. King stood by the item to maintain continuity, Cst. Wilson called his supervisor and it was decided that they required the assistance of the FIS. At 3:05 p.m. Sgt. Burwell called Cst. Wilson and was updated on what he had located. While Cst. Wilson was waiting for FIS members to arrive, Mr. Regis came out of the residence and asked if everything was good, to which Cst. Wilson replied yes but that they were still continuing with the search. Mr. Regis also asked S/Sgt. King if he could search the inside of the house as he had plans and wanted to leave the house. S/Sgt. King then proceeded to do a cursory search inside the

residence and stopped once he saw FIS members had arrived.

- [172] Sgt. Burwell examined the item Cst. Wilson discovered, which tested positive for blood. She then performed another test that revealed the item was presumptively positive for human blood, which meant the item was likely human remains. Sgt. Burwell informed Cst. Wilson of her findings. Sgt. Burwell examined the area and located other pieces of biological material in the grass near the mitre saw. She seized these items in order to preserve them.
- [173] As a result of Sgt. Burwell's findings, Cst. Wilson decided to secure the scene until he could obtain a search warrant. During this period Cst. Wood returned to the residence and was updated by Cst. Wilson. Cst. Wood was directed to inform Mr. Regis he had to leave the residence, but he was not to be detained or arrested.
- [174] Cst. Wood explained to Mr. Regis that the dog had indicated and the FIS testing had identified evidence. Cst. Wood also explained that the police did not believe the consent search was sufficient to allow them to continue, so they were going to stop and seek a search warrant. Cst. Wood did not tell Mr. Regis what they had found but did tell him he would have to leave the property. Mr. Regis said he was willing to dig up the yard to show that Ms. Onotera was not there. Cst. Wood also cautioned Mr. Regis that he did not need to speak to the police, but anything he did say could be used in evidence. Despite the caution, Mr. Regis told Cst. Wood that he had cut his hand on the saw two weeks earlier and that it had bled on the saw.
- [175] After Mr. Regis had collected some personal items, he and Cst. Wood departed the residence. Mr. Brewer, the basement tenant, gave Mr. Regis a ride and they departed the residence just before 6:00 p.m. Cst. Wood arranged for Mr. Regis to stay in the Days Inn in Langley at the RCMP's expense.
- [176] At 7:50 p.m. that same evening, Mr. Regis called Cst. McNutt, concerned about what the police had found at the residence. Cst. McNutt cautioned Mr. Regis about speaking but Mr. Regis insisted on explaining to Cst. McNutt how blood got onto the saw. Following the call there were some text exchanges from Mr. Regis in which he thanked Cst. McNutt for the hotel room.

Mr. Regis's status changed from witness to suspect

- [177] After the discovery at the residence on September 13, 2021, the Integrated Homicide Investigative Team (IHIT) assumed conduct of the investigation. On September 15, 2021, Cst. McNutt was directed to meet with Mr. Regis and advise him that he was no longer considered a witness in a missing person investigation, but was now a suspect in the murder of Ms. Onotera. Cst. McNutt arranged to meet with Mr. Regis at his hotel. Cst. McNutt advised Mr. Regis that he was now a suspect in Ms. Onotera's murder and cautioned him that anything he said could be used as evidence in court. Cst. McNutt also explained that Mr. Regis was not under detention or arrest.

Position of the Parties

- [178] In the Crown's submission, the evidence has established that the consent searches Mr. Regis entered into on August 30, 2021, and September 13, 2021, were both voluntary and informed. Accordingly, the searches complied with the requirements identified in *Wills* and *Borden*.
- [179] The Crown submits that throughout the police's dealings with Mr. Regis, he was treated with respect and sensitivity as the spouse of a missing woman. In addition, they submit Mr. Regis was informed that he did not have to give his consent and he could withdraw the consent at any time. Mr. Regis was also aware that the police were searching for anything that might assist in locating Ms. Onotera. At the relevant time, he was aware of his status in the investigation as a witness, not a suspect.
- [180] The defence submits the Crown has failed to establish on a balance of probabilities that Mr. Regis made voluntary, informed consents. Beginning with the August 30, 2021 consent, the defence argues there were several problems, including the fact that Mr. Regis was not informed of his status, was provided insufficient information regarding the scope of the search and was provided misleading information about obtaining a search warrant. They submit the September 13, 2021 consent was similarly flawed, and in addition, Mr. Regis was not informed the police were using a cadaver dog. They say the flaws with the consent for the August 30, 2021 search carry over and inform the analysis of the validity of the September 13, 2021 consent.
- [181] Counsel have referred me to a number of cases that consider the *Wills/Borden* framework. I have read and considered all of the cases and will refer to some as I conduct my analysis.

Analysis

- [182] I will begin my analysis by considering the first three factors identified in *Wills*. Given that Mr. Regis signed a consent to search form on both occasions, I have no difficulty finding that the consent was in the form of express written consent. I also have no difficulty finding that Mr. Regis had authority to consent, given he shared the residence with Ms. Onotera. Having found that the first two factors are established for both searches, I turn to the issue of voluntariness.

Were the consents voluntary?

- [183] As I have described in considerable detail in these reasons, Mr. Regis's interactions with the police were friendly, non-adversarial and respectful. Mr. Regis was keen to speak to the police and assist them in their investigation into his missing spouse. Indeed, on numerous occasions the police requested that Mr. Regis stop talking so they could inform him of what was transpiring. When Cst. McNutt first raised the issue of searching the house on August 30, 2021, Mr. Regis responded "let's go". While Cst. McNutt needed to clarify with Mr. Regis that the police would prefer to conduct the search without him in the house, he also

stressed that Mr. Regis could always withdraw his consent. I find that Mr. Regis clearly understood and agreed to the search. There is nothing in the evidence to support the defence submission that Mr. Regis was confused or reluctant to provide his consent.

[184] I reach the same conclusion regarding the September 13, 2021 consent. Mr. Regis was not prepared to accommodate the request to have the search take place on September 10, 2021, because of his personal commitments, and negotiated another more convenient date. This demonstrates that he felt he was able to make a choice about when, and indeed if, the search would be conducted.

Did Mr. Regis have sufficient information regarding the nature of the search?

[185] Defence counsel submit that on both occasions, Mr. Regis was provided insufficient information regarding the nature of the proposed search. With respect to the August 30, 2021 search, they submit Mr. Regis was not told what a forensics team would do during the search. Further, they say the reference to searching for "anything that may assist in locating Naomi Onotera" was deliberately vague. Similarly, with respect to the September 13, 2021 search, the defence submits the police did not inform Mr. Regis that they would be using a cadaver dog to search for human remains, nor that the dog would be conducting an olfactory search specifically.

[186] On August 30, 2021, Cst. McNutt told Mr. Regis how the search would be conducted. After Mr. Regis said "Yeah, let's go to my house", Cst. McNutt took time to explain to Mr. Regis that they would be looking for evidence that could assist them in locating Ms. Onotera, and that a forensics team would do some work inside the house. When Mr. Regis asked if he could be in the yard while the search was being conducted, Cst. McNutt explained that the forensic team would first take pictures and then proceed to go through the rooms of the residence. Defence counsel submit it was incumbent on the police to provide more detail regarding what the forensic team would be doing.

[187] I do not agree that Mr. Regis had insufficient information regarding the nature of the August 30, 2021 search. At the relevant time, the police were not investigating a crime and therefore had no reason to believe that any evidence would be located inside the residence. Accordingly, they were not in a position to provide further information about the nature of what they might find. All the police knew was that Ms. Onotera was missing; thus, they wanted to search the residence for anything that might assist in locating her. That is exactly what Mr. Regis was told. Further, when Cst. McNutt mentioned the use of a forensic team, Mr. Regis did not ask for clarification. Based on my review of Mr. Regis's encounters with the police, he was not hesitant to assert himself or ask for clarification when needed. I am satisfied that Mr. Regis did not require any further clarification regarding what a forensic team would do.

[188] I find the decision in *R. v. Tom*, [1995] B.C.J. No. 3009 (S.C.) [Tom] to be instructive. In *Tom*, Mr. Tom contacted the police to provide information in a murder investigation. After the police had taken a statement from Mr. Tom, they asked if they could take his clothes to have

them checked, explaining that they thought a stain on his shirt might be blood. Mr. Tom was told that if the blood on his shirt matched that of the deceased, he might become the prime suspect. At trial, Mr. Tom challenged the validity of the consent because he was not informed of the precise types of tests to be performed on his clothing. In rejecting this argument, Justice Brenner (as he then was) held at para. 84:

To satisfy this knowledge requirement the accused must know the general nature of the police investigation and purpose in taking the item. In my view an accused need not be told specifically what type of testing (serological, DNA, or otherwise) is going to be done with that item

[189] On August 30, 2021, the police did not know what they would find during the search. Mr. Regis was informed that a forensics team would conduct the search, but the police were in no position to detail what the specific type of testing might occur because they did not know what might be located. As in Tom, the critical issue is not whether a person knew the specific type of testing that would be done, but rather that they knew any item located in the search could be used to acquire evidence against them. I find that Mr. Regis had sufficient information regarding the nature of the search and the possible implications if evidence was found.

[190] Turning to the September 13, 2021 search, I am satisfied that Mr. Regis was provided sufficient information regarding the nature of the search. The consent form stated that the search for anything that might assist in locating Ms. Onotera would be conducted with a police service dog. I see no merit in the defence argument that the form is deficient because it does not explicitly state that the dog would be conducting an olfactory search for human remains. As in Tom, where it was not necessary to inform of the specific type of testing to be conducted on Mr. Tom's clothes, it was not necessary here for the police to explain to Mr. Regis that the dog would use her nose to search for human remains.

[191] I accept Cst. Wilson's testimony that he told Mr. Regis that the police service dog was trained to look for human remains. While Cst. Wilson did not have a specific note of doing so, I found him to be a credible witness who carefully detailed what occurred prior to and during the search. The lack of notes on this particular issue does not detract from either the reliability or credibility of Cst. Wilson's evidence. I accept Cst. Wilson's evidence. Thus, I find that Mr. Regis knew the dog was looking for human remains, and that the discovery of such evidence could be incriminating. Accordingly, I find that Mr. Regis was sufficiently informed of the nature of the search and he made an informed decision to consent.

Did Mr. Regis know he could refuse to permit the police to search the residence?

[192] I find the police informed Mr. Regis that he could refuse to consent, and that he could withdraw his consent and stop the search at any time. Cst. McNutt, and subsequently Cst. Wilson, explained to Mr. Regis that he did not have to agree to a police search. Both times Mr. Regis acknowledged he understood.

- [193] The defence has referred me to isolated exchanges between Mr. Regis and Cst. McNutt to support their submission that Mr. Regis was confused, misinformed and reluctant to provide his consent to the August 30, 2021 search. I do not agree. The problem with the defence approach is that they urge me to read a few lines in isolation and out of context of the overall exchange. In my view, to do so distorts the reality of what had unfolded. As I have said, when considered in its totality it is clear that Mr. Regis understood the search was voluntary, he could refuse to permit the police to search and could stop the search at any time.
- [194] The defence also argues that on August 30, 2021, Mr. Regis agreed to the search only after the police provided misleading information regarding a search warrant. They rely on *R. v. O'Connor*, 62 O.R. (3d) 263, 2002 CanLII 3540 (ON CA) [O'Connor] to support their position.
- [195] In *O'Connor*, the police were conducting a murder investigation in which Mr. O'Connor was a suspect. The police knew they did not have sufficient grounds to arrest him or apply for a search warrant, but they wanted to search his truck. Armed with a consent form, two police officers attended at Mr. O'Connor's residence intending to get Mr. O'Connor to consent to the search. Despite their repeated requests to search the truck, Mr. O'Connor declined, stating he wanted to think about it. Rather than accept Mr. O'Connor's refusal, the police told Mr. O'Connor that they could seize the vehicle without his consent if they applied for a search warrant and one was authorized. After, the police told him that if they obtained a search warrant, they could take his truck "at a time that wasn't convenient for him": at 284. Mr. O'Connor signed the consent form.
- [196] On appeal, the Court found that it was not necessary for the police to advise Mr. O'Connor that they did not have the grounds to obtain a warrant. However, once the police raised the issue of a search warrant application, the obligation on the police changed. As the Court explained at 286:

I agree with the Crown that in seeking the appellant's consent to search his truck, it was not necessary for the police officers to advise the appellant that they did not have the grounds to obtain a warrant. There would have been no problem if the police had not raised the subject of a warrant. However, once they chose to raise the matter, it was incumbent upon them to fully and fairly apprise the appellant of the correct situation, including the fact that they did not have sufficient grounds to obtain a warrant. Not only did they not do this, they described the situation in a way that likely led the appellant to believe that they could obtain a warrant. For that reason alone, I conclude that the appellant's consent was not valid to waive his rights under s.8 of the Charter.

- [197] The Court found that Mr. O'Connor was likely led to believe, because of the wording of the police, that they could obtain a warrant to search his truck, and that his misunderstanding invalidated his consent.

[198] The defence submits that the following exchange between Cst. McNutt and Mr. Regis demonstrates that Mr. Regis was similarly misled:

Cst. McNutt: So, so what we are saying is, is I know that we are holding your place but right now there's no uh, nothing to say that a crime has been committed.

Mr. Regis: Yeah, yeah, yeah.

Cst. McNutt: So instead of writing a search warrant for your house. We are just basically saying hey, instead of writing a search warrant, we just wanna have a look in your house to see if we can find anything.

Mr. Regis: Yeah.

Cst. McNutt: -that's gonna help us locate your wife.

Mr. Regis: Yeah, yeah, yeah.

[199] In my view, the above-noted exchange can easily be distinguished from what occurred in O'Connor. In O'Connor, when Mr. O'Connor told the police he would not consent to them taking his truck, they told him they could seize it with a search warrant. It is only after the police raised the possibility of a search warrant that Mr. O'Connor agreed and signed the consent form.

[200] As noted above, the reference to a search warrant was raised with Mr. Regis in a much different context. Earlier in their discussion, Cst. McNutt had repeatedly told Mr. Regis that he did not have to consent to the search. For example, Cst. McNutt told Mr. Regis "I can't say yeah, we are coming in no matter what. You have a say". As Mr. Regis was signing the consent form, Cst. McNutt continued to explain that he did not have to allow the police into his residence and could stop the search at any time. When Mr. Regis said "so I can just skip, skip it", Cst. McNutt repeated that he could refuse to have police at his house. It is then that Cst. McNutt provided the explanation noted above.

[201] Read in the proper context, Cst. McNutt's reference to a search warrant was to explain why the police needed Mr. Regis's consent to enter the house and not, as the defence suggests, to leave Mr. Regis with the understanding that the police could obtain a search warrant. In contrast, Mr. O'Connor was persuaded to consent to a search only after the police told him that they could apply for a search warrant. I am satisfied that there was nothing misleading in the exchange between Cst. McNutt and Mr. Regis that would have led Mr. Regis to believe that the police could obtain a search warrant and search the residence even if he did not consent. The reference to the search warrant did not vitiate Mr. Regis's consent.

Was Mr. Regis aware of the potential consequences of giving the consent?

- [202] The defence argues that the police deliberately misled Mr. Regis regarding his position within the investigation. In support of their position, they point to the inconsistency between Cst. McNutt's testimony, in which he said Mr. Regis was not a suspect, and the contents of his Task Action Report dated August 31, in which he wrote "at the time he was a suspect".
- [203] I acknowledge that the contents of the report are puzzling when compared to Cst. McNutt's evidence on the voir dire, but I am not prepared to reject Cst. McNutt's evidence. Cst. McNutt provided his testimony in a careful fashion. He was forthcoming when he did not recall certain details and did not attempt to embellish his evidence. He acknowledged the discrepancy between his evidence and what was written in his task action report. However, when pressed, Cst. McNutt maintained his position that he considered Mr. Regis a witness. I accept his evidence.
- [204] The defence also points to the fact that Cst. McNutt conducted a five-and-a-half-hour interview with Mr. Regis on August 30, 2021, as a further indication he considered Mr. Regis a suspect. I disagree. It is readily apparent from a review of the interview that the length was because Mr. Regis wanted to keep talking. Indeed, as discussed earlier, it was essentially a monologue by Mr. Regis. Neither the length of the interview, nor how it was conducted, support a finding that Mr. Regis was a suspect.
- [205] The defence also referred to the evidence of other investigators to illustrate that the police considered Mr. Regis a suspect. I see no merit in this submission. For example, the fact that Sgt. Cheung said he regarded the circumstances at the residence as suspicious does not equate to Mr. Regis being a suspect. At the relevant time, the police did not know where either Mr. Regis or Ms. Onotera were, nor were they investigating a crime. The disappearance of Ms. Onotera, Mr. Regis and their child could reasonably be viewed as suspicious but nothing more. Similarly, the fact that Cst. Price said he searched for bodies in the residence does not equate to Mr. Regis being a suspect in a criminal offence. Again, the police had no information that a crime had been committed. In addition, I do not find any basis to conclude that the decision of the police to secure the residence indicated Mr. Regis was a suspect. Indeed, at the time that decision was made, Mr. Regis and the child were also missing.
- [206] As I have already discussed, Mr. Regis was informed that he was not a suspect. He was also informed that if a search located incriminating evidence, his status might change. At the relevant time, the police were conducting a missing person investigation and Mr. Regis was considered a witness who could assist the police in determining the whereabouts of Ms. Onotera. While the police may have considered the circumstances suspicious, that did not render Mr. Regis a suspect. To reiterate, the police were not investigating a crime nor did they have any reason to believe an offence had been committed. Thus, there is no basis to conclude that they considered Mr. Regis a suspect in a criminal offence.

[207] Having considered all of the circumstances, I find that Mr. Regis was aware that his role in the investigation was that of a witness and he also understood the potential consequences of providing the consent to search the residence.

[208] In conclusion, I find that the Crown has established on a balance of probabilities that Mr. Regis's consents to search his residence, on both August 30, 2021, and September 13, 2021, were voluntary and informed. Accordingly, neither of the searches breached Mr. Regis's s.8 Charter rights.

Conclusion

[209] In summary, my findings are as follows:

- (1) The warrantless entry into the residence lasting from August 29 to August 30, 2021, was not authorized by law and is accordingly in breach of s. 8 of the Charter.
- (2) The Crown has conceded that Mr. Regis's initial detention by Cst. Pooni was arbitrary and in breach of s. 9 of the Charter. I find that after the initial detention, Mr. Regis was no longer detained by the police.
- (3) I find a s. 10(b) Charter breach during Mr. Regis's detention on the morning of August 30, 2021.
- (4) I am satisfied that the Crown has established on a balance of probabilities that the consent searches on August 30, 2021, and on September 13, 2021, were valid. Therefore, these searches do not constitute a breach of s. 8 of the Charter.

"Devlin 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/24/00/2024BCSC0007.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-regis-2024-bcsc-7>

Prepared on 25 October 2026 · Esheria