
CANADA / JUDGMENT

R. v. Tan

2010 BCSC 1948

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1948 R. v. Tan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tan,

2010 BCSC 1948

Date: 20101215

Docket: 24821

Registry: Vancouver

Regina

v.

Kien Beng Tan

Ban on Publication pursuant to s. 486.5 of the C.C.C. with respect to information that may identify the undercover officer

Before: The Honourable Mr. Justice Savage

Oral Ruling on Voir Dires Nos. 1, 2 and 4

Counsel for the Accused:

E. Lewis

N. Reithmeier

Counsel for the Crown:

G.A. Weber, Q.C.

S. Smith

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 29-30, 2010,

December 1-3, 6-10, 13-14, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 15, 2010

I. Introduction

- [1] These applications arise during the course of trial.
- [2] The accused, Kien Beng Tan ("Tan"), applied for certain voir dres to determine whether the Royal Canadian Mounted Police (the "RCMP") breached his rights under the Canadian Charter of Rights and Freedoms (the "Charter") in the course of an investigation which led to the accused being charged with second-degree murder. The Crown opposed the applications, saying the information is not evidence and the manner in which it was collected has no bearing on the real issues before the Court.
- [3] Tan also applied for a voir dire to determine whether to exclude evidence obtained during a cell mate plant operation (the "Cell Plant Evidence"). The Crown conceded that this was properly the subject of a voir dire and the relevant evidence has been heard.
- [4] These Reasons relate to the two applications for voir dres and the application to exclude evidence which is Voir Dire No. 4.
- [5] Tan says that there are at least four breaches of his Charter rights arising from the police investigation:
 - 1. Records including registration and telephone records concerning Tan which were obtained from the Comfort Inn without a warrant (the "Hotel Registration Records" and the "Hotel Telephone Records");
 - 2. Airline Ticketing Information concerning Tan were obtained from Campbell Travel without a warrant (the "Airline Ticketing Information"). Those matters are both the subject of the application for Voir Dire No. 1;
 - 3. Fingerprints were obtained from Tan while he was in Malaysia in 2006 (the "Malaysian Fingerprints"). That matter was the application for Voir Dire No. 2; and
 - 4. There was a warrantless interception of his private telephone conversation without prior judicial authorization (the "Telephone Wiretap").

- [6] I do not understand at this point for that last matter to be an issue before me. As I understand it, counsel refer to that in the context of there being a pattern that I should consider and I have considered it only in that aspect.
- [7] With respect to the Cell Plant Evidence, Tan argues that the evidence regarding such (1) fails to meet threshold reliability, because of woefully inadequate translation, (2) the Cell Plant Evidence is hopelessly tainted by the acts of interrogation by another officer, and (3) the statement was elicited in circumstances which were functionally equivalent to an interrogation.

II. Applications for Voir Dires

A. General Discussion

- [8] With respect to these applications, both the Crown and Tan referred the Court to the seminal case of *R. v. Vukelich*, 78 B.C.A.C. 113, [1996] B.C.J. No. 1535 (B.C.C.A.), leave to appeal to S.C.C. refused, [1997] 2 S.C.R. xvi (S.C.C.) (cited to B.C.J.). In that case McEachern C.J.B.C., discussed the procedure to be followed and remonstrated that courts must be decisive in their determination. The Chief Justice said:
- [16] I digress to mention the question of the proper procedure for seeking a voir dire to determine the admissibility of evidence either for Charter or other purposes. All of the authorities assume full Crown disclosure as required by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
- [17] Generally speaking, I believe that both the reason for having, or not having, a voir dire, and the conduct of such proceedings, should, if possible, be based and determined upon the statements of counsel. This is the most expeditious way to resolve these problems: see *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49 at 62 (Ont. H.C.); *R. v. Hamill* (1984), 14 C.C.C. (3d) 338 (B.C.C.A.); and *R. v. Kutynec* (1991), 70 C.C.C. (3d) 289 at 301 (Ont. C.A.). I suggest that judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these kinds of enquiries.
- [9] In *Vukelich* the accused argued that in every case where the constitutionality of a search warrant is in issue a voir dire must be held. The court disagreed:
- [24] On the merits of this ground of appeal, Mr. Bolton argued that whenever the constitutionality of a search warrant is challenged, the trial judge must conduct a voir dire in order to give a party whose premises have been searched an opportunity to cross-examine the deponent. This is particularly the case, he says, when it is alleged that the affidavit is false and misleading to the knowledge of the deponent. The Crown, on the other hand, argued on the basis of cases such as *Grant*, [1993] 3 S.C.R. 223; (1993), 84 C.C.C. (3d) 173 (S.C.C.) and some dicta in *Garofoli*, [1990] 2 S.C.R. 1421; (1990), 60 C.C.C. (3d) 161 (S.C.C.) that the contents of the Information were sufficient to support the warrant even if all the impugned material were expunged.

[25] Counsel referred to many authorities, including Grant, Garofoli, Feldman, Hamill, Kutynec, all supra, and Loveman (1992), 71 C.C.C. (3d) 123 (Ont. C.A.), Sismey (1990), 55 C.C.C. (3d) 281 (B.C.C.A.), Dellapenna (1995), 62 B.C.A.C. 32 (C.A.), (Belair) Bisson v. Attorney General of Canada (1994), 94 C.C.C. (3d) 94 (S.C.C.) and several others. With respect, I do not think it is necessary to review those authorities, although Garofoli, Feldman, and Hamill, in particular, provide useful guidance. I find it necessary to quote only a passage from Hamill, which was quoted with approval in both Kutynec and Feldman. In Hamill, Esson J.A., at pp. 366-7 said this:

It is not in every case in which an accused applies to exclude evidence under s. 24(2) that it will be necessary to conduct an inquiry as to the reasonableness of the search, or that it will be necessary to hear evidence at all. Where an accused applies for an order to exclude evidence on the ground that there has been a breach of s. 8 of the Charter, the onus is on him to assert and establish:

1. that the evidence was obtained in a manner which infringed or denied his right to be secure against unreasonable search or seizure;
2. that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute.

In those cases where the accused does apply to exclude the evidence, it will be for the trial judge to decide what procedure should be followed but, at the least, counsel for the accused should be required to state with reasonable particularity the ground upon which the application for exclusion is made. That much is essential for an orderly trial of the issue. It follows that, if the statement of grounds does not disclose a basis upon which the court could make an order excluding the evidence, the application may be dismissed without hearing evidence.

[26] Based on these authorities, it does not follow that an accused is always entitled as of right to a voir dire in the course of a criminal trial in order to challenge the constitutionality of a search. The trial judge must control the course of the proceedings, and he or she need not embark upon an enquiry that will not assist the proper trial of the real issues. I reach that conclusion because it is clear from cases such as Grant and Garofoli that a warrant remains valid if there is enough left in the supporting affidavit to support the issuance of the warrant after all the impugned portions are deleted. In other words, the trial judge does not revisit the application for the warrant ab initio in the light of subsequent information, but rather considers whether, as stated in Garofoli at 1452, "... there continues to be any basis for the decision of the authorizing judge" to issue the warrant.

[10] Similar reasoning applies when a court must determine whether to embark on a voir dire for other alleged Charter violations. The defence must establish that there is some basis on which to require a voir dire.

[11] The Ontario Superior Court expressed the threshold in this manner in R. v. Tash, 166 C.R.R. (2d) 358, 2008 CarswellOnt 245 (Ont. S.C.J.) (citing to CarswellOnt):

- [23] ...In any given case, as said, the trial court may decline to hear a Charter application where, on balance, and having regard to all relevant circumstances such as the degree of non-compliance, the measure of prejudice to the Crown, the degree of disruption in the proceedings, the history of the litigation, and the absence of any real indication of a prospect of success on the application, justice and fairness to all parties justifies such a disposition
- [12] In the passage quoted from Hamill, Esson J.A., tied the requirement for a voir dire to the exclusion of evidence. In this case, however, apart from the Hotel Registration Records, none of the impugned information is sought to be introduced as evidence. Tan says, however, there is a connection between the Charter breaches and the evidence relied upon by the Crown. Moreover, the nexus indicates a pattern of the police ignoring Tan's Charter rights.
- [13] Relying on *R. v. Wittwer*, 2008 SCC 33, Tan says that in determining whether evidence should be excluded flowing from Charter breaches, one must apply a purposive and generous approach, considering temporal, contextual and causal connections between the breach and evidence:
- [21] In considering whether a statement is tainted by an earlier Charter breach, the courts have adopted a purposive and generous approach. It is unnecessary to establish a strict causal relationship between the breach and the subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: Strachan, at p. 1005. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three": *R. v. Plaha* (2004), 189 O.A.C. 376 (Ont. C.A.), at para. 45. A connection that is merely "remote" or "tenuous" will not suffice: *R. v. Goldhart*, [1996] 2 S.C.R. 463 (S.C.C.), at para. 40; *Plaha*, at para. 45.
- [14] Subsequent searches and evidence gathering may be tainted by illegal warrantless searches which are part of the same investigatory transaction: *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173 and *R. v. Lauriente*, 2010 BCCA 72.
- [15] As I have said, the onus is on the defence to demonstrate that there is a basis on which I can find that holding a voir dire might assist to resolve an issue before me. This is a threshold test; at this point the defence does not have to establish each breach Tan alleges, however, the question of whether impugned conduct might constitute a breach is a central question, as is its purported relation to the issues before the Court.

B. Alleged Breaches

1. Hotel Registration Records & Airline Ticketing Information

- [16] During the course of their investigation police officers obtained Hotel Registration Records related to Tan's stay at the Comfort Inn. The evidence of the Hotel Registration Records indicates his presence there between May 3 and May 6, 2004. The Hotel Registration Records were introduced into evidence, but this was supplemented viva voce evidence.
- [17] The Airline Ticketing Information is not introduced into evidence.
- [18] Tan argues that these information gathering techniques were breaches of his s. 8 Charter right to be free from unreasonable search and seizure.
- [19] The principal purpose of s. 8 is to protect an accused's expectations of privacy against unreasonable intrusion by state actors: *R. v. Law*, 2002 SCC 10. Therefore before he can establish that his s. 8 rights were breached, an accused must establish that he had a reasonable expectation of privacy in the subject matter of the search: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.
- [20] In the present case, to establish a s. 8 breach on the ultimate voir dire, Tan would have to establish that he had a reasonable expectation of privacy in the Hotel Registration Records, the Hotel Telephone Records, the Airline Ticketing Information and the telephone call to his father recorded by the police which was the subject of the Telephone Wiretap. Both parties advanced threshold arguments on the basis of whether Tan had a reasonable expectation of privacy in the records and information.
- [21] Tan relies on *R. v. Duong*, [2006] O.J. No. 3524. This is an oral judgment, which appears to be made *niis prius*. The court there held that the renting of a motel room and filling out of a registration form gave rise to a very high expectation of privacy. The warrantless search of such records attracted the protection of section 8 of the Charter. The case was followed in *R. v. Poloni*, 2006 BCPC 611, a decision of a provincial court judge.
- [22] The Crown says these cases are wrongly decided. Neither is binding on me. The Crown cites *R. v. Chehil*, 2009 NSCA 111, a decision of the Nova Scotia Court of Appeal, where viewing electronic records of airline ticketing information was held not to be a breach of a privacy right. *Chehil* is a recent decision of a provincial appellate court.
- [23] In *Chehil* the court applied the "totality of the circumstances" analysis mandated in *R. v. Patrick*, 2009 SCC 17 in concluding that there was no section 8 breach of the Charter. The considerations enumerated in *Patrick* include the nature or subject matter of the evidence, the interest in the evidence, the subjective expectation of privacy, and whether the expectation is objectively reasonable.
- [24] Here the nature or subject matter of the Hotel Registration Records and Airline Ticketing Information concern public events on commercial or public property. The accused, of course, has an interest in those records.

- [25] The question arises whether Tan is presumed to have had an expectation of privacy in relation to the Hotel Registration Records and Airline Ticketing Information. In this case the information, excepting the Hotel Telephone Records, does not emanate from a residence, but from records evidencing primarily open events: hotel registration and check out, and airline ticket purchase. There are also statutory provisions.
- [26] In British Columbia there is a requirement to keep records, including dates of arrival and departure, under section 2 of the Hotel Guest Registration Act, R.S.B.C. 1996, c. 205. By s. 3 such records must be open to the inspection of a constable, "at all times". The provisions of what is now the Hotel Guest Registration Act were first enacted in 1937 in the Auto Camp and Hotel Guest Registration Act, R.S.B.C. 1937, c. 3. While the wording differed, s. 3 did require the hotel keeper to keep certain information and s. 5 required that that information be made available to a constable.
- [27] While the place where the alleged search occurred may be germane, in this case the Hotel Registration Records and Airline Ticketing Information were obtained from commercial concerns. Here, as in *Chehil*, there was no intrusion into a home, private real property, or private personal property.
- [28] The question arises as to the informational content of the subject matter of the records. In this case, as in *Chehil*, the informational content of the Hotel Registration Records and Airline Ticketing Information, were matters in public view. As Binnie J., wrote in *R. v. Tessling*, 2004 SCC 67, at para. 40, "...a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public..."
- [29] In this case neither the methods used by the police, requesting information from commercial businesses, nor their evidence gathering techniques are suggested to be problematic or unreasonable. It is not suggested by that, there was trickery or something surreptitious in the police actions. It is not suggested that the informational content exposed any intimate details of Tan's lifestyle or information of a biographic nature.
- [30] In my view, considering the totality of circumstances, as required by Patrick, I am not satisfied that there could be a reasonable expectation of privacy in connection with the Hotel Registration Records and Airline Ticketing Information. In the circumstances, the threshold requirement for mandating a *voir dire* in connection with this information is not met, as no breach could be made out.
- [31] Absent a finding the RCMP breached Tan's Charter rights when they obtained these records, these actions cannot form part of a pattern of breaches, as alleged by the defence. Therefore proceeding with a *voir dire* on this issue cannot assist me in determining the admissibility of the other evidence.

2. Malaysian Fingerprints

- [32] In 2006 Corporal Ferriera and Wellington arranged to meet with the Royal Malaysian Police ("RMP"), travelled to Malaysia, met with officials from the RMP in Kuala Lumpur and then interviewed Tan in Penang. They also obtained fingerprints from Tan in Penang. There is evidence that at some point prosecution counsel in Canada considered the events in Malaysia would not pass Charter scrutiny.
- [33] Counsel for Tan cross-examined the Canadian investigating officers at length regarding matters informing Malaysian sovereignty. They sought to demonstrate that Canadian law applied in the circumstances so as to open the Malaysian interview and the Malaysian Fingerprints to Charter scrutiny.
- [34] Despite that very capable cross-examination, in my view it established no more than the officers intended that their actions, and those of anyone else during the process, in relation to Tan would pass Charter scrutiny. The officers were acting under the authority of the RMP and the applicable law was Malaysian law, i.e., the RMP made it clear that Tan could only be questioned if he consented to such questioning, could only be questioned where he wanted to be questioned, and regardless of the outcome of the questioning, Tan was not subject to arrest.
- [35] At the time of these events the accepted law in Canada on the extra-territorial operation of the Charter is that reviewed in *R. v. Cook*, [1998] 2 S.C.R. 597, 57 B.C.L.R. (3d) 215. In *Cook* the court held that the Charter applies to the actions of Canadian police interviewing an accused in the United States, and its application there did not interfere with the sovereign authority of the United States. The law in *Cook*, however, was reconsidered by the Supreme Court of Canada in *R. v. Hape*, 2007 SCC 26.
- [36] In *Hape* the majority concludes that the Charter does not apply to the actions of police officers who are operating on the territory of other states except in exceptional circumstances. Those exceptional circumstances are that the foreign state grants permission for Canadian law to be applied on its territory. This is supported by a consideration of section 32 of the Charter, which in its relevant respect restricts the Charter's territorial reach and limits to matters "...within the authority of Parliament..." This is consistent with the reasoning in *R. v. Terry*, [1996] 2 S.C.R. 207, 135 D.L.R. (4th) 214 and *R. v. Harrer*, [1995] 3 S.C.R. 562, 128 D.L.R. (4th) 98.
- [37] In my opinion, the evidence falls well short of establishing even a *prima facie* case that there was agreement to apply Canadian law. The Crown raises, quite rightly in my view, the fact that the actors here are simply police officials operating on the ground floor. There is no suggestion of any diplomatic accord, or agreement between authorized government officials. The majority in *Hape* discusses the issue generally as follows:
- [63] In the classic example, Parliament might pass legislation making it a criminal offence for Canadian nationals to smoke in the streets of Paris, thereby exercising extraterritorial prescriptive jurisdiction on the basis of nationality. If France chooses to contest this, it may have a legitimate claim of interference with its territorial sovereignty, since Canada's link to

smoking on the Champs-Élysées is less real and substantial than that of France. France's territorial jurisdiction collides with Canada's concurrent claim of nationality jurisdiction. The mere presence of the prohibition in the Criminal Code of Canada might be relatively benign from France's perspective. However, France's outrage might be greater if Canadian courts tried a Canadian national in Canada for violating the prohibition while on vacation in Paris. It would be greater still if Canadian police officers marched into Paris and began arresting Canadian smokers or if Canadian judges established a court in Paris to try offenders.

- [64] This example demonstrates the nuances of extraterritorial jurisdiction. It is not uncommon for states to pass legislation with extraterritorial effects or, in other words, to exercise extraterritorial prescriptive jurisdiction. This is usually done only where a real and substantial link with the state is evident. Similarly, comity is not necessarily offended where a state's courts assume jurisdiction over a dispute that occurred abroad (extraterritorial adjudicative jurisdiction), provided that the enforcement measures are carried out within the state's own territory. The most contentious claims for jurisdiction are those involving extraterritorial enforcement of a state's laws, even where they are being enforced only against the state's own nationals, but in another country. The fact that a state has exercised extraterritorial prescriptive jurisdiction by enacting legislation in respect of a foreign event is necessary, but not in itself sufficient, to justify the state's exercise of enforcement jurisdiction outside its borders: F.A. Mann, "The Doctrine of International Jurisdiction Revisited After Twenty Years", in W. M. Reisman, ed., *Jurisdiction in International Law* (1999), 139, at p. 154.
- [65] The Permanent Court of International Justice stated in the *Lotus* case, at pp. 18-19, that jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". See also Cook, at para. 131. According to the decision in the *Lotus* case, extraterritorial jurisdiction is governed by international law rather than being at the absolute discretion of individual states. While extraterritorial jurisdiction -- prescriptive, enforcement or adjudicative -- exists under international law, it is subject to strict limits under international law that are based on sovereign equality, non-intervention and the territoriality principle. According to the principle of non-intervention, states must refrain from exercising extraterritorial enforcement jurisdiction over matters in respect of which another state has, by virtue of territorial sovereignty, the authority to decide freely and autonomously (see the opinion of the International Court of Justice in the *Military and Paramilitary Activities* case, at p. 108). Consequently, it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law. See Brownlie, at p. 306; Oppenheim's *International Law*, at p. 463. This principle of consent is central to assertions of extraterritorial enforcement jurisdiction.

- [38] As noted in Hape at para. 117 "[a] cooperative effort involving police from different countries "does not make the law of one country applicable in the other country": Terry, at para. 18." A cooperative effort, in any event, does not give rise to conferring jurisdiction for enforcement, which the court in Hape finds necessary for a matter to fall within the authority of Parliament and the provincial legislatures: Hape, para. 69.
- [39] It is suggested that because of the majorities involved in the respective decisions, Hape cannot and does not overrule Cook. The Supreme Court of Canada in Hape is expressly reconsidering Cook. If Cook is not expressly or impliedly overruled it must be considered by this trial court to be confined to its own facts.
- [40] In the circumstances, as the Charter has no extra-territorial application, and there is no evidence of an agreement to apply the Charter extra-territorially between Canada and Malaysia, no breach of a Charter right can be shown by the events in Malaysia. It therefore is unnecessary to hold a voir dire regarding the obtaining of the Malaysian Fingerprints.

3. Telephone Wiretap

- [41] This alleged Charter breach, which is said to form part of a pattern, arises because, during the course of an interview between Sergeant Dhillon and Tan, Tan determines to speak to his father. Tan is in an interview room at the Richmond RCMP detachment.
- [42] Sergeant Dhillon had earlier warned Tan that his interview was being recorded. He then warns Tan that their conversation was being recorded. This reiterates earlier warnings. The Crown does not seek to have admitted the conversation between Tan and his father, and that portion has been deleted from the transcript, and the video was not viewed by the court.
- [43] The interview with Sergeant Dhillon produced the following exchange (Exhibit F on the third voir dire at page 242):

Dhillon: ...What do you want to do?

Tan: I will talk to my father.

Dhillon: Okay. Um, you're gonna tell him the truth? You should right. Okay, um, let me arrange that. How we can make that long distance call, so you can talk to your dad. Um, okay, and I really, I told you before, and I want you to, to know this, that um, and I told you this back in Antwerp, okay, that everything you do with the police is recorded right. You remember that...

Tan: Yeah.

Dhillon: Okay, the only time we don't record you is when you talk to your lawyer.

Tan: Mmm-hmm.

Dhillon: Do you remember that? Okay, so uh, and you seen me with the recorder everywhere, right?

Tan: Mmm hmm.

Dhillon: So, everything here is also recorded. So, I want you to know your conversation with your dad is gonna be recorded as well. Okay, so you'll sit in a room like this, there'll be a phone, you can talk to him, but I'll be recording that. That's fair?

Tan: Yeah.

- [44] Tan argues, however, that the very recording of the interview breached Tan's Charter privacy rights because neither he nor his father authorized the recording, as required by law. The transcript of Sergeant Dhillon's conversation with Tan shows that the officer repeatedly warned Tan that his call to his father would be recorded. He nevertheless spoke to his father from the interview room at the RCMP detachment while under arrest. In circumstances such as this how can the accused have a reasonable expectation of privacy?
- [45] The Crown refers to the decision of this court in *R. v. Ballantyne*, 2008 BCSC 1566. The decision of Chamberlist J., references exhaustively the authorities on the subject of reasonable expectation of privacy respecting telephone communications made from within the correctional system, and concludes that it was not possible for the accused to prove that he had a subjective reasonable expectation of privacy when utilizing telephones within the correctional system.
- [46] What is clear here as well is that there was no prior legal authorization to make the recording. The legal issue here is one related to the technical legal requirements for intercepting communications. The consequence of the failure to comply with such requirements is clear -- where there is no statutory authorization, the intercepted communication is not admissible. However, the evidence presented and submissions of counsel at this stage do not support reasonable expectation of privacy although I am sure I have not heard the rest of the matter on that. The consequences were not argued before me with respect to the statutory requirements either.
4. Hotel Telephone Records
- [47] I turn now to consider the Hotel Telephone Records.
- [48] The defence says that Tan's s. 8 rights were violated when the police "seized", without judicial authorization, Hotel Telephone Records which detailed telephone calls made from Tan's hotel room during the relevant period.
- [49] The Crown has challenged the need for a voir dire to determine whether this constitutes a Charter breach and I must therefore assess whether, on the evidence and argument before me, there is "some basis" that a voir dire on this alleged Charter breach will assist me to resolve a matter at issue in the present case: See Vukelich.

- [50] I accept for the purposes of this argument that Tan may have had an expectation of privacy in the Hotel Telephone Records, although this is not free from doubt. The informational content of the record of such calls is very limited. A call was made by someone from the room he rented to another recorded number for a certain period. This seems bereft of any intimate details of Tan's lifestyle or information of a biographic nature.
- [51] That said, the telephone calls were placed from his hotel room and there is no evidence that Tan had "conducted himself in a manner that was inconsistent with the continued (and customary) expectation of privacy that an independent and informed observer would reasonably expect in a closed hotel room": see Patrick at para. 16 citing *R. v. Wong*, [1990] 3 S.C.R. 36, 60 C.C.C. (3d) 460 in which the accused's conduct was inconsistent with an ongoing expectation of privacy (see also *R. v. Buhay*, 2003 SCC 30 at para. 22). The Hotel Telephone Records therefore contain information which was not simply a third party account of Tan's public acts, as I have found the Hotel Registration Records and Airline Ticketing Information to be (see Chehil).
- [52] The Supreme Court of Canada considered the individual's privacy interest in computerized records for the first time in *R. v. Plant*, [1993] 3 S.C.R. 281, 8 W.W.R. 287. In that case, the police were able to access the electric utility records which indicated that a dwelling suspected of housing a grow-op was using four times the electricity as were neighbouring houses of similar size. An information was sworn and a warrant obtained, in part, on the basis of this information.
- [53] Writing for the majority, Sopinka J. said the following about s. 8's protection of private information at 291 and 293:

The purpose of s. 8 is to protect against intrusion of the state on an individual's privacy. The limits on such state action are determined by balancing the right of citizens to have respected a reasonable expectation of privacy as against the state interest in law enforcement. See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60. Section 8 protects people and not property. It is, therefore, unnecessary to establish a proprietary interest in the thing seized... [Citations omitted]

...

Consideration of such factors as the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated allows for a balancing of the societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement. It is, then, necessary to apply this contextual approach to the facts of the case at bar.

- [54] *Plant*, of course, is still good law. It has recently been cited by the Court in *Tessling*. I quote from the headnote at 2004 CarswellOnt 435:

[S]ocial and economic life creates competing demands. Safety, security and the suppression of crime are legitimate countervailing concerns. Thus s. 8 accepts the validity of "reasonable" searches and seizures. Adopting a purposive approach to s. 8, privacy has become the dominant organizing principle. The totality of the circumstances must be considered, with particular emphasis on the existence of a subjective expectation of privacy and the objective reasonableness of that expectation. The privacy interests protected by s. 8 include personal privacy, territorial privacy, and informational privacy. The original notion of territorial privacy developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are most likely to take place.

- [55] Considering the factors in *Plant*, the necessary balance which must be achieved between an individual's subjective expectation and society's interest in law enforcement and jurisprudence which has concluded that there is generally an expectation of privacy in a hotel room, I have concluded that it is possible that Tan reasonably expected that the hotel would not release his Hotel Telephone Records to police unless required to do so by law.
- [56] However, I have considered that it is not necessary to hold a *voir dire* to determine whether, by obtaining the Hotel Telephone Records, the police breached Tan's s. 8 Charter right to be free from unreasonable search and seizure.
- [57] As I have said, the Crown does not seek to enter the Hotel Telephone Records into evidence. However, defence counsel seeks to establish this breach to support the exclusion of other evidence. She says that the accused's statements to police and the Cell Plant Evidence followed breaches of Tan's s. 7 and 10(b) rights.
- [58] If the defence establishes one or both of these breaches, on a balance of probabilities, Tan will argue that the confession and Cell Plant Evidence should be excluded pursuant to s. 24(2). Under the s. 24(2) analysis, a finding that Tan's rights were also breached when the police acquired the Hotel Telephone Records could arguably form part of a "pattern of disregard" for his Charter rights, increasing the seriousness of each breach and militating in favour of excluding the evidence tainted by the breaches: see *Lauriente*.
- [59] I accept that this is the law in Canada. However, I do not accept that the defence has demonstrated any basis on which I could conclude that a police breach of Tan's Charter rights in acquiring the Hotel Telephone Records tainted the statements it seeks to have excluded. This is a threshold issue: see *Lauriente* at para. 35.
- [60] The defence has not alleged a nexus between the Hotel Telephone Records and the interrogation by Sergeant Dhillon and Cell Plant Evidence. There is certainly no temporal connection; the Hotel Telephone Records were collected by the police in Richmond in 2004 and the interrogation by Sergeant Dhillon and Cell Plant Evidence were made in 2008. There is no evidence that the Hotel Telephone Records were mentioned to Tan when he was in RCMP custody in 2008.

- [61] There is also no causal or contextual connection between the alleged breach and the evidence. The Hotel Telephone Records did not lead to the statements in the interrogation by Sergeant Dhillon or Cell Plant Evidence and did not form part of the circumstances surrounding those later events.
- [62] Before embarking on a voir dire to determine whether conduct by the police constitutes a Charter breach, the defence must show "some basis" on which I can find that the voir dire will help to resolve an issue before the Court.
- [63] I agree with the defence's submission that the admissibility of certain evidence is a live issue before me. However, the defence has not been able to suggest even a tenuous connection between the alleged breach by police in acquiring the Hotel Telephone Records and Tan's statements to police or Cell Plant Evidence four years later.
- [64] Absent this nexus, the alleged breach cannot assist the defence to argue that the statements to police and the Cell Plant Evidence should be excluded, even as part of a "pattern of disregard" for Tan's Charter rights.

III. Voir Dire Issue - Cell Mate Plant

- [65] The Crown seeks to introduce in evidence the audio and video recording of the interaction between Tan and a cell mate plant, Constable N. This forms part of the Cell Plant Evidence. There are recordings that take place at various times while Tan is being transported from the Richmond airport to the Richmond detachment of the RCMP. The important recording is that of the interaction between Tan and Constable N in cells immediately after Tan has been interviewed by Sergeant Dhillon. During this whole period Constable N assumes the role of a fellow prisoner. The interaction between Tan and Constable N takes place in Cantonese although English is also spoken.
- [66] During the voir dire the Court had before it a copy of a transcript of the translation. As the interaction takes place Constable N assisted the court in following the conversation by indicating the pagination of the translation that corresponds to the video and audio recording. This was helpful but the content of the recording also gives information about the corresponding translation, as there are also occasional English words, laughter, and other clues to correspondence.
- [67] The defence argues that the evidence of this interaction should not be admitted for three reasons: (1) The transcript of the interaction fails to meet the threshold test of reliability; Constable N is not a qualified translator, and the probative value is low while the prejudicial effect is high, (2) the Cell Plant Evidence is hopelessly tainted by the out of cell interrogation by Sergeant Dhillon, and (3) there is impermissible elicitation. I will deal with each of these reasons in turn.

A. Threshold Test of Reliability

- [68] Defence counsel objected to the admissibility of the cell plant evidence on the basis that the translation was not reliable. She argued that Constable N is not a qualified translator and the probative value of the evidence was therefore low while its prejudicial effect is high.
- [69] Counsel did not devote much time to that this in argument. She did not cite authorities illustrating the test for reliability either generally or with respect to the use of translated transcripts.
- [70] The probative value, in my opinion, of the Cell Plant Evidence is high. It is relevant to several material facts in issue including Tan's English level, whether Tan was in Canada at the relevant time, whether Tan knew evidence about the crime, Tan's motives, and the voluntariness of statements Tan made to Sergeant Dhillon.
- [71] The prejudicial effect is low. There is perhaps some chance that an inexperienced translation might affect my perception of the evidence, in my role as trier of fact. However this danger is mitigated by the fact that the defence has reviewed the transcript and video and has cross examined Constable N, both on his role in the conversation and on his skill as a translator.
- [72] It is trite law that evidence which is relevant and not subject to an exclusionary rule is admissible: *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, 61 D.L.R. (4th) 725; *R. v. Morris*, [1983] 2 S.C.R. 190, 1 D.L.R. (4th) 385. Defence counsel is asking that I exercise my discretion to exclude the evidence.
- [73] I am satisfied that any shortcomings in the translation should go to weight and I would therefore not give effect to this basis for objecting to the cell plant statements.

B. Hopeless Taint

- [74] Tan says that the Cell Plant Evidence was hopelessly tainted by the interrogation of Tan by Sergeant Dhillon. While it is true that one occurred sequentially after the other, in my view there is no "tainting" as alleged.
- [75] Of course Constable N knew that Sergeant Dhillon interviewed Tan. However there is no evidence that anything that took place in the cell was derived or otherwise prompted by knowledge Constable N somehow obtained regarding the interrogation. While Constable N knew Tan had been interviewed by Sergeant Dhillon, he did not know anything about the contents of that interview. There was no interlayering of the events as occurred in Tse.
- [76] There is discussion of what happened in the interrogation in the cell. I do not think the fact these events occurred sequentially adds anything more than add context to consideration of the central issue, whether there was elicitation. It is a fact to be considered, when considering the overall issue.

C. Impermissible Elicitation

- [77] The right to silence of a detained person, such as Tan, accords him a free choice on the matter of whether to speak to the authorities or to remain silent. A cell mate plant, however, is not a person in authority.
- [78] That is not the end of the matter. In *R. v. Hebert*, [1990] 2 S.C.R. 151, 1990 CarswellYukon 7 (cited to CarswellYukon) the Supreme Court of Canada drew a distinction between the use of undercover agents to observe a suspect, and the use of undercover agents to actively elicit information in violation of the suspect's right to silence:
- [133] Fourth, a distinction must be made between the use of undercover agents to observe the suspect and the use of undercover agents to actively elicit information in violation of the suspect's choice to remain silent. When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached, because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police.
- [79] In *Hebert* the court did not elucidate much the notion of elicitation, and the reference to the court was based on an agreed statement of facts. In *R. v. Broyles*, [1991] 3 S.C.R. 595, 1991 CarswellAlta 212 (cited to CarswellAlta) Iacobucci J., speaking for the court sought to do so. He said:
- [35] If, on the other hand, the suspect is ignorant of the fact that he is talking to an agent of the state, whether a suborned informer or an undercover police officer, somewhat different considerations will apply. It is clear from the majority reasons in *Hebert*, supra, that statements volunteered by the suspect to the agent of the state will not infringe the suspect's right to silence. There will be a violation of the s. 7 right to silence only if the statement is elicited by the agent of the state. As McLachlin J. expressed it in *Hebert*, supra, at p. 184, the state agent must "actively elicit" the information or statement. The focus will be on what constitutes "elicitation" in the context of the right to silence.
- ...
- [37] In my view, it is difficult to give a short and precise meaning of elicitation but rather one should look to a series of factors to decide the issue. These factors test the relationship between the state agent and the accused so as to answer this question: considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement by the accused? For convenience, I arrange these factors into two groups. This list of factors is not exhaustive, nor will the answer to any one question necessarily be dispositive.

- [38] The first set of factors concerns the nature of the exchange between the accused and the state agent. Did the state agent actively seek out information such that the exchange could be characterized as akin to an interrogation, or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done? The focus should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation.
- [39] The second set of factors concerns the nature of the relationship between the state agent and the accused. Did the state agent exploit any special characteristics of the relationship to extract the statement? Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?
- [80] In *R. v. Liew*, [1999] 3 S.C.R. 227, 9 W.W.R. 538 the Supreme Court of Canada disagreed with the Alberta Court of Appeal that for a statement to be excluded it was necessary that there be an aura of oppression. They agreed with the majority of the court, however, that the statement should be admitted, and applied the Broyles analysis, analysing the nature of the exchange and the nature of the relationship at paras. 47-57. Part of one of the statements made by the cell plant was "What happened". In the penultimate paragraph of the decision, the Court said:

In affirming a detainee's right to silence, Hebert and Broyles preserve and define an area of police investigation where undercover operations, including cell block interviews, are perfectly legitimate. The undercover officer's interventions in the exchange at issue in this appeal are so innocuous that to conclude that the appellant's statements are inadmissible is effectively to abolish, contrary to Hebert and Broyles, that legitimate area of police investigation. It would be tantamount to adopting either a "listening post" standard or an "absolute right to silence" standard, both of which were unambiguously rejected by this Court in those cases.

- [81] Tan relies on three decisions of this court, *R. v. Forslund and Quinn*, 2007 BCSC 357; *R. v. Radjenovic* (June 18, 2010), Vancouver 24124 (B.C.S.C.); and *R. v. Tse*, 2008 BCSC 1421. In *Forslund Romilly J.*, provides a very thorough review of the cases. He references *R. v. Mishra*, 2004 BCCA 598 where Prowse J.A., speaking for the court, eschewed analysis creating fine distinctions in favour of applying the guidelines established in Hebert and Broyles.
- [82] I propose to follow that approach here. The unique conditions in *Tse* (the virtual total failure of recording equipment, and the inability to provide the timing of statements) are not present. Butler J. in *Radjenovic* aptly calls *Tse* "a unique and highly unusual case" where the "layering of the cover story ...was created by the officers conducting the formal interrogations, and where they were kept informed of the content of the in-cell discussions". I don't find *Tse* helpful.

1. The Nature of the Exchange

[83] It is appropriate here to make some general observations regarding the interaction between Constable N and Tan. Oppressive conduct can entail elicitation. While I appreciate that it is unnecessary for elicitation to occur for there to be oppressive conduct, in my view there is none here.

[84] In fact, in the interactions between Constable N and Tan, Tan often appears ebullient, and a dominant party, his conversation and actions including outbursts of loud laughter, loud language, and spontaneity. During the conversation he commences doing push-ups in the small cell, demonstrating his fitness by doing more than 40.

[85] Counsel references the commencement of the conversation between Constable N and Tan at page 1 of the transcript:

Constable N: Where did you go?

Tan: Upstairs.

Constable N: They questioned you?

Tan: Yeah. Big trouble.

[86] The washroom is used and a conversation ensues about Constable N's "uncle". The washroom is used again and Tan continues the conversation at page 2:

Tan: Ugh, it's okay to admit it now. Fuck!

Constable N: What?

Tan: All evidence are available.

Constable N: The evidence are available? Really? You said there is none?

Tan: I've no idea. Motherfucker. (Sighs) Second degree murder.

[87] A conversation then ensues about sentences and newspaper reports in Malaysia.

[88] In my view there is nothing in this that suggests an interrogation or the functional equivalent of an interrogation. The parties were not complete strangers. They had shared space together. While Constable N initiates the conversation by asking where Tan went, and suggests Tan was questioned, this takes the form of a natural conversation. Nothing flows from that. There is a significant time lapse and washroom use before Tan spontaneously says "Ugh, it's okay to admit it now. Fuck!"

[89] Tan's counsel also refers to the following passage at page 8 in the transcript:

Constable N: What? I don't get you.

Tan: All the evidence was *shown* right in front of you.

Constable N: You said there was none.

Tan then replies.

[90] It is suggested this is a place where Constable N is directing the conversation. Previously, however, there is a discussion about jail time and working in the kitchen. That part of the conversation begins at page 7:

Tan: ...Just now when I had supper it was passed 7 o'clock. It'd be around 9 o'clock or 10 o'clock now. It would be. Because I can phone Malaysia at such a time. Malaysia is ahead of us. So tomorrow morning at 10 o'clock the lawyer comes. Then I'll phone my dad. Motherfucker, if I phone him the middle of the night, I'd get fuck, get fuck. If you want to go on the record, go ahead. In any case, I've admitted it. Right? And the, the question is-

Constable N: I see, you've admitted it.

Tan: I've admitted it. Motherfucker. The government produced all the evidence. And, and...

[91] As I see it, Tan first says "I've admitted it". As part of that he says "Right?" and Constable N only responds by saying "I see, you've admitted it", essentially repeating what Tan has said. In my view Constable N is not directing the conversation such as to make this the functional equivalent of an interrogation. He repeats what Tan says and then the conversation flows naturally from that point.

[92] In another passage on page 11, counsel references Constable N saying "I don't get you", as an example of Constable N directing the conversation. Tan however had directed the conversation himself by raising this topic.

[93] On page 10 of the transcript, the conversation is as follows:

Tan: I, when I was upstairs earlier ... I was thinking, well, just made casual talk, just casual talk.

Constable N: Yeah.

Tan: He took one copy after another, one after another. I asked him like, he was, I sensed that something is not right.

Constable N: What's not right?

Tan: He produced the photos one by one (making noises). Like, made casual talk and ... Didn't say anything, as if no knowledge of it. *I don't know.* Don't remember. The fingerprints, the fingerprints provide sufficient evidence.

Constable N: Mm.

Tan: Fuck! There's one, there's two fingerprints are very powerful evidence.

Constable N: I don't get you.

[94] Tan then talks without prompting about fingerprint evidence and blood.

- [95] In my view this is not interrogation or the functional equivalent of interrogation. It is a conversation. Most of the talking is that of Tan. He raises the topic himself and continues with it while there is minimal articulation by Constable N.
- [96] Tan's counsel raised other passages, such as where Tan writes an apology letter. I have reviewed those passages and fail to see why exception could be taken to them. These and the other passages referred to take the form of Constable N responding in a natural way, asking the occasional question, or indicating that he does not understand, while laying on his bunk in the cell and speaking quietly to Tan.
2. The Relationship Between State Agent and Accused
- [97] Counsel says that the accused was a vulnerable foreigner arriving after a gruelling journey. Constable N was chosen because he spoke Cantonese and befriended the accused assuming a position of trust. There is, it is argued, a strong causal link between the Cell Plant Evidence and the conduct of the police.
- [98] Although there was a lengthy flight from Antwerp to Toronto, 8 or 9 hours, and then a flight from Toronto to Vancouver, the cell plant operation did not take place until the following day. Tan is a fit young man at the time, who demonstrates his physical fitness by doing multiple push ups in the jail cell. I have described him as ebullient and the dominant figure in the cell, certainly at times. While Constable N speaks Cantonese, in my view that fact falls well short of establishing a position of trust between persons whose only other common feature is sharing relatively short periods of coincident incarceration.
- [99] In this case I also note that Constable N knew very little about Tan. In evidence is a statement signed by Constable N which provides only the most basic information about the accused and the charge against him. There is no special knowledge, for example, that would allow Constable N to direct the conversation to evidentiary matters about which he had knowledge, or allow Constable N to somehow ingratiate himself to Tan.
- [100] Counsel points to the fact that Constable N knew there was an interrogation by Sergeant Dhillon of Tan. Further, the fact that Tan took a pen and paper into the cell Constable N could assume Tan might be writing something incriminating. In my view knowledge of these matters is innocuous. To paraphrase Liew, a cell mate plant need not assume the role of an unsighted listening post, disregarding all that he has experienced or been taught or observes. None of this, in my opinion, converted the relationship from that of cell mates to one of vulnerability and trust, as in Broyles.
- [101] Considering the totality of the circumstances, including the sequencing with the prior interrogation, I am satisfied that Tan made a free choice to speak to his cell mate. Constable N did not guide the conversation to sensitive matters. In fact, the evidence shows that it was Tan who often controlled the conversation and who willingly, returned again and again to the subject of the investigation, his statements and the letter he was trying to write to the victim's daughter.

[102] It therefore follows that I do not find that any part of the conversation amounted to the functional equivalent of an interrogation. In reaching this conclusion, I have considered that there was no relationship of trust between Constable N and Tan, such as existed between the police agent and the accused in Broyles. Constable N acted in the role of a cell mate who had befriended a stranger and who showed interest in him. He played his role well and within the bounds of what is permissible under the Charter.

[103] In the circumstances, in my opinion, the statements made by Tan to Constable N were not elicited, in violation of Tan's Charter right to silence. The evidence is admissible in Voir Dire No. 3, regarding voluntariness which I have yet to hear argument considering. I refuse the applications for Voir Dire No. 1 and Voir Dire No. 2. By agreement of counsel, the evidence is admitted generally.

"The Honourable Mr. Justice Savage"

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