
CANADA / JUDGMENT

R. v. Tan

2014 BCCA 9

COURT

British Columbia Court of Appeal

DECIDED

10 January 2014

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

2014 BCCA 9 R. v. Tan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Tan,

2014 BCCA 9

Date: 20140110

Docket: CA039392

Between:

Regina

Respondent

And

Kien Beng Tan

Appellant

Restriction on Publication: There is a ban on publication under s. 486.5(2) of the Criminal Code, which prohibits the publication, broadcast or transmission of any information that could identify the undercover officers in this case.

Before:

The Honourable Mr. Justice Hall

The Honourable Madam Justice Bennett

The Honourable Madam Justice MacKenzie

On appeal from: Supreme Court of British Columbia, dated February 11, 2011,

(R. v. Tan, 2011 BCSC 335, Vancouver Docket 24821).

Counsel for the Appellant Kien Beng Tan:

H. Patey

Counsel for the Respondent:

M.J. Brundrett

Place and Date of Hearing:

Vancouver, British Columbia

June 19, 2013

Place and Date of Judgment:

Vancouver, British Columbia

January 10, 2014

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Hall

The Honourable Madam Justice MacKenzie

Summary:

The appellant was convicted of second-degree murder by a judge alone. His appeal focussed on three issues: (1) whether the RCMP breached the Charter in the process of collecting evidence abroad, (2) whether the statements he made to an undercover police officer posing as his cell mate were admissible, and (3) whether the confession he made during a police interrogation was voluntary.

Held: appeal dismissed; conviction upheld. Subject to two exceptions and the overriding requirement of trial fairness, the Charter does not apply to Canadian officers acting in a foreign jurisdiction. In this case, there was insufficient evidence to establish that Malaysia had provided positive consent to the application of the Canadian Charter to an investigation on their soil. Therefore the Charter did not apply. The trial judge properly admitted the appellant's statements to the undercover officer and his confession. The appellant spoke freely to the undercover officer and there was no evidence of oppression or trickery that would shock the conscience of Canadians.

Reasons for Judgment of the Honourable Madam Justice Bennett:

I. Introduction

- [1] The appellant, Kien Beng Tan, appeals his conviction for the second-degree murder of Sonny Le. On February 11, 2011, Mr. Tan was convicted following a judge alone trial.
- [2] Mr. Tan challenges a number of rulings decided in two voir dires made by the trial judge, all of which concern the evidence gathered by police throughout the investigation, and at times went beyond the borders of Canada. Mr. Tan argues that the actions of the police within Canada and beyond demonstrate a pattern of conduct that violated his rights under the Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter"). He asks that his conviction be set aside and that a new trial be ordered.
- [3] The trial judge's rulings are indexed at 2010 BCSC 1948 (Voir Dires Nos. 1, 2 and 4) and 2011 BCSC 334 (Voir Dire No. 3).
- [4] This appeal raises complex issues regarding the application of the Charter beyond Canada's borders. It raises the issue of the admissibility of evidence spoken in Cantonese and gathered by an officer posing as a cell plant. Finally, it raises the issue of the voluntariness of a confession made during a police interrogation.
- [5] I have concluded that the trial judge made no error in his rulings on the voir dires. I would dismiss the appeal.

II. Background

- [6] Sonny Le was the proprietor of Lee's Jewellers and Loans, a pawn shop in Richmond, British Columbia. On May 7, 2004, his body was discovered in his store - stabbed three times in his chest. The stab wounds were concentrated in a small group in and around his heart.
- [7] The police discovered a latent thumb print and palm print from the glass display case next to Mr. Le's body. The two prints were later identified as belonging to the appellant, Kien Beng Tan. Mr. Tan was a customer and had frequented the store several times before the death of Mr. Le. The police also discovered five pawn receipts that were in Mr. Tan's name, including one dated May 5, 2004, the day that Mr. Le was killed.
- [8] Following the death of Mr. Le, Mr. Tan travelled to Malaysia. In 2006, two RCMP officers travelled to Malaysia. They contacted Malaysian authorities to seek permission to interview Mr. Tan. The Malaysian law enforcement authorities, the Royal Malaysian Police ("RMP"), contacted Mr. Tan, asking him whether he would submit to RCMP questioning. He agreed. Mr. Tan was interviewed by the RCMP in a hotel in Penang. A member of the RMP translated. Mr. Tan agreed to provide the RCMP with fingerprints, and did so without the physical guidance of the officers.

- [9] The fingerprints taken in Malaysia matched those taken at the crime scene. Back in Canada, however, Crown counsel was of the opinion that, under the prevailing law of the day (*R. v. Cook*, [1998] 2 S.C.R. 597), the conduct of the RCMP would not pass Charter scrutiny. At trial, Crown counsel did not tender any evidence (statements or fingerprints) obtained by Canadian police in Malaysia. Mr. Tan would subsequently provide further sets of fingerprints in the course of the investigation.
- [10] Sometime after the interview, the RCMP learned that Mr. Tan was in custody in Belgium on unrelated charges. Pursuant to an international legal assistance request, the Belgian police forwarded Mr. Tan's finger and palm prints to the RCMP. These matched the latent prints on the display case. The RCMP swore an information and issued a warrant for Mr. Tan's arrest. Two RCMP officers, Sergeant Dhillon and Corporal Wellington, flew to Belgium, took Mr. Tan into custody and escorted him to Canada. The plane landed in Toronto and the party cleared customs there. While in Toronto, police obtained another palm print from Mr. Tan.
- [11] Sergeant Dhillon attempted to record his conversations with Mr. Tan during their journey to Vancouver. His digital audio recording device, however, stopped at some point during the Belgium-Toronto leg of the journey. No notes were taken until after they arrived in Toronto. Corporal Wellington testified later that nothing was discussed on the flight in relation to the investigation. Sergeant Dhillon was unable to recall the conversations he may have had with Mr. Tan on the flights from Belgium to Toronto or from Toronto to Vancouver, but stated he did not discuss the investigation. At trial, however, an audio recording was played for Sergeant Dhillon in which he said to Mr. Tan, "[b]ut I told you before in this case you're not going home for a long time" (*Voir Dire* No. 3, at paras. 9-12). Sergeant Dhillon could also not recall whether Mr. Tan asked to speak with counsel in Toronto, but a recording was put to him in which this request was made.
- [12] When the group first arrived in Richmond, British Columbia the police took additional fingerprints, which were used for comparison purposes, in addition to the palm print taken in Toronto.
- [13] Once in Vancouver, Mr. Tan spoke to counsel. He was then transported with an undercover officer, posing as another individual in police custody. They were lodged in the same cell, and Mr. Tan spoke to the undercover officer before, during and after he was interviewed by Sergeant Dhillon. The officer spoke Mr. Tan's first language, Cantonese, but was not a formally trained translator, and admitted to having some difficulty understanding Mr. Tan at times. He said his Cantonese was good enough to understand Mr. Tan at the critical junctures. Mr. Tan also spoke English occasionally. Audio recordings were made of their discussions.
- [14] The next day, Sergeant Dhillon of the RCMP interrogated Mr. Tan over an eight-hour period. This was video-recorded. Sergeant Dhillon began by confirming that Mr. Tan had slept and eaten and no one had disturbed him the night before. Sergeant Dhillon added that he could not threaten or make an offer and that anything Mr. Tan said would be on his own accord.

During the interview, Sergeant Dhillon showed Mr. Tan pictures of the crime scene and played a pre-recorded emotional statement from the victim's daughter. Eventually, Mr. Tan confessed to killing Mr. Le, and provided details of the killing, including his motivation: the victim was allegedly charging him extra money for the return of pawned items; this was a matter of "respect". He also drew a picture of the knife he used. Mr. Tan agreed to write an apology letter to Mr. Le's daughter, which was later given to police. Police subsequently indicted Mr. Tan for second-degree murder.

[15] After the interview, Mr. Tan returned to his cell and made further incriminating statements to the undercover officer.

III. Rulings on Voir Dire

[16] During the course of the trial, Mr. Tan applied for certain voir dres to determine whether the RCMP breached his Charter rights in the course of the investigation. The issue before the trial judge was whether there was some basis on which holding a voir dire might assist the Court in resolving an issue. The trial judge summarized the issues before him at para. 5 (Voir Dires Nos. 1, 2 and 4):

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").

[17] Aside from the Hotel Registration Records and Airline Ticketing Information, the Crown did not seek to introduce any of the impugned information as evidence. Mr. Tan argued, however, that there was a temporal and causal connection between the alleged infringement of his Charter rights in collecting evidence that was not being relied on and the evidence that was ultimately relied on by the Crown. Furthermore, he submitted that the record indicated a consistent pattern of police conduct ignoring his rights.

[18] The trial judge refused to hold the voir dres on issues 1-4. His rulings on issues 1, 2 and 4 are not before this Court. On issue 3, the judge refused to hold a voir dire to consider whether the RCMP breached Mr. Tan's rights in Malaysia because, as the Charter did not

apply to the actions of the RCMP officers abroad and no consent of the Malaysian state was demonstrated, the events in Malaysia could not establish a Charter breach. In paras. 33-40 (Voir Dires Nos. 1, 2 and 4), the trial judge considered the law on the extraterritorial application of the Charter and the issue of whether Malaysian officials consented to its application:

- [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 [Quotation omitted.]

- [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.
- [19] A voir dire was held to determine whether to exclude evidence obtained from the undercover officer, who is referred to in the judge's reasons as Constable N.
- [20] Before the trial judge, Mr. Tan argued that the evidence of the undercover officer should not be admitted for three reasons: (1) the transcript is unreliable because the officer was not a qualified translator, and the probative value of the evidence was outweighed by its prejudicial effect; (2) the evidence was tainted by Sergeant Dhillon's interrogation; and (3) the undercover officer elicited the evidence.
- [21] The judge admitted the evidence. He found that the probative value of the statement was not outweighed by its prejudicial effect, concluding at para. 71 that there was only "some chance that an inexperienced translation might [have affected his] perception of the evidence". He then found that there was no tainting of the discussions in the cell by reason of the fact that some evidence was obtained after Mr. Tan's interview with Sergeant Dhillon. At paras. 101-103, the judge turned to elicitation, and concluded as follows:
- [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 [[1991] 3 S.C.R. 595]. 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.

[Italics in original.]

[22] In a separate voir dire (Voir Dire No. 3), Mr. Tan argued that his confession to the police was not voluntary. He argued that the record of his interaction with officers was incomplete over the course of the return flight to Canada, which, he claimed, raised a reasonable doubt as to whether there was a threat or inducement.

[23] Mr. Tan did not testify on the voir dire.

[24] The trial judge concluded that the confession to police was voluntary, even though there were some gaps in the evidence as to what may have been said to Mr. Tan while he was in custody before his interrogation. The trial judge found that the confessions were a result of the evidence being presented to Mr. Tan and that the Crown established beyond a reasonable doubt that Mr. Tan's statement to police was voluntary - that is, "it was made without improper inducements or threats, in an atmosphere free of oppression, by an accused with an operating mind, and without impermissible police trickery" (at para. 93). Mr. Tan's constitutional right to remain silent was not breached. The trial judge concluded that evidence of the confession was admissible.

[25] In his reasons for judgment, the trial judge found that there was no issue as to who killed Mr. Le. He came to this conclusion on the basis of the fingerprints found in Mr. Le's blood and Mr. Tan's confession.

[26] The main issue was whether Mr. Tan had the requisite level of intent for second-degree murder. The Crown's theory was that Mr. Tan stabbed Mr. Le once from across the counter, and then, in quick succession, stabbed him twice more from behind the counter. The Crown argued that these actions were consistent with an individual who means to cause the death of another. This theory was supported by a re-enactment given by Mr. Tan to police during his interrogation. The defence accepted that the wounds were made in quick succession, but argued this was consistent with a provoked attack, thus providing evidence of something less than the mens rea required for murder.

[27] The trial judge accepted the Crown's theory. He also rejected the submission of the defence that the stab wounds were insufficient evidence to infer that Mr. Tan had the requisite intent to commit murder. He found beyond a reasonable doubt that Mr. Tan had the requisite intent. On this basis, the trial judge concluded that Mr. Tan was guilty of second degree murder.

IV. Issues on appeal

[28] Mr. Tan raises the following grounds of appeal:

1. The learned trial judge erred in law by refusing to hold a voir dire to determine whether or not the Appellant's rights as protected by section 8 of the Charter were infringed by the RCMP's actions in Malaysia in 2006.
2. The learned trial judge erred in admitting the English transcript of the cell plant operation into evidence without considering whether that evidence met the threshold for admissibility of expert evidence.
3. The learned trial judge erred in ruling that the Crown had proven beyond a reasonable doubt that the Appellant's statement to Sgt. Dhillon was voluntary.

V. Discussion

A. Did the trial judge err in refusing to hold a voir dire into whether Mr. Tan's s. 8 rights were violated in Malaysia?

1. Positions of the Parties

- [29] The trial judge concluded that no voir dire was necessary because Mr. Tan's Charter rights were not engaged extraterritorially when Canadian police interviewed him. In his view, there was no evidence that Malaysia had agreed to the application of Canadian constitutional law to the interrogation - the testimony of Canadian officers establishes only their own views on the matter. Rather, in the view of the trial judge, consent had to be demonstrated through the agreement of "authorized" Malaysian government officials.
- [30] He applied the test in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 at para. 26 (B.C.C.A.), where this Court held that an accused is not always entitled to a voir dire to challenge the constitutionality of the admission of evidence.
- [31] Mr. Tan argues that the trial judge erred in admitting the Malaysian evidence without first holding a voir dire to determine whether his s. 8 Charter rights were infringed by the RCMP's actions in Malaysia. He says there was evidence to show Malaysian officials consented to the application of the Charter and the trial judge erred in finding otherwise. At a minimum, a voir dire should have been held.
- [32] The Crown says the trial judge made no error and was correct in concluding that the Charter, absent the consent of an "authorized" official, does not apply extraterritorially. It says the judge was correct in concluding there was insufficient evidence that Malaysian officials consented to the application of the Charter in their territory.

2. Analysis

a) The Extraterritorial Application of the Charter

i. Overview

- [33] The starting point for the application of the Charter is s. 32, which states:

32. (1) This Charter applies
- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province
- [34] Section 32 defines the parameters of the application of the Charter extraterritorially. The Charter does not have extraterritorial application over the actions of foreign authorities: *R. v. Harrer*, [1995] 3 S.C.R. 562 at para. 35 (McLachlin J., concurring reasons). However, evidence gathered by such authorities may still be subject to Charter scrutiny and will be excluded where this is necessary to preserve the fairness of the trial that is ultimately held in Canada: see generally *Harrer*; *R. v. Terry*, [1996] 2 S.C.R. 207; *Schreiber v. Canada*, [1998] 1 S.C.R. 841. The test is trial fairness and the standard is whether the admission of the evidence would be "so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience" (*Harrer*, at para. 51).
- [35] The above cases concerned the actions of foreign authorities - not Canadian ones - acting in foreign territory. In *Harrer* and *Terry*, the Supreme Court contemplated the latter situation, and refused to foreclose the possibility of the application of the Charter to an investigation by Canadian authorities abroad (*Harrer*, at para. 11). This situation was considered by the Supreme Court in *R. v. Cook*, which held that the Charter applied to the actions of Canadian law enforcement officers, despite the fact that they were outside the territorial jurisdiction of Canada, so long as their actions did not have an objectionable extraterritorial effect.
- [36] In *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, the Supreme Court of Canada effectively overruled *Cook*: Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Looseleaf) (Toronto: Carswell, 2007) at 37-38; Robert J. Currie, *International & Transnational Criminal Law* (Toronto: Irwin Law, 2010) at 531. Since *Cook*, *Hape* has been the jurisprudential centre of gravity for the law on extraterritorial application of the Charter. For this reason, I will set out the facts in more detail.
- [37] The accused, Richard Hape, was prosecuted for money laundering, which he conducted out of the island state of Turks and Caicos. The RCMP began its investigation by contacting the Turks and Caicos police. One detective superintendent agreed to help, provided that the investigation would fall under his authority. The RCMP conducted a number of searches of Mr. Hape's office on the islands, which were apparently authorized by a warrant, though none was adduced into evidence at trial. The RCMP also conducted perimeter searches without warrants, which would have been required under Canadian law, but were not required by Turks and Caicos law. Mr. Hape applied to have the evidence excluded on the basis that the searches violated his s. 8 rights.

- [38] Justice LeBel, writing for himself and four others, dismissed the appeal. The four other justices would also have dismissed the appeal, but for different reasons.
- [39] Justice LeBel articulated a sweeping review of international law principles and their application to the Canadian constitution. He concluded that the Charter could not apply to govern the actions of Canadian officials abroad. He reasoned as follows: principles of customary international law, general practices and rules that are accepted by states as law, are adopted by Canadian common law. The principles of sovereignty and non-intervention are cornerstones of international customary law. Section 32 of the Charter, which says that the Charter only applies to matters within the authority of Parliament and the provincial legislatures, must be read to comply with these principles of customary international law. Applying the Charter to a Canadian investigation in a foreign territory would do unacceptable violence to the principle of sovereignty, as well as the non-binding principle of the comity of nations. Applying the Charter to an investigation abroad would, by its very nature, constitute an objectionable extraterritorial application of Canadian enforcement jurisdiction. This enforcement jurisdiction is what was at issue for LeBel J., and is what made the prior jurisprudence questionable:
- [85] The Cook approach therefore puts the focus in the wrong place, as it involves looking for a conflict between concurrent jurisdictional claims, whereas the question should instead be viewed as one of extraterritorial enforcement of Canadian law. The issue in these cases is the applicability of the Charter to the activities of Canadian officers conducting investigations abroad. The powers of prescription and enforcement are both necessary to application of the Charter. The Charter is prescriptive in that it sets out what the state and its agents may and may not do in exercising the state's powers. Prescription is not in issue in the case at bar, but even so, the Charter cannot be applied if compliance with its legal requirements cannot be enforced. Enforcement of compliance with the Charter means that when state agents act, they must do so in accordance with the requirements of the Charter so as to give effect to Canadian law as it applies to the exercise of the state power at issue. However, as has already been discussed, Canadian law cannot be enforced in another state's territory without that state's consent. Since extraterritorial enforcement is not possible, and enforcement is necessary for the Charter to apply, extraterritorial application of the Charter is impossible.
- [40] Justice LeBel conceded that if the only consequence of a Charter breach was the exclusion of evidence at the ultimate Canadian trial, there would be no infringement on a foreign state's sovereignty (at para. 91). He opined, however, that because the Charter aims to prevent infringements before they occur, extraterritorial enforcement jurisdiction would always be at issue, thus infringing the sovereignty of the foreign state (at para. 84). In any event, the Harrer-Terry trial fairness analysis would apply to ensure minimum standards for evidence tendered at trial (at paras. 108-111).

- [41] Finally, LeBel J. posited that while the Charter could not apply extraterritorially to limit investigations, "the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights" (at para. 101).
- [42] LeBel J. summed up his approach at para. 113:
- [113] The methodology for determining whether the Charter applies to a foreign investigation can be summarized as follows. The first stage is to determine whether the activity in question falls under s. 32(1) such that the Charter applies to it. At this stage, two questions reflecting the two components of s. 32(1) must be asked. First, is the conduct at issue that of a Canadian state actor? Second, if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the Charter to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the Charter will not apply. The inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be excluded at trial because its admission would render the trial unfair.
- [43] Put simply, the Hape principle is this: the Charter does not apply extraterritorially to Canadian authorities. This is subject to two exceptions. The first exception is state consent. If the foreign state consents to the application of the Canadian constitution, then s. 32 is not an issue and the Charter may apply. The Court did not define the meaning of consent. The second exception, described above, suggests that even without consent of the foreign state, violations of Canada's international human rights obligations may justify a remedy under the Charter (at para. 101).
- [44] Turning to the facts before him, LeBel J. found that the cooperation of the Turks and Caicos Islands police did not amount to consent to the exercise of Canadian enforcement jurisdiction, and therefore the application of the Canadian Charter, within its territory. At para. 106, he noted that consent was "neither demonstrated nor argued on the facts", and he declined to consider when and how it might be established. Later, LeBel J. stated that "[i]t is not reasonable to suggest that Turks and Caicos consented to Canadian extraterritorial enforcement jurisdiction" (at para. 115), but he nonetheless undertook a factual analysis of the circumstances of the investigation at paras. 115-117. I shall return to this analysis below.
- [45] Several courts, including the Supreme Court of Canada, have since considered Hape, though not on the issue of foreign consent (see for example *Re Canadian Security Intelligence Services Act*, 2008 FC 301). There is a paucity of cases from provincial appellate and trial courts considering the Hape principle and the meaning of consent in the circumstances of an investigation carried out by Canadian authorities extraterritorially.
- [46] One of the few cases to consider consent was *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 336, affirmed 2008 FCA 401, leave to appeal dismissed, [2009] S.C.C.A. No. 63. In that case, Madam Justice Mactavish dealt with the application of Amnesty

International and the British Columbia Civil Liberties Association for an order that the Charter applied to Canadian Forces operating in Afghanistan. Canadian Forces were handing over captured Taliban insurgents to Afghan authorities. There were allegations that the detainees were subject to abuse and even torture once in the hands of these authorities. There were two questions before the Court, which I paraphrase: (1) does the Charter apply during armed conflict in Afghanistan to the detention of non-Canadians by Canadian Forces or their transfer to Afghan authorities?; (2) if the answer to the first question is "no", would the Charter apply if the applicants established that the detainees were subject to torture, such that Canada would be in breach of its international human rights obligations? In other words, the applicants sought to distinguish Hape and demonstrate consent on the one hand, and, if that failed, they sought to rely on the international human rights exception from Hape.

- [47] Amnesty is an important case for the purposes of this case because it engages in one of the more extensive discussions of what is required for a sovereign state to consent to the application of another state's constitutional law.
- [48] Justice Mactavish engaged in a comprehensive analysis of the various bilateral and multilateral agreements between Afghanistan and Canada, and Afghanistan and the international community. The applicants argued that because Afghanistan had, pursuant to several agreements between the countries, ceded to Canada the power to detain and use deadly force on its citizens at will, Afghanistan had consented to the application of the Charter. Justice Mactavish rejected this argument. She found that while Afghanistan did cede some rights to foreign powers, it did not consent to the wholesale forfeiture of its sovereignty. She found that general agreements providing Afghanistan's consent for Canadian Forces to operate in Afghanistan, and specific, technical agreements on assistance in the armed conflict, training, stabilization and law enforcement activities did not provide for the application of Canadian constitutional law, but instead provided for the application of the Afghan Constitution and international law. Also, the more specific agreements regarding detainees only provided for the application of the Geneva Convention. On this basis, she concluded that Afghanistan did not consent to the enforcement or application of the Canadian Charter over the conduct of Canadian Forces in Afghanistan in relation to the detainees.
- [49] The Supreme Court of Canada has considered the international human rights exception to the Hape principle on two occasions and has accepted the availability of that exception: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44.
- [50] In sum, the state of the law is this: the Charter does not apply to Canadian state actors engaging in official duties extraterritorially (Hape). This is subject to two exceptions: (1) consent of the foreign state to the application of Canadian law in its territory, though, as LeBel J. stated, "[i]n most cases, there will be no such exception and the Charter will not apply" (Hape at para. 113); (2) the participation of Canadian officials in activities that violate

Canada's international human rights obligations (Hape; Khadr 2008; Khadr 2010). Of course, any evidence tendered in a Canadian trial is always subject to Charter scrutiny to determine if its admission would render the trial unfair: Harrer; Terry.

ii. Consent

[51] I turn now to an analysis of the major issue in relation to this ground of appeal: whether there was evidence that Malaysia consented to the application of the Charter in its territory and whether the Charter applies in this case to the actions of Canadian officials abroad evoking the need for a voir dire. Accordingly, I will consider the nature and requirements of consent.

[52] LeBel J. considered the consent exception at para. 106, stating:

In some cases, the evidence may establish that the foreign state consented to the exercise of Canadian enforcement jurisdiction within its territory. The Charter can apply to the activities of Canadian officers in foreign investigations where the host state consents. In such a case, the investigation would be a matter within the authority of Parliament and would fall within the scope of s. 32(1). Consent clearly is neither demonstrated nor argued on the facts of the instant appeal, so it is unnecessary to consider when and how it might be established. Suffice it to say that cases in which consent to the application of Canadian law in a foreign investigation is demonstrated may be rare.

[Emphasis added.]

[53] LeBel J. then went on to analyze, in some detail, the circumstances of the investigation of Mr. Hape in Turks and Caicos Islands at paras. 115-117:

[115] Without evidence of consent, that is enough to conclude that the Charter does not apply. It is not reasonable to suggest that Turks and Caicos consented to Canadian extraterritorial enforcement jurisdiction in the instant case. Nonetheless, I will say a few words on the factual circumstances of the investigation.

[116] The trial judge made several significant findings of fact, and the appellant has not attempted to argue that they were based on a palpable and overriding error. Those findings are that:

- Detective Superintendent Lessemun "agreed to allow the RCMP to continue its investigation on the Islands, but was adamant he was going to be in charge, and that the RCMP would be working under his authority" (para. 4);
- "the RCMP officers were, and understood that they were, operating under the authority of Detective Superintendent Lessemun" (para. 25);
- the RCMP officers "were subject to Turks & Caicos authority" (para. 25);

- "the Canadian police, in this case, were operating under and subject to the authority of Detective Superintendent Lessemun" (para. 29); and
- "the propriety and legality of the entries into the private premises in the Turks & Caicos Islands ... are subject to Turks & Caicos criminal law and procedures and the superintending scrutiny of the Turks & Caicos courts" (para. 29).

As those findings demonstrate, Turks and Caicos clearly and consistently asserted its territorial jurisdiction in the conduct of the investigation within its borders. It controlled the investigation at all times, repeatedly making it known to the RCMP officers that, at each step, the activities were being carried out pursuant to Turks and Caicos authority alone. As found by the trial judge, the RCMP officers were well aware that, when operating in Turks and Caicos, they were working under the authority and direction of Detective Superintendent Lessemun. Although much of the planning took place in Canada, and Canada contributed much of the human and technological resources, Turks and Caicos law and procedure applied to all the searches: it applied to the perimeter searches in February 1998, to the covert entries in March 1998, and to the overt entries in February 1999.

Finally, warrants were sought in Turks and Caicos courts, and that country's authorities prevented the seized documents from being removed to Canada.

[117] The appellant took issue in this appeal with the trial judge's finding that the RCMP and Turks and Caicos officers were engaged in a "co-operative investigation". There is no magic in the words "co-operative investigation", because the issue relates not to who participated in the investigation but to the fact that it occurred on foreign soil and that consent was not given for the exercise of extraterritorial jurisdiction by Canada. When investigations are carried out within another country's borders, that country's law will apply. A co-operative effort involving police from different countries "does not make the law of one country applicable in the other country": Terry, at para. 18.

[54] In para. 106, LeBel J. leaves the question of the nature of sovereign, foreign consent to another day and another case. One guideline provided by Hape is that consent to the extraterritorial application of Canadian law will be "rare", which implicitly accords with an assumption that something more than indications from on-the-ground officials can suffice for consent. However, LeBel J. does rely on the actions of the on-the-ground official to find that there was no consent.

[55] At paras. 115-117, LeBel J. turns to consider all the circumstances to see if Turks and Caicos consented to the application of the Charter. His analysis here suggests that non-consent to the exercise of Canadian enforcement jurisdiction and the application of the Charter may be determined by looking at all the circumstances of the interaction between Canadian and foreign officials.

- [56] Justice LeBel justifies the legal conclusion in *Hape* on the principle of sovereignty. He then turns to consider whether there were any facts on which to conclude that the Turks and Caicos officers did not consent to the application of the Charter. He did not conclude that the officers had the authority to give consent to the exercise of Canadian enforcement jurisdiction within its territory, but he did conclude that they could give evidence of a lack of consent.
- [57] In my opinion, *Hape* stands for the proposition that in order for the Charter to apply, the foreign state must consent. In order for a state to consent to the extraterritorial application of Canadian constitutional law, the expression of consent must be from a valid sovereign authority of that state.
- [58] This position seems to have been assumed in post-*Hape* authorities, including the trial decision in this case and in *Amnesty*. Those cases assumed that evidence of consent of a foreign state requires an expression of sovereign authority, often in the form of a bilateral agreement. In *Amnesty*, for example, Mactavish J. closely examined the bilateral and multilateral treaties between Afghanistan and Canada to determine the issue of consent to the application of Canadian constitutional law. The trial judge in this case was clearly uncomfortable with the idea of "ground level" law enforcement officers consenting on behalf of the entire state; something along the lines of a "diplomatic accord" would suffice to demonstrate consent in his view. The position adopted in these cases is consistent with *Hape*. If I am correct that *Hape* stands for the proposition that the principle of sovereignty and non-interference preclude the extraterritorial application of the Charter, then only officials with the authority to bind the state in question, or an expression of that state's sovereign will, can establish consent.
- [59] Principles of customary international law also support this view. I start by reiterating the proposition that states are sovereign from within their territorial boundaries; no other state may exercise enforcement jurisdiction within those borders (*Hape* at para. 65, citing *The Case of the S.S. "Lotus"* (1927), P.C.I.J. Ser. A, No. 10).
- [60] Under international law, however, states may consent to activities that would otherwise constitute violations of their sovereignty. The nature of consent between states has been considered by the International Law Commission ("ILC") with respect to the doctrine of state responsibility, that is, whether and how a state is held responsible for a breach of an international obligation. The ILC's scholars and jurists have set out codified, authoritative statements on the law of state responsibility in the articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, UN GAOR, 56th Sess., UN Doc. A/RES/56/83 (2001) ["Articles of State Responsibility"]. These articles have been adopted by the UN General Assembly, used by the International Court of Justice and are generally considered a restatement of customary international law (John H. Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008) at 535-536).

- [61] In international law, one of the major issues with a state's consent is related to the establishment of true and valid consent, as well as the scope of that consent. Article 20 of the Articles on State Responsibility states: "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."
- [62] The ICL has also published commentaries on the Articles of State Responsibility: see Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts in "Report of the International Law Commission on the Work of its Fifty-Third Session", UN GAOR, 56th Sess., Supplement No. 10 (A/56/10) [Commentaries]. The commentary to Article 20 provides a number of issues to consider in relation to consent (Commentaries, at page 73):
- (4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor. Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.
 - (5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4. In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.
 - (6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by

error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

[Emphasis added. Footnotes omitted.]

[63] From the Commentaries, it is clear that law relating to treaties and treaty-making is relevant. Treaties need not be a formal, high-level exchange; they may be a simple exchange of diplomatic notes (J.H. Currie at 137). This engages, to some extent, the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, which represents international law on the subject. The Vienna Convention provides general rules as to which state actors may express the binding will of a state: see Articles 7 and 8.

[64] For our purposes, rather than delve into the principles related to the law of treaties, it is more useful to set out a general framework that can guide a court in determining whether consent to the application of Canadian constitutional law over a Canadian investigation was given. These requirements are informed by international law on treaties and state responsibility, and general principles relating to consent:

- The foreign official or entity purporting to give consent to the application of Canadian constitutional law must be an agent or "state organ" of the foreign state (Articles 4-6 of the Articles on State Responsibility);
- The foreign official or entity purporting to give consent must have apparent or actual authority to consent to the application of the Canadian Charter to an investigation by Canadian authorities in that foreign territory. Obviously, officials with "full powers" to make international treaties suffice (Articles 7 and 8 of the Vienna Convention), but in most cases, the issue will not be as clear. The Court must determine whether the official or entity at issue is able to agree to the Canadian investigation and the application of Canadian law. In other words, the question is whether this official or entity purporting to proffer consent has the apparent or actual authority to give a binding expression of the sovereign will of the state.
- Consent of the foreign state must be informed and freely given; error, coercion, fraud or corruption vitiate consent (Commentaries on Articles of State Responsibility);
- The consent must be in accordance with any domestic laws of the state purporting to give consent (see *Amnesty*); and
- The foreign state must specifically consent to the application of the Canadian Charter (see *Amnesty*).

[65] This is not an exhaustive list, but simply an overview. All of the circumstances of each case must be analyzed. However, the focus of the analysis should not only fall on whether there is evidence that foreign officials consented. While that is a factor to consider, the focus should also be on who those officials are and the nature of their authority within the foreign state and under international law. The consent analysis must be done with a view to determining the will of the sovereign foreign state. In short, the law of consent to the extraterritorial

application of the Charter must be grounded in international law principles relating to sovereignty. In my view, this approach is consistent with the principles articulated in Hape, and accords with the subsequent jurisprudence in Amnesty.

- [66] In many cases, consent will be demonstrated through a treaty or binding international law agreement. Mutual Legal Assistance Treaties ("MLAT"), like the Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, Can. T.S. 1990 No. 19, are examples. These treaties allow a state to request its partner state to conduct an investigation within its own borders and then send that evidence to the requesting state. MLATs generally designate a "central authority" to deal with investigation requests. These treaties are usually explicit that the request and the consequent investigation are governed by the law of the requested state (R. Currie at 483).
- [67] While a treaty or a binding international agreement that provides for consent to Canadian investigations and the application of Canadian constitutional law are obvious examples, the principle of sovereign consent can be established with evidence that an authorized official or entity in the foreign state validly consented to the extraterritorial investigation and the application of the Charter to that investigation. (For an example of a state's consent to the application of Canadian law, albeit not the Charter, see the judgment of this Court, R. v. Dorsay, 2006 BCCA 117, though the facts are unique.)

iii. Did the state of Malaysia consent in this case?

- [68] The appellant argues that the trial judge misapprehended the law by concluding that a formal agreement between authorized government officials akin to a "diplomatic accord" is necessary for a finding that the foreign state has consented to the application of the Charter. He argues that the trial judge's finding that the evidence fell "well short" of establishing an agreement to apply Canadian law was incorrect, and that there was "considerable evidence before the court on this point." Mr. Tan summarizes this evidence as follows:

The request for permission went through a liaison officer with the Canadian diplomatic mission in Malaysia. The RCMP communicated their expectations to a senior Interpol official in Malaysia that the investigation would comply with Canadian legal guidelines. He granted permission for the RCMP's 'official visit' to take place and explicitly agreed that the interview would be conducted in accordance with the Canadian Charter of Rights and Freedoms

- [69] Mr. Tan points to the testimony of Corporal Ferreira, who was initially conducting the investigation. He testified that he contacted the liaison officer, Wade Oldford, in the Canadian mission in Kuala Lumpur to seek permission for the RCMP to travel and speak to Mr. Tan. Mr. Oldford contacted Chief Inspector Singh, an official with Interpol in Malaysia. By letter dated June 15, 2006, Chief Inspector Singh informed Mr. Oldford that the RCMP's request had been approved by the Director of the Criminal Investigation Unit of the RCMP. This letter was tendered at trial.

- [70] Corporal Ferriera testified that he expected the interview to be conducted in accordance with Canadian law, and told Mr. Oldford that the RCMP were acting "within Canadian legal guidelines." He also testified that Chief Inspector Singh agreed that the interview was to be conducted in accordance with the Charter.
- [71] The Crown submits that the trial judge's conclusion was correct. It concedes in its factum that "Malaysian authorities allowed the RCMP to conduct the interview and take the Appellant's fingerprints in a manner that RCMP believed would be admissible in a Canadian court." The Crown, however, points to evidence that suggests Malaysian authorities did not consent to the application of Canadian constitutional law. It says the RCMP had to request permission at the outset for the interview, and had to comply with Malaysian law at all times. Pointedly, the RCMP had to respect Malaysian law that required the following: an accused could not be interviewed unless he consented, the interview could not go past 6:00 p.m. and, regardless of what an accused said in the interview, he could not be arrested as a result of it.
- [72] With respect, as I have explained above, this analysis misconstrues the central theme in Hape: respect for sovereignty of the host state. The Crown errs in its assumption that because Malaysian law was enforced, the Charter could not be applied. While an analysis of all the circumstances (including the authority of the official, the scope of his or her agreement, the nature and effect of that agreement and so on) can support a finding that a foreign state has consented, the fact that foreign officials have asserted that their law applies merely reflects a presumption in international law. The crux of the analysis is the determination of whether there is any positive, authoritative and effective consent by the foreign state to the application of the Charter.
- [73] Herein lies the problem with the argument of the appellant. In my respectful opinion, it would not respect the sovereignty of Malaysia to conclude on the basis of the testimony of a RCMP officer that Malaysia consented to the application of the Charter. The evidence here is scant. Aside from the second-hand statements of Chief Inspector Singh, of whom no evidence with respect to his authority to grant consent was adduced, there is no evidence of any consent that would satisfy the Hape principle of sovereign non-interference. There is, furthermore, no evidence that Malaysian law enforcement entities or officials - for example, the Director of the Criminal Investigation Unit - consented. Nor is there evidence that that official was in a position to consent. In short, there is no evidence that the officials named by the appellant are in a position to express the sovereign will of the Malaysian state.
- [74] In my view, the trial judge was correct in his conclusion that the "evidence fell well short of establishing even a prima facie case that there was any agreement to apply Canadian law." To engage the application of the Charter to the conduct of Canadian officials operating in a foreign state, an accused must tender evidence that a foreign official, possessed of the proper authority, consented to the application of the Charter.

[75] In my view, the trial judge did not err in concluding that the Charter was inapplicable to the RCMP's conduct in Malaysia. As such, he was correct to decline to hold a voir dire into whether the RCMP breached Mr. Tan's Charter rights by failing to obtain a warrant before requesting Malaysian assistance to collect his fingerprints.

[76] If I am wrong, and law enforcement officials with no authority may consent to the application of the Charter, I would still conclude the Charter does not apply to the extraterritorial activities of the RCMP in this case, given the findings of fact by the trial judge.

[77] There is insufficient evidence that Malaysian officials consented to the application of the Charter. At its highest, there is the alleged consent of a Malaysian Interpol-RMP liaison officer. All of the other circumstances appear to suggest that Malaysian authorities did not consent. The trial judge's findings of fact are at para. 34 (Voir Dires Nos. 1, 2 and 4):

Despite that very capable cross-examination [of trial counsel for Mr. Tan], 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.

[78] In short, the evidence indicates that Malaysian authorities viewed their law relating to searches and seizures as operative, and not the Charter. The evidence Mr. Tan points to as indicating consent reflects the views of Canadian law enforcement officials and diplomatic authorities - not Malaysian ones. Nowhere in Hape is it expressed that Canadian law enforcement officials can impose the Charter on their investigation by stating their belief as to its application. If this were the case, this would undermine the very principle that Hape stands on.

[79] At its highest, this investigation was an example of lower, enforcement-level police cooperation. In Hape, Lebel J. found that "[a] cooperative effort involving police from different countries 'does not make the law of one country applicable in the other country'" (at para. 117, quoting Terry at para. 18).

[80] Finally, I note that Mr. Tan did not argue the Charter applied on the basis of any other exception from Hape (e.g., the international human rights exception), nor did he argue that his trial would be rendered unfair if the evidence obtained outside of Canada were admitted. Accordingly, I decline to address any possible application of the Charter on these grounds. Even if Mr. Tan did raise the issue of the fairness of the trial in Canada, the possible effect of the evidence gathered in Malaysia falls well short, in my view, of being anathema to the conscience of Canadians.

[81] I would not give effect to this ground of appeal.

B. Did the trial judge err in concluding that the evidence of the undercover officer was admissible?

1. Positions of the Parties

- [82] Mr. Tan argues that the trial judge erred in admitting the English translation of the Cantonese conversation between himself and the undercover officer. Before the trial judge, the defence objected to this evidence because of concerns with the undercover officer's lack of qualifications as a translator and the translation's reliability. Mr. Tan says the officer corrected crucial aspects of the transcript; he had no formal training (in translation or Cantonese) and had some difficulty understanding Mr. Tan. Furthermore, he says, there were inconsistencies between two overlapping translations of the same conversation, which were brought out in cross-examination of the officer.
- [83] Despite these challenges to the translation, the trial judge admitted the evidence. Mr. Tan says this was an error. He argues before this Court that the transcript of the undercover officer's interaction with Mr. Tan is classified as expert evidence. The undercover officer was not a properly qualified expert in speaking Cantonese and its admission into evidence was contingent on his ability to authenticate it. The trial judge erred by failing to consider whether the transcript was admissible expert evidence. In addition, Mr. Tan submits that there were significant concerns as to the reliability of the transcript, especially given its importance to the issues at trial and the frailties shown on cross-examination. Mr. Tan relies on *R. v. Sanghera*, 2012 BCSC 995 as an example. In this case a police officer, who was fluent in both English and Punjabi, had formal schooling in the latter, and had provided interpretation services before, was refused as an expert on the basis that there was insufficient evidence to establish that he had the necessary qualifications as a translator and interpreter.
- [84] The Crown submits that Mr. Tan's argument on the reliability of the translation goes to the weight given to Mr. Tan's statements, not to admissibility. It says Mr. Tan's argument on reliability is somewhat misplaced given that the majority of the translation for the trial was not done by the undercover officer, but by civilian translators. In the end, two Cantonese speaking individuals, including the officer, confirmed the transcript.
- [85] The Crown says admissibility of the English translation is not an issue of expert evidence; it is an issue of the admissibility of a hearsay statement of an accused at trial, which is subject to the admission exception to the hearsay rule. This rule is premised on the adversarial system and admissibility is determined on the basis of the statement's authenticity, not reliability: *R. v. Evans*, [1993] 3 S.C.R. 653. Once admissible, the weight of the statement and quality of the translation were an issue for the trial judge, whose finding that the probative value of the transcript outweighed any prejudicial effect should be afforded deference from this Court. In any event, the trial judge was justified in placing some weight on the translated statements as there were ample indicators of trustworthiness surrounding the statement. For example, the allegation that the undercover officer "corrected crucial aspects of the

transcript" amounted to the officer making very minor changes on very few pages.

- [86] The Crown also likens Mr. Tan's argument on the English translation to "partial statement" cases. In those cases, only a part of a statement is recorded or tendered as evidence. The issue for the trier of fact becomes one of weight, not authenticity. The trial judge was aware of the language issue, but was not concerned with the statement's accuracy.
- [87] Finally, the Crown submits that even if the trial judge erred in admitting the English translation, the curative proviso applies.

2. Analysis

- [88] I agree with the Crown that this is not an issue of admissibility of expert evidence under *R v. Mohan*, [1994] 2 S.C.R. 9. With respect, I do not find *Sanghera* applicable or instructive. That case was addressing an application to have a police officer accepted as an expert witness to translate portions of intercepted communications. The undercover officer in this case was a participant in a conversation; he was a contemporaneous listener and could relate that content to the trial judge. He was also cross-examined on that evidence.
- [89] The trial judge was correct to view the shortcomings of the translation as only going to weight. In my view, the trial judge properly admitted the statements. The quality and accuracy of the undercover officer's evidence went to the weight to be given to the statements at trial. On both these determinations, I see no error in the trial judge's analysis requiring the intervention of this Court.
- [90] I would not accede to this ground of appeal.

C. Did the trial judge err in concluding that the confession was voluntary?

1. Positions of the Parties

- [91] Mr. Tan argues that the trial judge erred in his conclusion that the confession to Sergeant Dhillon was voluntary. He says that this Court may overturn a finding of voluntariness where the trial judge failed to properly consider all the relevant circumstances.
- [92] Mr. Tan first points to an incomplete evidentiary record with respect to his dealings with police and the circumstances surrounding his confession.
- [93] Mr. Tan then argues the trial judge erred by failing to adequately consider relevant evidence in his ruling, including:
- Sgt. Dhillon's inability to remember the Appellant's request for counsel at Toronto Pearson Airport despite being played an audio recording;
 - Sgt. Dhillon was a member of the forensic interview team, was chosen because he spoke the Appellant's language, and agreed that he started to 'build rapport' with the Appellant during the transport;

- c. The Appellant was in handcuffs for the duration of the transport;
 - d. Sgt. Dillon's [sic] was unable to recall the 'context' or 'details' of the conversation between himself and the Appellant during the flight from Toronto to Vancouver.
 - e. Sgt. Dhillon's repeated references (in the statement) of speaking to the Appellant in Antwerp despite his and Officer Wellington's recollection that the first interaction took place at Brussels International Airport and
 - f. The Appellant's statement to [the undercover officer] during the cell plant operation to the effect that the police had told him he wasn't going home for a "long, long time," on the flight and that as a result he was "expecting what was going to happen."
- [94] Mr. Tan submits that the trial judge erred in placing too little importance on discrepancies between the recollections of Sergeant Dhillon and Corporal Wellington during the journey from Belgium. He says that while the trial judge did reference Sergeant Dhillon's statement to Mr. Tan that he was not "going home [for a] long, long time", the judge did not consider whether this was a threat, or whether Sergeant Dhillon's inability to recall the statement without hearing a recording of it went to his credibility in asserting that nothing regarding the investigation was discussed. Sergeant Dhillon was also unable to recall whether Mr. Tan asked to speak to a lawyer in Toronto. In the circumstances, Mr. Tan argues there is no way of knowing whether threats or inducements were made.
- [95] Mr. Tan also takes issue with an alleged misstatement of evidence made by Sergeant Dhillon during his interview. Mr. Tan says Sergeant Dhillon deceived him with respect to evidence relating to a thumb print found on the open/closed sign of the store and a thumb print found in the victim's blood on the display counter. The judge referred to and dismissed the first misstatement, but did not refer to Sergeant Dhillon's alleged deception regarding the display counter. Mr. Tan argues that in all the circumstances, Sergeant Dhillon's presentation of this false evidence amounts to a deception and the trial judge misapprehended this evidence.
- [96] Finally, Mr. Tan argues that the alleged deception, combined with a lengthy interview, Sergeant Dhillon's repeated references to the strength of the case and creation of a false sense of urgency, fostered an atmosphere of oppression. Furthermore, Mr. Tan says that the judge only considered Sergeant Dhillon's misstatements under the heading of "police trickery", and failed to consider whether they contributed to an atmosphere of oppression.
- [97] Considering all these circumstances, Mr. Tan says the trial judge's conclusion that voluntariness was established beyond a reasonable doubt is undermined.
- [98] The Crown states that the trial judge's ruling on the voir dire is a factual determination and entitled to deference on appeal; this Court may not intervene unless it finds a palpable and overriding error. It says that the issues going to the evidentiary record and the discrepancies with the officers' recollection are issues going to the assessment of the evidence, the province of the trial judge. While there were misstatements by police, the trial judge was entitled on all of the evidence to conclude that they did not amount to trickery or oppression

and did not impact voluntariness. Finally, the Crown argues that the trial judge correctly found that there was no atmosphere of oppression: Mr. Tan was treated well and in a position of relative comfort; Mr. Tan's demeanour was relaxed. He laughed and, at times, contradicted Sergeant Dhillon. The Crown submits that these findings are supported by the evidence. The circumstances do not support the conclusion that this was an atmosphere of oppression compared to other cases.

2. Analysis

a) Confessions Rule

[99] In my view, the trial judge accurately set out the law on the confessions rule at paras. 13-14 of his ruling on *Voir Dire* No. 3:

[13] The common law confessions rule is that where an accused makes a statement to a person in authority, the Crown bears the onus of proving the voluntariness of the statement beyond a reasonable doubt as a prerequisite to its admission into evidence: *R. v. Spencer*, 2007 SCC 11. The rule addresses concerns about the reliability of confessions and the dangers of false confessions. The rule aims to protect an accused's rights without unduly limiting society's need to investigate and solve crime: *R. v. Oickle*, 2000 SCC 38 at para. 33. The classic formulation in *Ibrahim v. The King*, [1914] A.C. 599 (P.C.) also continues to have application:

...no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

[14] *Oickle* is now the leading case on the test for determining voluntariness of statements made to persons in authority. In *Oickle*, Iacobucci J., for the majority, held that application of the rule requires a contextual approach that considers all relevant factors. Four factors to be considered are whether the statement was made (1) without threats or promises by a person in authority, (2) in an atmosphere free of oppression, (3) by an accused with an operating mind, and (4) without impermissible police trickery that would shock the community: *Oickle* at paras. 47-67; *Singh* at para. 35. The use of police trickery is a distinct inquiry.

[100] There is no suggestion from Mr. Tan that the trial judge erred in law with respect to voluntariness or the factors to be taken into account from *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3. In *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500, Madam Justice Deschamps set out the standard of review in such a circumstance:

[16] In *Oickle*, Iacobucci J. stated the following about the standard of appellate review of a trial judge's decision on whether a statement is voluntary (at paras. 71 and 22):

If a trial court properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for "some palpable and overriding error which affected [the trial judge's] assessment of the facts". . . .

...

... a disagreement with the trial judge regarding the weight to be given various pieces of evidence is not grounds to reverse a finding on voluntariness. [Emphasis deleted.]

[17] Where a trial judge considers all the relevant circumstances and properly applies the law, deference is owed to the judge's determination on the voluntariness of the statement at issue. Thus, [trial judges] are in the best position to draw conclusions from the evidence both because of this expertise and because of their privileged position in assessing the evidence as a whole.

[101] In my respectful opinion, the trial judge reviewed all of the relevant circumstances of the confession to determine its voluntariness. It appears that what Mr. Tan really takes issue with is the trial judge's weighing and assessment of the evidence, claiming that he misapprehended the evidence by not referring to certain aspects of the record or that the judge misstated evidence around Sergeant Dhillon's alleged deception. This allegation takes issue with the judge's failure to highlight minor pieces of evidence of the overall interaction. This Court is not entitled to re-weigh evidence in the manner suggested by Mr. Tan: *R. v. Benham*, 2013 BCCA 276 at para. 30. Nonetheless, with this in mind, I will consider Mr. Tan's allegations.

i. Incomplete Record

[102] The trial judge addressed the completeness of the record of the trip to Canada at paras. 28-36 (*Voir Dire* No. 3). He agreed with counsel that the entire context had to be considered and that the Crown must establish an adequate record. In this case, the judge found that despite the lack of a recording, there was evidence from the police officers and continued:

[29] Defence counsel points to contradictions between the officers' notes and recordings taken at Pearson International Airport to establish that the record is insufficient or incomplete. With one exception, discussed below, I place little importance on these discrepancies. The officers thought they were being recorded during the flights. They therefore did not take notes and now, almost three years later, have an incomplete memory of what was said.

[30] A further and perhaps more significant distinction between the facts of *Barreda* [[1999] B.C.J. No. 2259 (S.C.)] and the present case is the time lapse between the gap in the record and the Statement on which the Crown seeks to rely.

[31] In *Barreda*, an unreported conversation occurred, the police discovered a grow-op and the accused is alleged to have made the incriminating statement that she was the occupant of the house all within approximately 20 minutes. Here, I am told the recording equipment failed on the flight between Belgium and Canada. There was a stopover in Toronto and recordings were made at the airport there. These were commercial flights.

- [32] This leaves a long travel period during which there is only a sporadic record of what transpired between the officers and Tan. Tan was transferred to police cells in Richmond at 10:00 p.m. He slept and ate. Tan confirms on videotape that he was not bothered during the night. Dhillon began interrogating him some 17 hours after their arrival in Richmond. The interrogation lasted eight hours. Several topics are canvassed before Dhillon refers to the murder. Only after six hours of questioning does Tan make comments which could be characterized as a confession. During the eight hours no allusion is made to any promise or threat made by Dhillon, Wellington or anyone else.
- [33] The cell plant evidence, which I have found to be admissible and which forms part of the relevant context, also does not reveal that anything occurred either in Belgium or during the trip to Canada which led Tan to later confess. In fact, the cell plant evidence indicates quite the opposite. Tan tells the undercover officer that Tan made the Statement because he was presented with evidence by Dhillon during the recorded interrogation that is the subject matter of this voluntariness inquiry. There is no evidence that anything untoward occurred in Belgium.
- [103] The judge stated at para. 36 that where there is a gap in the record, an explanation is owed and, in this case, one was provided. He concluded there was nothing in the evidence that raised a reasonable doubt as to the voluntariness of Mr. Tan's statements.
- [104] A statement may be excluded on the basis of lack of completeness if the judge is not able to determine voluntariness. (*R. v. Richards* (1997), 6 C.R. 5th 154 at para. 33 (B.C.C.A.)). The fact that an investigating officer is unable to recite the exact words spoken does not, however, necessarily render a statement inadmissible. The possibility of incompleteness is generally a matter of weight for the trier of fact. There is no suggestion that the officers intentionally edited the statements in a way unfavourable to Mr. Tan. Mr. Tan did not testify to having said something that was omitted (*Richards* at para. 31; *R. v. Kennealy* (1972), 6 C.C.C. (2d) 390 (B.C.C.A.); *R. v. Lessard* (1982), 10 C.C.C. (3d) 61 (Que. C.A.); *R. v. Lapointe* (1983), 9 C.C.C. (3d) 366 at 377–82 (Ont. C.A.), affirmed [1987] 1 S.C.R. 1253; *R. v. Howard* (1983), 3 C.C.C. (3d) 399 at 412 (Ont. C.A.); *R. v. Ferris* (1994), 27 C.R. (4th) 141 at 153 (Alta. C.A.), affirmed [1994] 3 S.C.R. 756).
- [105] Traditional methods of assessing credibility and reliability may be used to assess voluntariness: *R. v. Crockett*, 2002 BCCA 658 at para. 20. This is what the trial judge did here. In this case, the impugned gap in evidence was not the actual confession, which was recorded. Only peripheral, contextual matters were missed, but with reasonable explanation. The trial judge could, and did, assess the voluntariness of the statement despite the gap in the evidence. In my view, there is nothing meriting the intervention of this Court on the trial judge's assessment of the sufficiency of the overall record.

ii. Misapprehended / Ignored Evidence

[106] Mr. Tan's argument that the trial judge ignored or misapprehended important pieces of evidence also relates to his submissions on the incomplete record. In my view, this argument, at its core, amounts to asking this Court to re-weigh the evidence before the trial judge. The trial judge's reasons on the voir dire reveal that he was clearly alive to the frailties of the officers' memories and took that into account on his final assessment of the circumstances of the confession. But the judge naturally focused his attention on the circumstances of the interview with Sergeant Dhillon, and he was still mindful of all the relevant events leading up to the interview. The fact that not every piece of evidence was recorded does not impugn the overall conclusion. It is not for this Court to point to individual pieces of evidence that are not explicitly referenced to impugn the trial judge's reasons on the voir dire.

[107] In my view, the trial judge's conclusion that there was no evidence of threats or inducements (no quid pro quo) is supported on the evidence.

iii. Presentation of False Evidence

[108] The trial judge addressed Mr. Tan's allegation of police deception or trickery arising from Sergeant Dhillon's misstatements at paras. 63-71, and found that Sergeant Dhillon did misstate the evidence to Mr. Tan ("probably inadvertently"). The judge found that the misstatements did not give rise to the confession, distinguishing *R. v. Hammerstrom*, 2006 BCSC 1700. Mr. Tan says the trial judge misapprehended this evidence, and says there is ample evidence, some of which was even referred to by the trial judge, that the misrepresentations had the effect of compelling him to confess.

[109] I do not agree that this amounts to police trickery or oppression on the level that would call into question the voluntariness of Mr. Tan's confession. The trial judge concluded that the Sergeant's misstatement was inadvertent and insignificant. In the context of the entirety of the evidence, and in my view, it cannot be said he erred. This was not a case where police exaggerated or fabricated the balance of their case against the accused. There was ample evidence on which police could have put their case to Mr. Tan, and they did so; the trial judge was aware of this too (at para. 68). In other words, in my respectful opinion, this was not a case where police were tricking the accused into confession. Oickle, in any event, is clear that even if the evidence is not put to the accused accurately, it is not "necessarily grounds for excluding a statement" (at para. 61). Police conduct in this case certainly does not rise to the level of conduct that would be so appalling as to shock the community: Oickle at para. 67. As stated by Lamer J. (as he then was) in *Rothman v. The Queen*, [1981] 1 S.C.R. 640 at 697:

It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.

In my view, the trial judge's assessment of the circumstances of the confession discloses no reviewable error.

iv. Atmosphere of Oppression

[110] Again, in a related argument, Mr. Tan points out that evidence relating to Sergeant Dhillon's misstatement, while considered under police trickery, was not considered in the context of what he says was an oppressive interview. The trial judge carefully considered the transcript and the circumstances of the interview. He compared this case to *R. v. Ciliberto*, 2005 BCSC 1859, where police interviewed an accused with a mental illness. They used intense, loud interview tactics. They left the accused alone with the victim's relatives for an hour. They used false evidence. The judge then summarized his impressions of this case at para. 54:

[54] In this case there is no evidence that Tan has any special vulnerability similar to mental illness. Tan did not know the victim's family and knew the victim only slightly, through his pawn shop dealings. There is no physical presence, as the recording was shown on a computer screen. There is no evidence of any shouting or aggressive behaviour by Dhillon. Dhillon appears polite. The accused appears relaxed. Tan laughs, burps, and at various times sprawls on the couch or sits on the floor while eating. At times Dhillon presses for an answer but his demeanor and manner are not aggressive. I therefore find that, on these facts, showing a recorded plea of the victim's daughter to Tan did not constitute oppressive conduct or create an atmosphere of oppression.

[111] In the next paragraph, he considered the implication of police trickery:

[55] With respect to police trickery as a factor in determining whether there has been oppression, I discuss that matter below. As noted, I accept that Dhillon made some misstatements of evidence. In my opinion, however, taking all of those matters into consideration, there was no oppressive conduct or atmosphere surrounding the making of the Statement.

[112] In my respectful opinion, the trial judge was clearly alive to how police trickery could potentially contribute to an atmosphere of oppression. Mr. Tan was treated appropriately while in police custody (he was fed, he slept, had washroom breaks and he had a cigarette). There was no excessive aggression and the interrogation was not inordinately long. The judge considered the circumstances of the interview, Mr. Tan's demeanour and his responses to Sergeant Dhillon's evidentiary, moral and emotional propositions, and found that the atmosphere was not oppressive. This conclusion was open to him and I would not interfere with it.

b) Conclusion on Voluntariness

[113] In my respectful opinion, I can see no error in the analysis of the trial judge requiring this Court's intervention. He considered all relevant elements of the voluntariness analysis and all the relevant circumstances to determine whether Mr. Tan's confession was voluntary. His factual conclusions and the inferences he drew from them are supported on the

evidence. While there were certainly gaps in the record and the trial judge did not refer to every piece of evidence, in my view, none of this affects the ultimate conclusion that Mr. Tan's confession was voluntary. The trial judge did not err by admitting that evidence.

[114] I would not accede to this ground of appeal.

VI. Conclusion

[115] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Madam Justice MacKenzie"

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/CA/14/00/2014BCCA0009.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-tan-2014>

Prepared on 26 October 2026 · Esheria