
CANADA / JUDGMENT

R. v. West

2020 BCSC 1780

COURT

Supreme Court of British Columbia

DECIDED

21 August 2020

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2020 BCSC 1780 R. v. West

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. West,

2020 BCSC 1780

Date: 20200821

Docket: 16260-2

Registry: Powell River

Regina

v.

John Darcy West

Before: The Honourable Madam Justice Iyer

Oral Ruling on Voir Dire

Counsel for the Crown:

D.A.S. Peltier

Counsel for the Accused:

C.L. Hodson

Place and Date of Trial/Hearing:

Powell River, B.C.

August 20, 2020

Place and Date of Judgment:

Powell River, B.C.

August 21, 2020

- [1] THE COURT: Before giving my ruling in this matter, I want to say for the record that I reserve the right to edit it for citations and form if necessary, but I will not be changing anything of substance.
- [2] Mr. West is charged with three counts of possession for the purposes of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19. Each count relates to a different substance: fentanyl, Count 1; cocaine, Count 2; and methamphetamine, Count 3.
- [3] In this blended voir dire, Mr. West applies to have the evidence taken from him during a strip search excluded under s. 24(2) of the Charter, because he says it was obtained in violation of his right to counsel under s. 10(b). He says that the breach of his s. 10(b) rights made the search unreasonable contrary to s. 8 of the Charter, but does not assert that the search was independently unreasonable.
- [4] Mr. West also challenges the voluntariness of a statement he made to the police. However, in oral submissions, Mr. West conceded that his statement was voluntary. He argued under the principled exception to the hearsay rule that the statement was necessary but not reliable. The Crown pointed out that Mr. West's statement is admissible under the categorical exceptions to the hearsay rule because it is a statement made to a person in authority. I agree. Under this exception, the only issue is voluntariness: *R. v. S.G.T.*, 2010 SCC 20 at para. 20.
- [5] The statement is therefore admissible. The weight to be accorded to it is a matter for the trial proper. There is an issue about the content of the statement, which I address below. The balance of my reasons address the alleged Charter violations. The parties requested that I provide them before they make submissions, if necessary, on s. 24(2).

Background

- [6] In the early hours of December 20, 2018, the Powell River RCMP received an anonymous tip that Mr. West was at a particular address in Powell River and that he had outstanding warrants. Constables McRae, Szulhan, and another officer who did not testify responded. Each was in full uniform and driving his own police cruiser. They arrived at the address at about the same time. At about 2:35 a.m., Constable McRae knocked on the door. A woman answered. Constable McRae saw Mr. West seated in the living room and recognized him from previous interactions. Constable McRae stood in front of Mr. West and arrested him on the outstanding warrants. He put Mr. West in handcuffs and gave him his s. 10(b) Charter rights from memory. He does not have a note of Mr. West saying anything at that point.

- [7] Constable McRae took Mr. West outside and performed a pat-down search on him. He found a wad of \$1500 in cash in the right front pocket of Mr. West's sweatpants, along with a small glass vial of what he believed to be methamphetamine. He also retrieved a wallet containing \$650 in cash from a cellphone shoulder holster that Mr. West was wearing. He put Mr. West in the back of the police cruiser and examined what he had found.
- [8] Based on his examination, Constable McRae arrested Mr. West for possession for the purposes of trafficking and gave him his s. 10(b) Charter rights from memory once again. Mr. West said that he wanted to speak with a lawyer. This occurred at 2:42 a.m.
- [9] Constable McRae drove Mr. West to the RCMP detachment. He explained that his usual practice is to provide access to counsel at the detachment after the person has been processed and more thoroughly searched, and not to question the person before then.
- [10] Constable McRae arrived at the detachment with Mr. West at 2:57 a.m. He read Mr. West his s. 10 rights from the standard police Charter card. Mr. West responded that he understood his rights. When Constable McRae asked if he wanted to call a lawyer, Mr. West replied, "Not right now. I just want to go to sleep. I mean it's really not gonna do me no good."
- [11] Since Mr. West had previously asserted his right to counsel, Constable McRae read him the supplementary warning from the Charter card. Again Mr. West said that he understood the warning. When asked what he wanted to do, he replied, "Well, I don't need to call a lawyer, I'm not going to get bailed out tonight."
- [12] Constable McRae then left Mr. West in the cruiser and went to talk with his superior, Corporal Hamilton, about conducting a strip search on Mr. West. He explained that he had decided to do this based on his previous dealings with Mr. West and the items found on him that evening. Constable McRae testified that he got the authorization at that point.
- [13] Corporal Hamilton testified that they discussed the matter but he did not formally authorize the strip search until after the second pat down of Mr. West. I prefer Corporal Hamilton's evidence on this point over that of Constable McRae. As Corporal Hamilton was responsible for giving formal authorization, he is more likely to recall accurately when he did this.
- [14] When Constable McRae brought Mr. West into the booking area, he was uncuffed and Constable McRae asked him to take off his shoes. Constable McRae did a second pat down. Both Corporal Hamilton and Constable McRae explained that a second pat down is a routine part of the booking procedure. Its purpose is to remove every item from the detained person that could be evidence or that the detainee could misuse when they are put in a cell or in a phone room.

- [15] Mr. West was cooperative during this search and Constable McRae did not find anything else. However, Constable McRae observed that when he ran his hand up Mr. West's leg toward his groin, Mr. West appeared uncomfortable. He bent over and then squatted down, taking a couple of breaths. Corporal Hamilton testified that Mr. West "pulled away" and seemed "antsy". Corporal Hamilton said that he knew Mr. West from previous dealings with him and this was not in character.
- [16] Corporal Hamilton formally authorized the strip search based both on what Constable McRae had told him earlier and on his observations of Mr. West during the second pat down. Constables McRae and Szulhan took Mr. West into the shower room to do the strip search with appropriate privacy. As they entered the shower room, Mr. West asked why they were there. Constable McRae told him he was going to be strip searched. Mr. West became agitated. He resisted and insisted that he was not going to be strip searched. A brief struggle ensued, during which Constable McRae and Constable Szulhan restrained Mr. West and he was handcuffed. Corporal Hamilton came over but remained in the hall while the others re-entered the shower room.
- [17] When Constable McRae pulled down Mr. West's sweat pants he saw a pocket on the outside front of Mr. West's underwear that contained a black pouch. Mr. West said words to the effect of, "Okay, you've got it," and said that they did not need to remove his underpants. The three officers recalled slightly different wording, but nothing turns on that. Constable McRae stopped the search at that point.
- [18] Constable McRae opened the pouch and found two vials and two baggies. Testing later revealed that one vial contained 1.35 grams of crack cocaine. The other contained 1.72 grams of fentanyl. One baggie held 2.97 grams of powder cocaine. The other held two rocks of crack cocaine weighing a total of 6.48 grams. Constable McRae believed Mr. West when he said that he did not have anything else on him. Constable McRae did not pull down Mr. West's underwear or remove his shirt.
- [19] I find that Constable McRae left the shower room at that point, leaving Mr. West with Constable Szulhan and Corporal Hamilton.
- [20] Corporal Hamilton said that after the drugs had been found and removed, Mr. West resumed his normally pleasant demeanour. Noting the change, Corporal Hamilton asked him, "Darcy, why did you resist?" According to Corporal Hamilton, Mr. West replied, "Christmas is coming and I have bills to pay." Corporal Hamilton made a note of this response in his notebook shortly afterwards.
- [21] Constable Szulhan's recollection was different. He could not remember whether or not Mr. West was responding to a question from Corporal Hamilton. He recalled Mr. West as saying that he was "between a rock and a hard place" and that he had to support his children. Constable Szulhan did not make a note of the statement that day. He wrote it in his report, which he completed based on his memory five days later when he returned from leave.

[22] I find as a fact that Mr. West made the statement recounted by Corporal Hamilton, not the one recounted by Constable Szulhan. Constable Szulhan made no contemporaneous note of the statement. In general, his recollection of the interaction with Mr. West was poor. By contrast, Corporal Hamilton's recollection was clear, detailed, and confirmed by his contemporaneous notes. Mr. West's statement, "Christmas is coming and I have bills to pay", is voluntary and admissible.

Issues

[23] As voluntariness has been determined, the remaining issues on the voir dire are:

- a) Were Mr. West's Charter s. 10(b) rights breached?
- b) If so, were Mr. West's Charter s. 8 rights breached?
- c) If there are Charter breaches, should the evidence obtained from the strip search be excluded under s. 24(2) of the Charter?

Analysis

Were Mr. West's s. 10(b) rights breached?

[24] I am asked to consider two questions under this heading. First, did Mr. West waive his right to counsel when Constable McRae read him his Charter rights at the detachment? Second, does s. 10(b) require police to readvise a person of their s. 10(b) rights prior to a strip search?

Waiver

[25] A detainee can waive the right to counsel. To establish waiver, the Crown must prove it was "clear and unequivocal". The waiver must have been "free and voluntary". It cannot result from direct or indirect compulsion: *R. v. Prosper*, [1994] 3 S.C.R. 236. There is no suggestion of compulsion here.

[26] When a detainee initially asserts a desire to exercise the right but then has a change of mind, the police must "advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee": *Prosper*, para. 51.

[27] I understand this has been standardized as the supplementary Charter warning on Constable McRae's Charter card.

[28] Finding whether or not a waiver occurred is a matter of fact for the trial judge and the burden of proof is on the Crown. Cases have gone both ways as to whether a person's statement that they do not want to call a lawyer right now, only later, is a waiver: see *R. v. Seehra*, [2009] B.C.J. No. 1285.

- [29] Here Mr. West's responses to the information Constable McRae gave him about his rights under s. (b) changed. Although he consistently said that he understood his rights, after having said that he wanted to speak to a lawyer at the scene, he did not say that at the detachment. He said that he did not want to call a lawyer at that time of night. He also expressed his reasons: that he wanted to sleep and calling a lawyer would not get him out on bail at that point.
- [30] Where a person asserts their right to counsel, not only do the police have an obligation to facilitate it, the individual must exercise that right diligently: *R. v. Sinclair*, 2010 SCC 35 at para. 27.
- [31] The only basis on which Mr. West argues that he did not waive his s. 10(b) rights is that Constable McRae ought reasonably to have understood Mr. West's waiver was premised on his assumption that nothing significant was going to happen that night and ought to have told him that he might or would be strip searched. I do not agree with that submission. It is not reasonable to require a police officer to know what the detained person considers significant. As defence counsel conceded, this submission is very closely intertwined with the defence submission on whether s. 10(b) includes a positive obligation on police to always read s. 10(b) Charter rights to a person before strip searching them. I address that argument below.
- [32] The evidence before me is that Mr. West was familiar with the police procedures in drug investigations and knew that the usual booking procedure involved a more thorough pat-down search. He knew that he had drugs on him that the police had not found. Whether he adverted to it or not, he was also aware that police sometimes do strip searches during drug investigations, because that had happened to him once in the past.
- [33] Mr. West was given the supplementary Charter warning that if he said he wanted to speak to counsel, the police were obliged "not to take a statement from him or ask him to participate in any process which could provide incriminating evidence, until you are certain about whether or not you want to exercise this right." In response, he reiterated that he did not need a lawyer at that time. Mr. West did not ask to speak to a lawyer when he was told he would be strip searched.
- [34] I am satisfied that Mr. West understood his s. 10(b) right to speak to counsel and chose not to exercise it at that time. I find that his waiver was clear and unequivocal.

Right to be re-advised

- [35] There is no dispute that the police had reasonable and probable grounds to search Mr. West incidental to his arrest, and that they had reasonable and probable grounds to perform a strip search. There is also no dispute that the search was performed in compliance with the requirements of *R. v. Golden*, 2001 SCC 83.

- [36] Mr. West's position is that before strip searching a person incidental to arrest, s. 10(b) requires police to inform the person that they are going to be strip searched, informed of their rights under s. 10(b) and given an opportunity to speak to counsel before the search, unless they waive that right.
- [37] The Crown's position is that s. 10(b) does not require that the police tell the person that they are going to be subject to a strip search before performing it, nor does it require a separate reading of their s. 10(b) rights and access to counsel before the strip search if the person asserts that right.
- [38] The genesis of both parties' positions is the Supreme Court of Canada's decision in *Sinclair*. As that case dealt with a person who had already exercised his right to counsel, the court framed its s. 10(b) analysis as a "right to re-consultation".
- [39] The parties agree that *Sinclair* establishes that, regardless of whether a person has previously been informed of their s. 10(b) rights, and regardless of whether they have asserted or waived them, the police are constitutionally obliged to re-inform a person of their s. 10(b) rights, including providing them an opportunity to speak with counsel, in at least three circumstances:
- a) where there are new procedures involving the detainee;
 - b) where there is a change in jeopardy; or
 - c) where there is reason to question the detainee's understanding of their s. 10(b) rights.
- [40] While these categories are not closed, Mr. West relies only on the first of them. He says that a strip search is a "new procedure" such that he had a right to be informed about the strip search, advised of his right to counsel, and given the opportunity to speak to counsel before the strip search occurred.
- [41] *Sinclair* was about a person charged with murder who had exercised his right to counsel before being interviewed by police. Despite expressing repeatedly that he wanted to talk to his lawyer during the interrogation, Mr. *Sinclair* continued to answer police questions and he participated in a re-enactment. A majority of the court held that there was no violation of s. 10(b) when the police failed to give Mr. *Sinclair* another opportunity to speak with a lawyer during his interrogation.
- [42] In *Sinclair*, the court explained why a new procedure re-triggers the s. 10(b) right in the following two paragraphs:
- [50] The initial advice of legal counsel will be geared to the expectation that the police will seek to question the detainee. Non-routine procedures, like participation in a line-up or submitting to a polygraph, will not generally fall within the expectation of the advising lawyer at the time of the initial consultation. It follows that to fulfill the purpose of s. 10(b) of providing the detainee with the information necessary to making a meaningful choice about whether to cooperate in these new procedures, further advice from counsel is

necessary: *R. v. Ross*, [1989] 1 S.C.R. 3.

...

- [65] We conclude that the principles and case-law do not support the view that a request, without more, is sufficient to retrigger the s. 10(b) right to counsel and to be advised thereof. What is required is a change in circumstances that suggests that the choice faced by the accused has been significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(b) of providing the accused with legal advice relevant to the choice of whether to cooperate with the police investigation or not. Police tactics short of such a change may result in the Crown being unable to prove beyond a reasonable doubt that a subsequent statement was voluntary, rendering it inadmissible. But it does not follow that the procedural rights granted by s. 10(b) have been breached.
- [43] The Crown argues that the hallmark of a new procedure is that the detainee's consent is required, because that is when the individual needs access to the information necessary to make a meaningful choice. As a strip search does not require consent of the detainee, s. 10(b) is not triggered.
- [44] Mr. West argues that a strip search is a new process, relying on two decisions of the Ontario Superior Court involving penile swab searches: *R. v. Johnson*, 2016 ONSC 3947 and *R. v. Pun*, 2012 ONSC 5305. In *Johnson*, the court relied on *R. v. T.G.H.*, [2014] O.J. No. 3129 a decision involving a rectal search of a detainee for drugs. In *Johnson*, Munroe J. quoted the Ontario Court of Appeal's rationale for finding that the s. 10(b) right was re-triggered under *Sinclair* even where the detained person's consent was not required: *Johnson* at para. 163, citing *T.G.H.* at para. 40:

The examination authorized by the general warrant was about as far from a "routine procedure" as one could get. No one would suggest that the appellant's lawyer, when he was advising the appellant at the time of his arrest, could have anticipated an order in the terms of the general warrant and given the appellant the appropriate advice. It also is irrelevant that the appellant was required to comply with the warrant and that [the] advice he might have received from his lawyer would not have altered that reality. The appellant was entitled to legal advice even if that advice left him with few, if any, options other than compliance. The appellant was entitled to legal advice about the scope of the warrant and exactly what he had to do or, more importantly, not do, to comply with the warrant. In any event, and assuming the lawyer could do nothing other than tell the appellant to comply with the warrant, that advice could be important in that a reasonable detainee, in the appellant's position, might well refuse to allow the police to do what the warrant authorized. Without proper legal advice, a detainee might well refuse to cooperate and find himself in further difficulty with the law.

- [45] Munroe J. then articulated the rationale for applying the new procedure category in *Sinclair* to a penile swab search as follows:

- [168] First, a penile swab search is a new, non-routine procedure, the type contemplated by Sinclair. Indeed, by their very intrusiveness, penile swab searches will never be routine. Moreover, even though a penile swab search is inherently compulsory, the purpose of s. 10(b) encompasses advice on those procedures for which a legal obligation attaches.
- [169] I find that when the police decided to conduct a penile swab search on Mr. Johnson, the police had the duty to give Mr. Johnson an additional opportunity to receive advice from counsel. The failure to do so constituted a breach of s. 10(b) of the Charter. Further, I reject the Crown's alternate argument that the police were entitled to suspend Mr. Johnson's s. 10(b) rights pending completion of the penile swab search. I agree with T.G.H. that Debot does not control here. Debot was a street search case. Mr. Johnson's penile swab search was conducted at the police station more than an hour after his arrest. The practical difficulties present at a street search are absent at a station search.
- [170] I do not ignore the stated and accepted concerns of the police about intentional efforts to eliminate evidence in a penile swab context. This is why the arrested individual is handcuffed and placed in a dry cell. But, the facilities available here included a private telephone room with a window where an officer can monitor the conduct of the arrested person during his private lawyer call. With the availability of such a facility, I am of the opinion that a claim for the need to suspend such a telephone call is unwarranted. Finally, I note the accused was given a lawyer call before the swab procedure in Laporte, at para. 11.
- [46] These Ontario cases interpret Sinclair as determining that the non-routine or extraordinary nature of the contemplated procedure is the trigger for renewal of the s. 10(b) right, rather than a requirement for the detainee's consent. The decisions in Pun and Johnson emphasize the intrusive, embarrassing, and novel nature of a penile swab search. Counsel did not point me to any Ontario case finding that the police must provide the s. 10(b) right and an opportunity to exercise it before conducting the kind of strip search to which Mr. West was subjected.
- [47] I was given one case from the Nunavut Court of Justice, R. v. M.T., 2016 NUCJ 09, in which the court held that a penile swab procedure is non-routine, but does not trigger the s. 10(b) right as set out in Sinclair.
- [48] The only case to which I was directed in this jurisdiction is R. v. Adams, 2019 BCPC 360. It concerned a drug investigation. Mr. Adams was charged with possession and trafficking offences after his vehicle was stopped. He was patted down at the scene and informed of his s. 10(b) rights. Mr. Adams asked to speak to a specific lawyer, but when told there would be no privacy at the roadside, said he would call him later, at para. 14. The officer told Mr. Adams that he was going to be strip searched when they returned to the station and gave him a chance to avoid that by giving up any hidden drugs. The officer testified that he gave Mr. Adams his s. 10 rights again at the station before doing the strip search. However, he had no notes relating to s. 10 or Mr. Adams' responses to the required questions. The strip search was performed in compliance with Golden and drugs were found.

[49] The defence argued that Mr. Adams ought to have been given an opportunity to speak to counsel before the strip search. Importantly, the Crown did not take issue with that proposition. Instead, it argued that Mr. Adams had waived his rights, based on the officer's evidence. The court rejected that argument:

[51] I am not prepared to accept Cst. Shaikh's evidence on this point. It may well be that he interpreted something said by Mr. Adams as a waiver but that is something the court needs to decide. With no, even remotely, contemporaneous record of what was said by the accused, if anything, I find that the accused has established on a balance of probabilities that his s. 10(b) rights were violated at the implementation stage. The police had a duty at the detachment to offer Mr. Adams a right to speak to counsel in private and I am unable to conclude that they did so.

[50] Adams is distinguishable from the present case because Mr. Adams had asserted his right to counsel and was not provided with access in a timely way. The court did not address directly whether a strip search necessarily retriggers the s. 10(b) right.

[51] Mr. West relies on that portion of Adams in which the court found that the search was not carried out in a reasonable manner contrary to s. 8 of the Charter. Under that heading, the court noted at para. 61 that:

[Where] the police provide credible grounds for delaying a lawyer call until after the strip search, the courts seem to be reluctant to find a breach of s. 8.

[52] There was no evidence before the court in Adams about the risks of destruction of evidence: para. 64.

[53] It is in that context that the court considered that failing to afford Mr. Adams access to counsel before the strip search contravened s. 8. This case is different. Mr. West argues that s. 8 is violated because he was denied a right that he had under s. 10(b). In light of this, Adams is of limited assistance. As I have found Mr. West had waived his right to counsel, unless it was retriggered by the contemplated strip search, there is no s. 10(b) breach. The defence does not submit that the search of Mr. West was unreasonable independent of the alleged s. 10(b) breach.

[54] Does a "new procedure", as defined in Sinclair, mean any procedure that is non-routine for the types of offences with which the detainee has been charged?

[55] In my view, it does not. Throughout the majority reasons, the court emphasizes that access to counsel is important to ensure that the person has advice about the choices they are facing. For example, the majority described the purpose of s. 10(b) at para. 26:

[26] The purpose of the right to counsel is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": R. v. Manninen, [1987] 1 S.C.R. 1233, at pp. 1242-43. The emphasis, therefore, is on assuring that the detainee's decision to cooperate with the

investigation or decline to do so is free and informed. Section 10(b) does not guarantee that the detainee's decision is wise; nor does it guard against subjective factors that may influence the decision. Its purpose is simply to give detainees the opportunity to access legal advice relevant to that choice.

- [56] Together with the passages from Sinclair that I have already quoted, I conclude that Sinclair establishes that a new procedure includes those procedures that are not within the reasonable contemplation of counsel, providing advice in relation to a particular charge or charges, where the consent of the detainee is required. I cannot interpret it as saying anything about the situation here; a non-routine procedure for which the detainee's consent is not required.
- [57] The difference between the majority and dissenting judgments in Sinclair is about whether there is a right to have counsel present during a custodial interrogation. The majority rejected that proposition on the basis that doing so would be an unwarranted and significant departure from the jurisprudence. This supports the view that the effect of Sinclair was to recognize a narrow category of exceptional situations where the right to s. 10(b) is retriggered.
- [58] In *R. v. Debot*, [1989] 2 S.C.R. 1140, the Supreme Court held that the police are not obliged to suspend a search incidental to arrest until the detainee has had a chance to speak to counsel, unless the lawfulness of the search is dependent on their consent. The majority judgment rejected the dissenting judge's position that the right to consult counsel must be provided prior to a search, even where the detainee's consent is not required. Thus, Debot emphasizes that the fact that the detainee has a choice to make is a key consideration in deciding whether fresh opportunity to access counsel is constitutionally required.
- [59] In *R. v. Ashmore*, 2011 BCCA 18, our Court of Appeal held that a re-enactment does not retrigger the s. 10(b) right contemplated in Sinclair. After discussing that decision, the court wrote at para. 71:
- [71] The second reason is that even if a re-enactment could be considered to be a new procedure, a request to participate in one was not a matter on which Mr. Ashmore required further legal advice. Although Mr. Dumonceaux did not specifically use the word "re-enactment", he did counsel Mr. Ashmore against participating in a line-up or a lie detector test, and to be aware that the police might ask him to participate in some form of "test" as a ruse to get him to talk. Given that advice and the strong general admonition Mr. Ashmore received with respect to providing any information to the police, he was in a position to be able to make a meaningful choice about whether to participate in the re-enactment.
- [60] This suggests that even where the detainee is faced with a choice about a new procedure, a renewed right to be informed of one's s. 10(b) rights may not arise.

- [61] While not routine, the kind of strip search in this case is not exceptional. It lacks both the novelty and the degree of intrusiveness of a penile swab search. Sinclair also requires that the new procedure be beyond the contemplation of counsel providing the initial advice. Although I have no evidence on this, I find it hard to believe that if Mr. West had chosen to exercise his right to counsel, the possibility of a strip search would have been outside the expectation of the advising lawyer.
- [62] In saying that, I do not intend to minimize the negative impact that strip searches have on individuals or the well-known fact that aboriginal and African-Canadian people are more often subject to them, as the Supreme Court recognized in *Golden* at para. 83. That was one of the reasons the Court in that case established guidelines for conducting strip searches in a manner compliant with s. 8. It also led the Court to hold that strip searches cannot be carried out as a matter of routine policy, at para. 90. See also *R. v. Deschamps*, 2017 BCSC 1989.
- [63] Here, Constable McRae and Corporal Hamilton testified that even if Mr. West had said he wanted to speak to a lawyer, as he had initially, and had continued to assert that right when read his s. 10(b) rights at the detachment, neither would have allowed him to do so until after the strip search had occurred. Both officers said it was their practice not to afford access to counsel until after a strip search had been conducted.
- [64] Constable Szulhan testified that he would advise a person of their s. 10(b) rights and give them an opportunity to speak with a lawyer before conducting a strip search. All three officers confirmed that there was no applicable policy. This evidence satisfies me that the strip search in this case was not conducted as a matter of routine policy.
- [65] However, where a detainee has asserted the right to counsel, which is not the case here, it is imperative that the police advert to all of the circumstances, including the circumstances of the alleged offence, those of the alleged offender, and the ability to mitigate risk, before deciding whether conducting the search before providing access to counsel is justified. A consistent practice of always conducting strip searches in drug investigations before providing access to counsel would be constitutionally suspect.
- [66] I conclude in the circumstances of this case that Mr. West did not have a right to be readvised of his s. 10(b) rights before he was strip searched. It follows that there was no breach of s. 10(b). Since Mr. West's s. 8 claim is premised on the violation of s. 10(b), that claim must fail. I find that Mr. West's Charter rights were not violated and I dismiss his application.
- [67] That concludes the voir dire.

"Iyer J."

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