Citation:   Date:

82455-3-C

Abbotsford

# IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

## Abbotsford

**REGINA**

v.

**QUOC TUAN TRAN**

**D. GAFFAR**

J. Michael Le Dressay

Jayse Reveley

Abbotsford, B.C.

July 25, 26, August 4, 2016

Date of Judgment: September 16, 2016

**INTRODUCTION**

1. Mr. Tran is charged with 3 counts of Possession for the Purposes of Trafficking (marijuana in substantive and derivative forms) contrary to s. 5(2) ***Controlled Drugs and Substances Act***. The police discovered fresh, green marijuana in the vehicle being driven by Mr. Tran. A *voir dire* was declared at the outset of the trial to determine if the marijuana evidence is admissible at trial.
2. I note that, in order to arrest without warrant, the police must have reasonable and probable grounds to believe that the accused is presently committing an offence. I note that a warrantless search is prima facie unreasonable unless it is authorized by law, that law is reasonable and the search was conducted in a reasonable manner. The onus is on the Crown to demonstrate on the balance of probabilities that the police had the requisite grounds to arrest. The Crown and Defence disagree about whether the initial arrest was lawful.
3. If I find that the initial arrest was lawful, the parties agree that the search was lawfully incidental to arrest and conducted in a reasonable manner. Conversely, if the initial arrest is unlawful, the search incident to arrest is unlawful. In a related manner, the Defence submits that an unlawful arrest results in an arbitrary detention. The Defence also argues that Mr. Tran was not appropriately provided with his constitutional right to access counsel. The Defence bears the onus of demonstrating its alleged constitutional violations, on a balance of probabilities.
4. I am required to assess what occurred in this case and apply the legal principles found in s. 495 of the ***Criminal Code of Canada*** (the “***Code***”) and ss. 8, 9 and 10(b) of the ***Charter of Rights and Freedoms*** (the “***Charter***”).
5. The ultimate question on this *voir dire* is whether the evidence of the purported fresh or green marijuana buds, leaves and stems is admissible at trial. At this stage, I must consider the conduct of the police, as follows:

a. In conducting the warrantless arrest, has the Crown established that the police had reasonable and probable grounds to arrest Mr. Tran on a balance of probabilities? In other words, has the Crown established, on a balance of probabilities, that the police officer had a subjective belief that Mr. Tran was committing an offence and was that belief objectively reasonable, in all the circumstances?

b. Was Mr. Tran provided with his right to counsel and access to counsel in a lawful manner?

1. On this *voir dire*, the Crown called the arresting officer, Cst. Fuller, as a witness while Mr. Tran testified for the Defence. If the evidence is found to be admissible, the parties have agreed that the prosecution’s *voir dire* evidence will be tendered at trial, without the need to recall Cst. Fuller. If I find that the police lacked the requisite grounds to arrest Mr. Tran or breached his constitutional rights, I will require additional submissions from counsel concerning the admissibility of the marijuana evidence at trial, further to s. 24(2) of the ***Charter***.

**THE VEHICLE STOP**

1. On December 28, 2014, Cst. Fuller was working on traffic patrol as part of the RCMP’s Fraser Valley Traffic Services Unit. At approximately 0116 hours, Cst. Fuller was parked in a marked police vehicle on the westbound shoulder of Highway 1 near Abbotsford BC. Cst. Fuller was looking for motor vehicle infractions and speeders. His driver’s window was down. Mr. Tran’s vehicle passed the officer’s parked vehicle at 98 km/hour. Mr. Tran was not speeding. However, the officer believed that he smelled an “overpowering smell of fresh green marijuana” coming from the vehicle. Mr. Tran’s vehicle passed the officer in a fraction of second.
2. Cst. Fuller testified that Mr. Tran’s car had a burned out left tail light. He was “intrigued” by the vehicle and kept an eye on it. The officer allowed 2 other vehicles to pass his police vehicle 30-50 seconds later. Cst. Fuller then decided to stop Mr. Tran’s vehicle. He pursued and stopped this vehicle approximately 2 km from his initial parked position. When he stopped Mr. Tran’s vehicle, two minutes had passed since Mr. Tran’s vehicle passed the officer’s stationary vehicle.

**THE ARREST**

1. When Cst. Fuller stopped his vehicle behind Mr. Tran’s vehicle, the officer queried the car licence place (376 XNW) on his computer, and learned that the accused Quoc Tran owned the vehicle. It does not appear that Cst. Fuller learned any further information relevant to his belief that he smelled fresh marijuana when the vehicle passed him earlier. Cst. Fuller exited his police vehicle and went directly to the driver’s window, which he said was rolled down. The driver was the sole occupant.
2. I am unable to conclude that the driver’s window was rolled down, given that the officer also testified that he looked at the backseat area through “the glass window.” The officer did not place his head inside the car to view the car interior. The vehicle was a 2-door Mercedes sedan. I have no evidence about whether there were any other windows on the driver’s side, other than the driver’s window.
3. The officer saw nothing of interest or concern in the backseat area of the car. At 0117 hours, he told the driver that his left tail light was burned out and then immediately told him he was under arrest for the possession of marijuana. Less than 15 seconds had elapsed at this point between the time the officer arrived at the driver’s window and the time he told Mr. Tran that he was under arrest.
4. At some point between his exit of the police vehicle and his initial arrest of Mr. Tran, Cst. Fuller believed that he smelled “a really strong,” “overpowering,” and “overwhelming” odour of fresh marijuana that gave him a headache. He stated that the odour made his eyes water. He testified that he had never experienced such a strong smell of marijuana in his entire life.
5. He said and did nothing further to physically arrest the driver but the officer now considered Mr. Tran to be “in [his] custody.” Cst. Fuller then immediately instructed Mr. Tran “to pop the trunk” of his car. The driver complied. Cst. Fuller went to the trunk and observed 5 large garbage bags. He did not look inside the bags. He detected an odour of fresh marijuana emanating from the trunk. Cst. Fuller assumed physical control of the driver at this point. He returned to the driver’s window. From the time he first arrived at the driver’s window until he returned to the driver’s window, approximately 15 seconds had elapsed.
6. The officer instructed the driver to exit his vehicle and directed him to the police vehicle. He quickly patted down the driver to determine if he had any discernible tools or weapons. Cst. Fuller then placed the driver in the back seat of the police truck. The rear doors of the police truck were locked from the outside. Mr. Tran was not handcuffed. The rear of the police car was completely separated from the front seats by a barrier called a “silent policeman.”
7. After placing Mr. Tran in the police vehicle, the officer placed electronic flares and traffic cones on the highway to divert traffic to the left lane, away from the stationary cars for safety purposes. This process took approximately 3 minutes. Then, he notified police dispatch about the traffic stop.
8. At some point after he was first arrested, Mr. Tran identified himself to Cst. Fuller. At some point, the officer located and seized Mr. Tran’s driver’s licence and cell phone. I accept Mr. Tran’s evidence that he handed his driver’s licence to Cst. Fuller when the officer first spoke to him. The officer then seized Mr. Tran’s wallet and keys. He returned the cell phone and wallet to Mr. Tran before Mr. Tran left the scene. Cst. Fuller photographed Mr. Tran and the vehicle trunk contents at some point.
9. Mr. Tran’s testimony differed from Cst. Fuller’s evidence in some aspects. Mr. Tran testified that Cst. Fuller did not tell him that he was under arrest before the officer instructed him to open the trunk. He estimated that much more time passed before the trunk was opened (5 minutes) as well as before he was placed in the back of the police vehicle (a further 10 minutes). He testified that he did not hear the officer inform him about his ***Charter*** rights at any point and was not given his cell phone back while he was in the police vehicle. I am unable to accept this evidence. While Mr. Tran may recall things differently and feel that the events lasted a much longer time, I accept the evidence of Cst. Fuller with regards to the timing of the initial arrest and eventual right to counsel, as well as the duration of events. He made relatively contemporaneous notes and recorded precise times when he made the initial arrest and provided the right to counsel in his police vehicle. Both witnesses agree that the trunk was opened prior to Mr. Tran’s placement in the police vehicle.
10. Mr. Tran recalled different details about how and when his wallet and cell phone were seized and photographs were taken, which I accept (immediately after his removal from his car). I do not accept that the officer took his driver’s licence when he first spoke to Mr. Tran and went away for 5 minutes. Again, the officer refreshed his memory from relatively contemporaneous notes containing precise times of their initial contact. His evidence is more reliable in this regard.

**ACCESS TO COUNSEL**

1. After Cst. Fuller set up the security perimeter around their vehicles, he returned inside his police vehicle. He informed Mr. Tran of his ***Charter*** rights and the police caution. The officer was in the front seat of the police vehicle while Mr. Tran was seated in the rear seat. They were separated by the “silent policeman.”
2. At 0120 hours, the officer re-arrested Mr. Tran for the possession of marijuana. He asked Mr. Tran if he understood. Mr. Tran responded “yes.” He then advised Mr. Tran of his right to counsel by reading verbatim from a card. He informed Mr. Tran that he had the right to retain and instruct counsel in private without delay; that he could call any lawyer he wanted; that there was a 24-hour telephone service which provided a legal aid duty lawyer who could give him this advice in private; that this advice was given without charge; and that the lawyer could explain the legal aid plan to him. The officer told Mr. Tran that if he wished to contact a legal aid duty lawyer, the officer could provide him with a telephone number. He then asked Mr. Tran if he understood. Mr. Tran said yes. Cst. Fuller asked Mr. Tran if he wanted to call a lawyer, to which Mr. Tran responded “yes.” The officer then read the police caution and official warning to Mr. Tran: “You are not obliged to say anything but anything you do say will be given in evidence.”
3. After Cst. Fuller read the police caution, Mr. Tran indicated that he did not understand that part so the officer repeated the police caution in layperson’s terms. The officer does not remember exactly what he said but it was along the lines of: “you don’t have to say anything to me at all, you don’t have to talk to me or answer questions.” Cst. Fuller made no notes about this exchange and could not now remember how the driver responded to the clarified police caution.
4. At some point after Mr. Tran was initially arrested, Cst. Fuller asked Mr. Tran if he had a licence to grow marijuana. Mr. Tran responded to the officer’s question. Cst. Fuller recalled having the conversation but could no longer recall exactly what he had said to Mr. Tran. His notes were silent on the matter. Contrary to this testimony, the officer wrote specifically in his police report that he had made a point of not asking Mr. Tran about anything in the vehicle so that he did not violate Mr. Tran’s ***Charter***  rights.
5. After providing the ***Charter*** rights and police caution to Mr. Tran, the officer returned his cell phone to Mr. Tran in order to facilitate access to counsel. No evidence was adduced about how the officer came into possession of the driver’s cell phone prior to this point. He recalls giving the driver his cell phone at that time and then exiting the police vehicle. There is no evidence that the officer asked Mr. Tran if he wanted the telephone number for the legal aid duty lawyer or if he needed assistance to contact a lawyer. The driver was left in the rear of the locked police vehicle with his own cell phone. The officer saw the driver speaking on the cell phone. Cst. Fuller never spoke with Mr. Tran afterwards about who Mr. Tran telephoned. The officer never confirmed whether Mr. Tran had spoken to a lawyer. There is no evidence that Cst. Fuller assisted Mr. Tran in speaking with a lawyer, other than handing Mr. Tran the cell phone.
6. After he exited the police car, Cst. Fuller then went to re-check the driver’s vehicle and quickly searched it. He took a photograph of the 5 garbage bags and then removed them from the vehicle trunk. He opened at least one bag. At that time, the driver was on his cell phone in the rear of the police car. The officer wanted to give the driver some privacy so he waited until the driver had completed his phone call before he re-entered the front of the police vehicle. He eventually released Mr. Tran at the scene. I accept Mr. Tran’s evidence that he eventually left the scene in a taxi. Cst. Fuller estimated that the driver left the scene 35-40 minutes after the officer stopped the vehicle.
7. Although Cst. Fuller believed that he had no difficulty conversing with Mr. Tran, I find that Mr. Tran did not fully comprehend everything that the officer said. Mr. Tran’s responses to questions asked were invariably and simply “yes.” He spoke with broken English and it was apparent, from all the evidence, that English was not his first language. Cst. Fuller had insufficient conversation with Mr. Tran to appropriately assess whether Mr. Tran understood everything that was said to him.
8. The officer also served a 24-hour prohibition on Mr. Tran, based on intoxication by drug, i.e. consuming or inhaling marijuana in some form. I find that he had a limited opportunity to view Mr. Tran’s movements at this time. I do not consider this evidence to be relevant to the issues on this *voir dire*.
9. Mr. Tran said that he did not hear his right to counsel at any point and that the officer did not speak to him while he was in the back of the police vehicle. He also testified that he did not use his cell phone while inside the police vehicle. However, I accept Cst. Fuller’s evidence about when and how he provided the right to counsel. The officer refreshed his memory from relatively contemporaneous notes about when and how this occurred.

**PROCESSING THE EVIDENCE**

1. After the driver left the scene, Cst. Fuller processed the exhibits and seized the garbage bags. The most relevant evidence about this process, for the purpose of this *voir dire*, is as follows:

a. The fresh marijuana in the bags comprised stems, leaves and buds.

b. The bags and all contents weighed a total of 31.2 kg (68.7 lbs): Bag #1 was 6.5 kg; Bag #2 was 5.9 kg; Bag #3 was 7.3 kg; Bag #4 was 5.4 kg; and Bag #5 was 6.1 kg.

c. Cst. Fuller did not extract all the contents from the bags to determine if there was anything else in the bags, which may have impacted the weight of the bags.

d. The officer tore off samples of leaves and buds from each bag to be sent to the laboratory for testing.

e. He incorrectly stored the lab samples in plastic bags, which caused the samples to decompose and affected the laboratory’s ability to test the samples.

**EXPERIENCE OF THE OFFICER**

1. At the time of this incident in December 2014, Cst. Fuller had been an RCMP officer for approximately 6 years (since November 2008). During that time, he worked almost entirely in traffic and road safety units. He received training in conducting traffic stops and identifying the symptoms of alcohol and drug impairment. He never received drug investigation training. The officer has received no official training in the detection or identification of the different odours of marijuana. He testified that he had dealt with and seized marijuana on unspecified “numerous” occasions, in the course of his traffic duties. Those occasions largely dealt with car stops. He testified that some of those cases went to court but the majority were “no case seizures.” I understand the latter to mean that no one was charged criminally.
2. Cst. Fuller testified that he had smelled marijuana (both smoked and green marijuana) before this incident. He had stopped or encountered people with regards to both kinds of marijuana. He did not have an estimated number for 2014, but stated that in November 2014, he had encountered marijuana over 20 times. I am uncertain whether this figure relates to smoked marijuana or fresh marijuana. He testified that he had dealt with situations involving green and smoked marijuana over 100 times. I am uncertain whether this figure related to the years prior to 2014 or the trial date in July 2016. Again, the majority of these cases did not go to court.
3. Cst. Fuller also used to be a paid on call firefighter for Chilliwack. He testified that he had entered fire scenes containing marijuana grow operations. He has seen marijuana plants at various stages of cultivation. He has also worked for BC Corrections, where he indicated that he smelled green and smoked marijuana. I was not provided with the frequency, dates or durations of such occupations nor observations.
4. Cst. Fuller testified that he was able to distinguish between smoked marijuana and green marijuana. His evidence was as follows: smoked marijuana smells “…like a burned smell. Unless you’ve experienced the burned smell, you can’t really articulate it.” As part of his description, he referred to smoked marijuana having little roaches shoved into ashtrays. Cst. Fuller’s only description of the smell of green marijuana was as follows: “[it is] totally different from the burned smell” and that it was hard to articulate the smell of green marijuana.
5. He believed that the smell of fresh marijuana would dissipate after 10-15 minutes after its removal from a vehicle. He acknowledged later that it may linger on a person’s clothing for at least 45 minutes. The largest seizure of fresh marijuana made by Cst. Fuller was 8 lbs., prior to this incident.
6. I find that Cst. Fuller’s experience with fresh marijuana and detecting its odour is on the lower end of the spectrum based on the his lack of training with regards to marijuana odour detection, particularly fresh marijuana; his insufficiently specified experience with fresh marijuana; and his inability to provide any meaningful description of its odour.

**LAW – ARREST & SEARCH**

1. By the end of his submissions, defence counsel appeared to concede that the officer had a reasonable suspicion to stop the vehicle because he believed that he smelled fresh marijuana and because of the broken tail light. Therefore, I have not addressed an alleged violation of the s. 9 ***Charter*** right not to be arbitrarily detained as it applied to the time period prior to the arrest (the investigative detention stage). If I am wrong on this point and the Defence did intend to pursue the alleged s. 9 (investigative detention) breach, I would find that Mr. Tran was not arbitrarily detained at this point. This was a dual purpose stop because the officer believed he smelled fresh marijuana and because he observed the broken tail light. Under the ***Motor Vehicle Act***, the officer was permitted to stop the vehicle to deal with the broken tail light.
2. Both Mr. Le Dressay for the Crown and Mr. Reveley for the Defence have presented a series of cases on the arrest and search issues. I have reviewed the cases. In the interest of time, I do not intend to cite extensively from the case law. The main principles are well known, as follows:

a. Where the police arrest without a warrant, s. 495(1)(b) applies. The police are entitled to arrest without warrant if the officer personally observes facts or events that can support an objectively reasonable belief that the suspect is presently committing an offence. The circumstances supporting the offence must be apparent to the officer at the time of the arrest: ***R. v. MacCannell***, 2014 BCCA 254 at para. 21.

b. The assessment of whether “it is apparent to the police officer that an offence is being committed” contains both subjective and objective components: ***MacCannell***, *supra* at para. 28, citing ***R. v. Boyd***, 2013 BCCA 19 at para. 6.

c. Depending on the facts of the case, an odour alone may be sufficient to justify an arrest under s. 495(1) (b): ***MacCannell***, *supra* at para. 43. The real question is whether the factual matrix that existed at the time the arrest decision was made satisfies the objective criterion. It is not necessary to decide whether a person can be lawfully arrested based solely on that odour. It is the cumulative effect of the observations perceived by the officer’s senses -- the totality of the circumstances that give rise to her or his belief that the accused was in possession of marijuana. The court should assess the officer’s olfactory and visual observations on a practical, non-technical, and common sense basis to determine if the arrest decision was objectively justified: ***R. v. Ashby***, 2013 BCCA 334 at paras. 56, 59. The police officer’s experience in detecting and recognizing the smell of vegetative marijuana is also relevant: “It may be that some officers through experience or training can convince the trial judge that they possess sufficient expertise that their opinion of present possession can be relied upon” [***R. v. Polashek*** (1999), 134 C.C.C. (3d) 187 (Ont. C.A.) at para. 14].

d. For an officer to have reasonable grounds for arrest, the officer is not required to rule out potential innocent explanations: ***MacCannell***, *supra* at para. 46.

e. An officer may lawfully stop a vehicle for a dual purpose, which includes a *bona fide* ***Motor Vehicle Act*** purpose and a separate investigative purpose: ***R. v. Lauriente***, 2008 BCCA 187 para. 38.

f. The court may consider the evidence presented that is relevant to the existence or non-existence of the officer’s subjective belief. Consequently, the court may infer or refuse to infer that the officer possessed the requisite subjective belief that the accused was committing an offence at the time of arrest: ***R. v. Rosie***,[1980] B.C.J. No. 2119 (Q.L.) (B.C.Co.Ct.) at para. 9; ***R. v. Shiels***,[1978] B.C.J. No. 308 (Q.L.) (B.C.C.A.) at para. 5. An officer does not need to explicitly say that she or he formed the requisite subjective belief: ***R. v. De Roy Van Zuydewyn***,2008 BCPC 467 at para. 33.

1. Both parties agree that my decision on whether this warrantless arrest was objectively reasonable is a question of law but is highly fact sensitive (***R. v. Acosta***, 2014 BCCA 218 at para.13).
2. If the arrest is found to be lawful, the officer may lawfully search the accused and the vehicle incidental to arrest: ***R. v. Storrey***, [1990] 1 S.C.R. 241. The search must be conducted in a reasonable manner and must be linked to purpose of the arrest.
3. If the arrest is found to be unlawful, that does not necessarily mean that the person was unlawfully detained in violation of s. 9 of the ***Charter*.** I must consider the particular facts of this case. I must also assess the extent or degree to which the officer departed from the requisite standards of reasonable and probable grounds; the honesty of his subjective belief; and the basis for his belief: ***R. v. Duguay, et al.***,[1985] O.J. No. 2492 (Q.L.) (Ont. C.A.) at para. 25; aff’d [1989] 1 S.C.R. 93. As the Defence is alleging this breach, it must establish it on the balance of probabilities.

**LAW – RIGHT TO COUNSEL**

1. The ***Charter* s.** 10(b) entitles the arrested or detained person to retain and instruct counsel without delay, and to be informed of that right. The right to counsel arises immediately upon arrest or detention. “Without delay” means immediately, as soon as practicable or at the first reasonable opportunity: ***R. v. Taylor***, [2014] S.C.J. No. 50 (Q.L.) at para. 24. The police have a duty to facilitate access to counsel as soon as practicable to reduce the possibility of accidental self-incrimination: ***Taylor***, *supra,* at para. 28. The police are required to refrain from eliciting evidence from the arrested person or taking further investigative steps to elicit evidence before the police facilitate access to counsel: ***Ibid***. To facilitate access to counsel, the police should assist the arrested person by providing the contact information for the 24-hour legal aid duty lawyer (***R. v. Bartle***, [1994] 3 SCR 173para. 28).

**THE “CHARTER NOTICE”**

1. I note that Crown strenuously objected, in part, to the Defence submissions on the basis that Mr. Reveley’s “*Charter* Notice” lacked sufficient detail to provide actual notice of the issues. In his notice, Mr. Reveley alleged a s. 9 ***Charter*** violation because, “Cst. Fuller did not have reasonable and probable grounds at the time of the arrest to believe that Mr. Tran was in possession of marijuana.” Mr. Le Dressay argued that he was taken by surprise when the Defence cross-examined Cst. Fuller on his subjective beliefs to justify the arrest. He said that the Crown took a different approach to the *voir dire*. The Crown did not interpret the aforementioned s. 9 ***Charter*** challenge to mean that there would be a challenge to the subjective and objective grounds for arrest. It also appeared to him that the Defence was now arguing that there was no arrest prior to the officer directing Mr. Tran to open the car trunk. In addition, the Defence “*Charter* Notice” only referred to an alleged violation of s. 10(b) access to counsel. It did not refer to a violation involving s. 10(a), the right to be informed promptly about the reasons for arrest.
2. I am unaware of what discussions or other correspondence occurred between counsel prior to this *voir dire*. It may be that prior interactions left a different impression on the Crown than intended by the Defence. Or, perhaps, the Defence has changed or is now changing his position on a particular point. Mr. Reveley did express some hesitation and uncertainty when he was asked to clarify the grounds of the Defence challenges. He appeared to want to keep his options open. I acknowledge that *vive voce* evidence may later reveal, strengthen or weaken various legal issues or positions. Both Crown and the Defence usually remain flexible and are guided by the direction of the evidence. However, the court does expect counsel to know the essential nature and substance of their positions prior to the start of a *voir dire*.
3. While the “*Charter* Notice” could have been better expressed, the Defence was not required to enumerate in significant detail the nature of the legal argument. The facts and legal issues are not overly complex in this case. The law that applies to traffic stops, arrests and searches incident to arrest is well-known. It is undisputed law that the burden remains on the Crown to establish that the arrest was lawful and reasonable. Therefore, it is the Crown that must establish that the officer possessed the necessary subjective belief that Mr. Tran was in possession of marijuana and that his belief was objectively reasonable in all the circumstances.
4. Any perceived disparity between the “*Charter* Notice” and the Defence argument appears rooted in Defence counsel’s hesitant articulation of his argument. I do not understand Mr. Reveley to be saying that the officer did not have a subjective belief. Rather, he argued that the officer did not articulate a subjective belief. As mentioned above, the law does not require that the officer specifically say “this was my subjective belief.” A subjective belief can be inferred from the evidence.
5. I do note that Defence counsel, in cross-examination of Cst. Fuller, appeared to raise the possibility that the officer did not officially arrest Mr. Tran before he first looked in the trunk. His client offered that testimony. However, he appeared to retreat from that position later on. Such an argument is absent from his “*Charter* Notice.” An argument that no actual arrest occurred differs from an argument that an arrest occurred but was unlawful and unreasonable. If counsel has given notice to the opposing party about a particular legal position but is later required to modify that position due to new information prior to the *voir dire* or trial, it is appropriate that counsel notify opposing counsel and/or amend the notice of constitutional issues in a timely fashion.
6. The argument concerning s. 10(b) is clear on the face of the “*Charter* Notice.” The later attempt to invoke a s. 10(a) breach appeared unclear and uncertain. It was preferable that any intended arguments are included in the “*Charter* Notice.” However, the court is also required to ensure that the accused receives a fair trial and that he receives the protection of the ***Charter***. If I see a potential ***Charter***breach, it is appropriate that I bring it to the parties’ attention. In this case, and based on all the evidence, I see no reason to seek submissions on a purported s. 10(a) breach.

**ANALYSIS – ARREST & SEARCH**

1. The ability to arrest a person without warrant is a significant exercise of power by the police. That is why the ***Code*** and the ***Charter*** limit how this power should be exercised. The key component to Cst. Fuller’s initial arrest of Mr. Tran rests on his smell of fresh marijuana.
2. Cst. Fuller based his subjective belief on the following:
   1. the fraction of a second smell when Mr. Tran’s car passed him at 98 km/hour;
   2. the less than 15 seconds at the traffic stop before he initially arrested Mr. Tran;
   3. his description of the smell as (“really strong,” “overpowering” etc.); and
   4. his previous experience in smelling fresh marijuana.
3. In order to find that his subjective belief was objectively reasonable, I would have to conclude that the officer’s evidence about the smell was reliable, in all the circumstances. I would also have to accept that he had sufficient experience in smelling fresh marijuana to recognize it within seconds.
4. When the officer was parked at the roadside to monitor traffic, I accept that he detected no more than a whiff of something in that fraction of a second. The vehicle passed him at an extremely high but lawful rate of speed in the middle of the night. This “intrigued” Cst. Fuller. He thought he smelled fresh marijuana. At most, he objectively had a bare suspicion that he smelled fresh marijuana at that moment.
5. Less than a minute or two later, he stopped the vehicle. Then, it took approximately 15 seconds for the officer to approach the driver’s window, arrest him, direct him to open the trunk, view the trunk, and return to the driver’s window. He took basically no investigative steps upon his arrival at the traffic stop. He ran the licence plate and he looked in the back seat through a glass window. He saw nothing to indicate the presence of fresh marijuana or illicit activity. He did not walk around the vehicle first or try to localize the odour. He did not tell Mr. Tran that he was investigating him for possession of marijuana and provide him with his ***Charter***rights. He then immediately leaped to an arrest of Mr. Tran based on the smell of marijuana alone.
6. It is tempting to simply accept Cst. Fuller’s description about the odour and its affect on him. His conclusory description is expressed in strong terms. The Crown argued that I should accept his evidence about the strength of the smell and description because it is vivid. He also suggests that the presence and quantity of the fresh marijuana found substantiated Cst. Fuller’s description. However, I cannot use the fruits of the search to justify the arrest or search.
7. In all the circumstances, I am unable to conclude that the officer’s description of the smell and his experience are sufficiently reliable to render his belief objectively reasonable, for the reasons that follow.
8. It is trite to say that the detection of a particular odour is extremely subjective and personal. Without more evidence, it is difficult to test or assess the nature of a particular scent. The officer was unable to describe the nature of the smell he detected in this case, other than it was a fresh, vegetative marijuana smell. In fact, the officer was unable to describe burned and fresh marijuana in any meaningful way. His description of both types was brief, conclusory and did not contain any actual descriptive elements. He described smoked marijuana as a “burned smell” that could not be articulated unless a person had smelled it. Therefore, Cst. Fuller should have been able to describe it. Cst. Fuller described the smell of green marijuana as “totally different from the burned smell” and that it was hard to articulate the smell of green marijuana. This description does not permit the court to assess the smell detected. Its value as a description is extremely limited. The officer’s evidence was not sufficiently specific nor descriptive to permit me to assess the quality and nature of the odour he detected. Although the officer described the odour as really strong and overpowering, his opportunity to make this observation occurred over too short a time for me to rely on the smell, without more evidence.
9. In addition, the officer’s evidence differed about when he actually smelled the alleged vegetative marijuana at the vehicle stop. He initially testified that he detected the smell of fresh marijuana when he was at the open, rolled down driver’s window. However, I am unable to conclude that the window was rolled down when he first moved to the driver’s window. This contradicts his evidence that he viewed the backseat area through a glass window. He described the vehicle as a two-door Mercedes sedan. I have not heard evidence about any other window on the driver’s side of the car, other than the driver’s side window. Then he testified that he smelled fresh marijuana after he had told Mr. Tran about the burned out tail light, but before he arrested him. Later, he testified that he smelled it immediately when he exited his police vehicle and the smell got stronger as he approached the driver’s window.
10. These contradictions impact the reliability of his evidence. The position of the driver’s window and the point at which he actually detected the alleged odour is important because both are linked to his ability to detect the smell and the strength of the alleged odour.
11. I find that he arrested Mr. Tran within seconds of his arrival at the vehicle stop. He leaped immediately to an arrest, rather than entering into an investigation. Cst. Fuller then immediately conscripted Mr. Tran to assist him in searching the trunk. There was no legal requirement that Mr. Tran comply. The officer identified no immediate security concerns. There were neither exigent circumstances nor concerns about the preservation of evidence.
12. There are other contradictions in Cst. Fuller’s evidence. While I am mindful that the passage of time may have diminished the officer’s memory about some of the events, his evidence contained internal contradictions. Some of the contradictions are more important than others.
13. There are ambiguities and contradictions concerning exchanges between Cst. Fuller and Mr. Tran. The officer clearly testified that there were no questions asked about the incident or regarding the possession of marijuana. He stated, “I didn’t grill him.” His notes were silent on the matter. The officer wrote specifically in his police report that he had made a point of not asking Mr. Tran about anything in the vehicle so that he did not violate Mr. Tran’s ***Charter*** rights.
14. Unfortunately, the officer failed to mention in his direct evidence that he had asked Mr. Tran if he had a licence to grow marijuana. Mr. Tran responded to this question. Cst. Fuller recalled having the conversation but could no longer recall exactly what he had said to Mr. Tran. Cst. Fuller testified that he had asked him this question while Mr. Tran was in the back of his locked police car, after the re-arrest for possession of marijuana and provision of his ***Charter*** rights. In other words, he asked this question after Mr. Tran had indicated that he wanted to speak to a lawyer. This point is also relevant to whether there was a violation of Mr. Tran’s right to counsel.
15. Yet later on in his evidence, he contradicted himself again. Cst. Fuller testified that he asked Mr. Tran the question about a licence to grow marijuana after he first arrested Mr. Tran, before he placed Mr. Tran in the police vehicle, and before he provided the ***Charter*** rights and police caution. This point is still relevant to the issue surrounding Mr. Tran’s right to counsel.
16. Cst. Fuller could not recall locating or seizing Mr. Tran’s cell phone. However, he is certain that he handed the cell phone back to Mr. Tran after he re-arrested him and provided his ***Charter*** rights to Mr. Tran for the first time. He had no notes of taking the driver’s car keys but thought he may have taken them at one point, to pass to the tow truck driver. He could not recall if he did that before placing the driver into the police vehicle. He was uncertain how, where and when he obtained Mr. Tran’s driver’s licence. He believed that Mr. Tran identified himself after he was first arrested but is vague on the details and context of this information. While some of these activities are more important than others, particularly the seizure of items from Mr. Tran, his limited memory on so many points diminishes the overall reliability of his evidence.
17. This evidence also raises the prospect that there were further questions or exchanges between the officer and the driver. It was clear from the officer’s evidence that he had very limited independent recollection of the events, and relied heavily on his notes and his police report to refresh his memory. This became important and concerning when his notes or report were silent on this salient point.
18. I place the officer’s experience in detecting and dealing with fresh marijuana on the lower end of the spectrum. His past experience detecting and dealing with fresh marijuana lacked sufficient details with regards to the frequency and duration of those occasions. Most of his experience with fresh marijuana did not result in either the submission for or approval of criminal charges. He was unable to provide any meaningful description of its odour. His failure to examine all the contents of the bags before weighing them and his mishandling of the marijuana lab samples demonstrate his lack of experience.
19. On the evidence before me and on the totality of the circumstances, I find that the evidence is not sufficiently reliable to conclude that the officer’s beliefs were objectively reasonable. Accordingly, I find that Mr. Tran’s arrest was unlawful. Consequently, the search incidental to arrest was also unlawful. I find that the unlawful arrest amounted to a breach of Mr. Tran’s s.9 ***Charter*** right to be free from arbitrary detention. While the officer may have believed strongly in his belief, I find that the detention was arbitrary. On the evidence before me, his belief fell markedly short of reasonable and probable grounds and lacked an objectively reasonable basis, as described above.

**ANALYSIS – RIGHT TO COUNSEL**

1. I find that there are 3 aspects of the right to counsel that apply to Mr. Tran:

a. whether the 3 minutes delay impaired his right to counsel;

b. whether the officer sufficiently facilitated the right to counsel;

c. whether the officer breached his duty to refrain from taking investigative steps to elicit evidence from Mr. Tran before his right to counsel was provided and after he told the officer he wanted to speak to a lawyer.

1. Three minutes elapsed between the initial arrest and Cst. Fuller reading the s. 10 ***Charter*** rights to Mr. Tran. The Crown has established that this delay was reasonable and practically necessary. The officer was securing the perimeter of the vehicles and ensuring the safety of both Mr. Tran and the officer. The Defence has not established a s. 10 ***Charter*** breach on this basis.
2. Mr. Tran was asked if he wanted to speak to a lawyer. Although the officer had no independent recollection about the ***Charter*** questions and answers, I accept that Mr. Tran indicated to the officer and the officer understood that Mr. Tran wanted to speak to a lawyer. Cst. Fuller had a duty to be pro-active in facilitating Mr. Tran’s access to counsel. When reading from his card, the officer told Mr. Tran that if he wanted to speak to a lawyer, the telephone number for legal aid duty counsel could be provided to him. However, after reading from the card [the informational component of s. 10 (b)], he simply handed Mr. Tran his cell phone and left the car to provide Mr. Tran with privacy. His efforts to provide privacy were laudable. However, there is neither explanation nor evidence about what other pro-active steps Cst. Fuller took to facilitate access to counsel. He does not appear to have made any effort to provide the legal aid duty counsel telephone number, at a minimum. Upon his return to the vehicle, he did not confirm that Mr. Tran had actually spoken to a lawyer. The Defence has established a s. 10(b) breach on this failure to facilitate access to counsel, on the balance of probabilities.
3. The officer enlisted Mr. Tran’s assistance by directing him to open the trunk before Cst. Fuller informed Mr. Tran about his right to counsel. Mr. Tran was unable to make an informed decision about whether to assist the police. Given the speed with which the officer acted, Mr. Tran had no time to make any decision or even know that he had a choice. He had no legal duty to assist the police, by action or word, in the discovery of evidence. The Crown describes the officer’s conduct as having Mr. Tran facilitate a quick search. I describe it as conscripting Mr. Tran in the discovery of evidence without informing him that he had the right to speak to counsel, after which he could make an informed choice whether to assist the police in its search. He cannot be said to have consented to the opening of the trunk. There were no exigent circumstances that required a quick search.
4. The officer failed to mention in his direct evidence that he questioned Mr. Tran after the initial arrest. This is a significant point and omission. He only admitted that he did so in cross-examination. This question about whether Mr. Tran had a licence to grow marijuana is directly related to the evidence of the marijuana discovered in his vehicle. Although he contradicted himself about when he asked this question, it is clear that this question was not necessary prior to informing and facilitating Mr. Tran’s right to counsel. If the question was asked after his initial arrest but before he was informed of his right to counsel, Mr. Tran would not have been able to make an informed choice about whether to speak to the officer. If the question was asked after Mr. Tran indicated that he wanted to speak to a lawyer but before he had an opportunity to speak to a lawyer, it is a violation of his duty to “hold off” or refrain from eliciting evidence. The Defence has established a breach of s. 10(b) on either basis, on the balance of probabilities.
5. I find that the 3 minutes of delay between the initial arrest and the eventual reading of his ***Charter*** rights did not violate the requirement to provide the right to counsel at the first reasonable opportunity. I conclude that the officer did not sufficiently facilitate access to counsel by failing to ensure that Mr. Tran was actually able to contact a lawyer or spoke to a lawyer. Most importantly, I conclude that the officer breached his duty to refrain from taking investigative steps to elicit evidence from Mr. Tran before his right to counsel was provided and/or after he told the officer he wanted to speak to a lawyer.

**CONCLUSION(S)**

1. Arrest: The arrest was unlawful, contrary to s. 495(1)(b). The search incident to arrest was unlawful, contrary to the common law and s. 8 of the ***Charter.*** Mr. Tran was arbitrarily detained contrary to s. 9 of the ***Charter*.**
2. Right to Counsel: Mr Tran’s right to counsel was breached, contrary to s. 10(b) of the ***Charter***.

The Honourable Judge D. Gaffar

Provincial Court of British Columbia