Citation:	R v Thi Le Nguyen	Date:	20000711
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		Registry:	Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

2000 BCPC 103 (CanLII)

REGINA

v.

THI LE NGUYEN

REASONS ON VOIR DIRE
OF THE
HONOURABLE JUDGE E.A. ARNOLD

Counsel for the Crown:	Mr. J. Torrance
Counsel for the Defendant:	Mr. J. Solomon
Place of Hearing:	Vancouver, B.C.
Date of Hearing:	April 14, 2000
Date of Decision and Continuation:	July 11, 2000

Introduction:

[1] Thi Le Nguyen is charged with unlawful possession of a controlled substance, marijuana, in an amount not exceeding three kilograms, for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act.* She threw a bag containing about a pound of marijuana (a combined weight of 480 grams, including the marijuana and two zip lock bags) out

the back door of her beauty salon when police engaged in a warrantless search of the interior of her premises while attending on suspicion of possession of stolen property, to check her business licences and to look for her son who was wanted on an outstanding warrant. The Crown has conceded that a s. 8 *Charter* violation occurred in relation to the warrantless search, but argues that as a lesser expectation of privacy exists in a commercial premise into which members of the public are invited, the marijuana ought not to be excluded from evidence pursuant to s. 24(2) of the *Charter*. The Defence argues for exclusion, citing the seriousness of the violation, due to the complete lack of reasonable and probable grounds and the lack of good faith on the part of the searching police officers.

The Issue to be Decided:

[2] Given the nature of this s. 8 *Charter* violation in relation to a commercial premise where individuals must be considered to have a reduced expectation of privacy, ought the results of the unlawful search, the bag of marijuana, be excluded pursuant to s. 24(2) of the *Charter,* insofar as having regard to all the circumstances, its admission would bring the administration of justice into disrepute?

The Evidence:

[3] On this *Charter voir dire* the Crown called three police officers to testify. The accused did not testify on her own behalf. Cst. Picard and Cst. Mah were the two police officers that decided to enter the accused=s beauty salon, called ALisa Lee=s Beauty Salon@ about 6:15 p.m. on October 7, 1999 as part of their work on the Mount Pleasant beat to liase with business owners and check business licenses. It was in the course of their search of those premises that Ms. Nguyen, who was alone at the time, directed their attention to a bag containing two smaller zip lock bags of marijuana, containing about a pound of the illegal substance, by rushing towards the back door and throwing the bag out onto the back landing as Cst. Mah conducted a warrantless search of a closed back room where facials and massages were done adjacent to the back door. The marijuana, in an orange plastic bag, had been hanging on a hook near the back door of the salon. The Crown also called Detective Tyldsley to give expert testimony on the use, distribution, price and packaging of marijuana in Vancouver at that time. The marijuana found weighed 480 grams, including the two zip-lock bags that contained about a half a pound each and was worth approximately $3,000 depending on whether it was sold at the ounce or gram level. He said that the quantity, packaged in the half pound amounts was in his view consistent with marijuana to be trafficked and inconsistent with personal use, although on cross examination he admitted that if properly stored, it could be used by one person for a year.

[4] Cst. Picard testified that the police had received reports of stolen property in and out of that premise and they attended to take a look, to check the ownership and business licenses. Initially, upon entry he engaged Ms. Nguyen in conversation and examined her licenses at the front of the shop, whereas Constable Mah moved fairly quickly to the back, and when she moved into a back room, he observed Ms. Nguyen to become quite distracted and then to run to the rear and grab an orange shopping bag off a coat hook and run to the back door, throw the bag out and slam the door. He recovered the bag from the back landing of the shop. He was unaware of a warrant outstanding for Ms. Nguyen's son.

[5] Cst. Mah testified that she attended the premises and acted as she did to check business licenses, search for stolen property and to see if Ms. Nguyen's son, wanted on a warrant, was there. She was aware of a "thin line" in terms of how much or thoroughly she could search those premises for stolen property and said that she entered the back room "to see if there were any further nooks and crannies" and the door closed behind her. Then she heard the commotion at the back door. She said she did see in the premises multiples of certain items that would have led to follow-up in relation to possession of stolen property.

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Defence Submissions:

[6] Mr. Solomon argued on behalf of the Defence, that although there was a reduced expectation of privacy in this beauty salon as a commercial premise, the public may enter to the front counter to make inquiries and appointments and thereafter must be invited to various parts of the salon, where there are varying degrees of privacy expected. He submitted that this warrantless search is *prima facie* unreasonable and the Crown must satisfy the Court that the search was reasonable in the circumstances. He submitted that it is open to the court to find that the primary purpose of the search was to search for stolen property, a search in relation to which Cst. Picard did not think a warrant was required, whereas Cst. Mah admitted that there was a Afine line@ in the present circumstances given the various reasons that the police expressed for searching the premises. Mr. Solomon argued that the evidence here ought to be excluded, given that the police also harassed Ms. Nguyen by taking $640 from her including the $10 from her pants pocket, and her pager without any prior evidence of illegal drugs being kept at the beauty salon or trafficked from there. In his submission, at best the Crown evidence reveals that the police had a suspicion that stolen property might be possessed there, and the possibility that Ms. Nguyen=s son, who was wanted on a warrant in relation to an alleged assault might be present. He submitted that a check of business licences would not permit a search of those parts of the business not normally open to the public, including the back room entered by Cst. Mah and further submitted that it was artificial to distinguish between the accused Adiscovering@ the bag containing the marijuana and the police doing the same in the course of their unlawful search of the premises. Mr. Solomon referred to *Regina v. Silveira* (1995), 97 C.C.C.(3d) 450 (S.C.C.) at p. 495 in the context of a close temporal link between the commencement of the search here and the finding of the marijuana, and in relation to exclusion pursuant to s. 24(2). Arguing for the exclusion of the evidence seized pursuant to the unlawful search Mr. Solomon submitted that the violation of s. 8 was intentional, given that the officers appear to have held the belief that they could search the entire premises for stolen property, and that the search ought not to be regarded as being in good faith, given that they also knew that a search warrant has to be obtained to conduct searches in the context of *Criminal Code* offences. He also pointed out that there are no exigent circumstances here, and no reasonable and probable grounds upon which to seek a search warrant so the court ought to consider the violation of s. 8 to be a serious one and exclude the real evidence pursuant to s. 24(2).

Crown Submissions:

[7] Counsel for the Crown admitted that a violation of s. 8 of the *Charter* had occurred, but submitted that there is a lesser expectation of privacy in relation to a business premise and that the court ought to take that into account in assessing the seriousness of this *Charter* violation. Mr. Torrance also conceded the temporal connection between Cst. Mah=s unlawful search of the back room and the actions of the accused in throwing the bag of marijuana out the back door. Given the real nature of the impugned evidence, Mr. Torrance reminded the court that trial fairness was not a factor to be considered in the context of exclusion, just the seriousness of the violation. He referred the court to *Regina v. Fitt* (1995), 96 C.C.C.(3d) 341 (N.Sc.C.A.) in which it was found that the trial judge erred in finding a s. 8 violation regarding illegal gambling devices that were in plain public view and upon which the public was impliedly invited to play. They also held that the taxi stand was not a private premise. Mr. Torrance argued that the court ought not to exclude the real evidence here, the bag of marijuana, given the nature and the value of the drug found and the lack of seriousness in the context of the breach, and concluded that to exclude the evidence would tend to bring the administration of justice into disrepute.

Analysis and Findings:

[8] I find that the primary purpose of the warrantless search was to look for stolen property and was based on suspicion only. I make no finding as to bad faith on the part of the officers, but find an absence of good faith.

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[9] The bag of marijuana that the accused threw out of the back door of her beauty salon as one of the police officers conducted an unlawful search of a back room is real evidence. However, it is also clear on the unique facts of this case that it was the officer's unlawful search that triggered the accused=s actions, which in my view imbues the impugned evidence with a conscriptive quality. In the context of this s. 24(2) analysis I have carefully considered how to weigh the fact that it was ultimately the actions of the accused, herself, that led to the discovery of the marijuana while an unlawful search of her business premises was being carried out. I am mindful that the requirement under s. 24(2) that evidence was obtained in a manner that infringed *Charter* rights or freedoms is met where it is established that a *Charter* violation occurred in the course of obtaining the evidence, and that it is not necessary that there be a strict causal nexus between the *Charter* violation and the obtaining of the evidence, although there may be some cases where the obtaining of the evidence is too remote from the *Charter* violation: *Regina v. Strachan*, [1988] 2 S.C.R. 980 (S.C.C.). Here, there can be no doubt that the actions of the accused, in tossing the marijuana out the back door, were precipitated by the unlawful search of the police, which occurred simultaneously and in close physical proximity to the initial location of the bag of marijuana. There is a clear causal nexus in time and place between the actions of the accused that led to the marijuana being discovered and the unlawful search of the back room being carried out by Constable Mah.

[10] While community liaison work with merchants and businesses is no doubt an important police role and the raised awareness of a police presence in the neighbourhood may well significantly reduce the commission of certain types of crime, it is important that while in the community, the police themselves observe the law and engender amongst those they deal with, a respect for the rule and fair and impartial application of the law. Searching through the back room of a business without a warrant where the public are not routinely invited or present, looking for stolen property with only suspicions to go on, under the pretence of attending to check for business licenses is, in my view, a practise to be heartily discouraged by the courts. Cst. Picard said that he was there to do a business license check and that he believed that the police have the authority to walk into business premises and look about, but not the authority to look in every nook and cranny. He said that he and Cst. Mah did not have a plan in terms of what they intended to do at the salon, and he was seemingly unaware of the possibility that Ms. Nguyen=s son wanted on a warrant, might be there. The business licenses were displayed on the front wall. The police did not check the business hours before entering or ask Ms. Nguyen's permission to look around. Cst. Mah, the more experienced of the two officers, agreed that there was a Afine line@ in terms of searching these premises for stolen property, which she admitted she was doing, when asked whether she believed there was any privacy interest for shop owners in such circumstances. The Crown here conceded the s. 8 *Charter* violation, so it was clear to the Crown, if not to the police that the police actions in searching the premises exceeded what was lawful and reasonable in the circumstances. Indeed, members of the community who frequent beauty and tanning salons, privately owned health and exercise clubs, physiotherapy and dental clinics and other such businesses, even the changing rooms in clothing stores and shops would be surprised, perhaps even astonished, to have police officers suddenly walk through without notice and without warrant looking for evidence of crimes based only on suspicion. Having a clear police presence in the public areas of business premises is to be encouraged, whereas having the police invade the private areas of business premises without warrant or exigent circumstances is to be discouraged, and when the line is crossed, the Athin line@ as understood by Cst. Mah, the police run the risk that evidence obtained as a result of that *Charter* violation may be excluded by the courts. Real evidence, such as narcotics, is usually classified in s. 24(2) analysis as non-conscriptive evidence. Accepting that is the case here, then the seriousness of the violation and the effect of exclusion pursuant to s. 24(2) on the repute of the administration of justice are the appropriate considerations: *Regina v. Stillman* (1997),113 C.C.C.(3d) 321 (S.C.C.). For the reasons set out above I find the s. 8 violation here to be serious and am of the view that to admit the bag of marijuana into evidence in these circumstances would have a significant negative impact of the repute of the administration of justice, insofar as reasonably minded citizens in the community would wish to discourage the police practises in evidence here. In addition, as I have indicated I regard the actions of the police here in commencing to search the back of the salon

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and the closed back room, causing Ms. Nguyen to act as she did, give this impugned evidence a somewhat conscriptive quality, which brings into play the trial fairness factor as a part of s. 24(2) considerations: *Stillman*, supra. This also militates for exclusion. Finally, I do not believe that absent the *Charter* violation, triggering the actions of the accused, the bag containing the marijuana would have been discovered, and therefore the Crown has not established discoverability to a balance of probabilities.

Conclusion:

[11] For the above reasons, therefore, I find that the bag containing the marijuana, is excluded from evidence pursuant to s. 24(2) of the *Charter.*

Judge E.A. Arnold

Provincial Court Judge

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