IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Nuttall,*
2014 BCSC 2355

Date: 20141212
Docket: 26392
Registry: Vancouver

Regina

v.

John Stuart Nuttall and Amanda Marie Korody

Restriction on Publication: There is a publication ban pursuant to the Court's inherent jurisdiction and s. 648 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of any part of a trial heard in the absence of a jury. This publication ban applies until the jury returns with a verdict. This publication ban was lifted on May 30, 2015.

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Before: The Honourable Madam Justice Bruce

Reasons for Judgment

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Place and Date of Trial/Hearing:	Vancouver, B.C. November 17-21 and 24-25, 2014
Place and Date of Judgment:	Vancouver, B.C. December 12, 2014

INTRODUCTION

[1] The accused, Amanda Korody and John Nuttall, are charged with several related counts involving allegations of terrorist activities that culminated in the construction and placement of two improvised explosive devices at the B.C. Legislature in Victoria on July 1, 2013. All of the evidence against the accused was obtained through an undercover operation carried out by the RCMP between February 23, 2013 and July 1, 2013.

[2] This is an application to exclude evidence from the trial pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms* on the ground that the police violated the accused's right under s. 8 of the *Charter* to be free from unreasonable search and seizure. The notice of application dated October 17, 2014, describes the following violations of s. 8 of the *Charter*:

1. A warrantless search and seizure on June 29 and 30, 2013, of items from a room occupied by the accused at the Sundance Motel in Delta, BC;
2. A warrantless search and seizure on July 1, 2013, of items in a hotel room occupied by the accused at the Western Bakerview Inn Hotel in Abbotsford, BC;
3. A warrantless search and seizure of Nuttall's external hard drive on July 1, 2013;
4. A warrantless search and seizure on June 25, 2013, of a shopping list;
5. A warrantless search and seizure on May 25, 2013, of Nuttall's last will and testament; and
6. A warrantless search and seizure on June 5, 2013, of certain annotated diagrams.

[3] The Court decided that the defence application for a *voir dire* should be granted and provided oral reasons for this conclusion. A *voir dire* was declared and evidence was heard from Officer A., who was the primary undercover officer, and Sgt. Kalkat, who was the senior officer in charge of the investigation. In addition to oral evidence, the Court considered excerpts from the recorded conversations between the accused and the undercover officers, as well as summaries of the police reports and the notes of the undercover officers. The Court also considered excerpts from recorded conversations between the accused outside of the presence of the undercover officers as evidence of their state of mind at the time of the events.

OVERVIEW OF THE EVENTS

[4] The undercover operation, called Project Souvenir, was instigated due to reports from the Canadian Security Intelligence Service concerning Nuttall's interest in jihad. The first scenario occurred on February 23, 2013, at which Nuttall was introduced to Officer A. at a gas station for a view only encounter. Officer A. was dressed in traditional Muslim attire. On March 2, 2013, Officer A. had another encounter with Nuttall at the gas station but this time he asked Nuttall for help finding his niece. Nuttall agreed to help. During their encounter, Nuttall told Officer A. that he had plans to become involved in jihad terrorist activities but required money and equipment. They met again on March 3, 2013 to continue searching for the niece. Thereafter during a number of encounters, Officer A. engaged Nuttall in various "jobs" that were designed to make him believe that he was assisting Officer A. with criminal activities. During these encounters Nuttall made various statements that indicated he believed that Officer A. was a radical Muslim who supported jihad. Nuttall frequently discussed his terrorist ideas and plans with Officer A.

[5] On May 3, 2013, the police obtained a one party consent authorization under s. 184.2(3) of the *Criminal Code,* R.S.C. 1985, c. C-46, to intercept the private communications of Nuttall and Korody when in conversation with listed undercover officers for evidence of participation in terrorist activity. It was valid for a period of 60 days.

[6] On May 5, 2013, the police planned a trip to Whistler for the purpose of obtaining a hard drive that Nuttall told Officer A. he was using to compose his plan for jihad. Korody also accompanied them to Whistler. En route to Whistler, Nuttall added to his plan using the computer he brought with them and Korody wrote in her diary. In this scenario, Officer B. posed as a business associate of Officer A. who was to take possession of the hard drive from Nuttall after the plan was complete. Nuttall exited Officer A.'s vehicle and walked over to Officer B.'s vehicle and handed him an envelope containing the hard drive. Officer B. did not say anything to Nuttall.

[7] The police subsequently made a copy of the hard drive and found that it contained a terrorist plan, as well as videos and recordings of Osama Bin Laden lectures and shortcuts to Inspire magazine and the Anarchist Cookbook. There was no warrant obtained prior to the search of the hard drive. It was returned to Nuttall on May 11, 2013, when Nuttall met with Officer B. in a parking lot.

[8] On May 24, 2013, Officer A. took the accused to Vancouver Island ostensibly to search out sites that may be potential targets for jihad. The next day Officer A. introduced

Officer C. to the accused as another “brother” who would be helping with their reconnaissance. While they drove around the Victoria area, Nuttall noted on paper maps plausible sites for targets. He also took videos of various sites and vantage points. When they finished the reconnaissance, Officer A. told the accused that he did not want to take the ferry back to the mainland with any electronic storage devices containing maps or pictures of their target sites. Notwithstanding the accused’s statements about eating the maps, Nuttall downloaded the videos and photographs he had taken during the day onto a USB jump drive and gave them to Officer C. who promised to get them back to Officer A. once they were on the mainland. Nuttall also gave Officer C. an SD storage card, a red map book and a folded map.

[9] The storage card and the USB jump drive were forensically examined by the police without first obtaining a search warrant. While en route back to the mainland on May 25, 2013, Nuttall dictated his will to Korody who wrote it on two lined pieces of paper. When Nuttall decided that he had to destroy the will, Officer A. told Nuttall that he would burn it. In response, Nuttall instructed Korody to give the will to Officer A. and she did so.

[10] On May 31, 2013, Nuttall asked Officer A. to return the SD card and Officer A. said he had not yet finished examining its contents. Nuttall was then taken to a store to purchase a new SD card.

[11] On June 6, 2013, Nuttall showed Officer A. drawings he had made of a pressure cooker bomb that came from Inspire magazine. After discussing the diagrams with Officer A., Nuttall said that he wanted to burn them; however, Officer A. told Nuttall that he would burn them and would not leave any trace of them. Nuttall said he “kinda need[ed]” the diagrams but then agreed to give them to Officer A. to destroy. Nuttall said, “I’ll give it to you. See akhi, I trust you. Right here is enough to get me thrown into prison for the rest of my life but that’ll get me thrown into, right there, you gotta get rid of that properly, brother.” In reply, Officer A. assured Nuttall that he should not worry as he knew how to destroy such items. On June 16, 2013, Nuttall asked Officer A. to confirm that he had destroyed the diagrams and Officer A. replied that he had burnt the documents and that “those papers are gone” meaning he had destroyed them. Sgt. Thibeault, an RCMP expert in explosives, examined the diagrams and opined that they were a couple of steps away from being able to construct a functioning explosive device.

[12] On June 14, 2013, the police obtained an authorization to intercept the private communications of the accused pursuant to s. 186 of the *Criminal Code* to investigate various terrorism offences designating the accused as the primary targets. The Part VI

authorization was valid for 60 days. To facilitate installation of the recording devices in the accused's home, Officer A. took them on a trip to Kelowna between June 16 and 19, 2013. The trip was designed to give the accused some time to plan a terrorist attack. They drove with Officer A. to the Kelowna airport where they picked up Officer C. The undercover officers subsequently rented a room for the accused at a Sandman hotel. Nothing was accomplished regarding a terrorist plan during this period at the hotel.

[13] On June 25, 2013, Officer A. met with the accused and Nuttall gave Officer A. a shopping list containing items he believed were required to build a pressure cooker explosive device for safekeeping. This list was photocopied by another RCMP officer and the original was returned to Officer A. the next day.

[14] On June 26, 2013, Officer A. picked up the accused from their home and told them that they would be away for several days for the purpose of constructing the pressure cooker explosive devices. Officer A. gave Nuttall the shopping list and drove the accused to various stores where the accused purchased items required for the explosive devices. Their shopping trip was audio and video recorded. The accused worked from the shopping list that they had prepared beforehand.

[15] At the end of the day, Officer A. checked the accused into the Sundance Motel in Delta where they were to work on constructing the explosive devices from the pressure cookers. Before they left his vehicle, Officer A. counselled the accused to leave behind anything that they wanted to be burned. Officer A. also told the accused that he would provide the explosives for the devices. After the accused left the vehicle, Officer A. discovered that they had left the shopping list in his vehicle. That night Nuttall telephoned Officer A. and told him to burn the shopping list and Officer A. agreed to do so.

[16] On June 27 and 28, 2013, the accused were driven to more stores to buy additional supplies for the explosive devices. Officer A. advised the accused that he had burnt the list.

[17] During their stay at the Sundance Motel, the accused worked on the construction of the pressure cooker explosive devices and collected items that they would need to discard. Officer A. instructed the accused to fill two bags; one would contain items that must be destroyed and the other bag would be for garbage.

[18] On June 29, 2013, Officer A. went to see the accused at their motel room and told them that Officer D., who was introduced to them as the "main brother", was coming to meet them. Officer D. staged an interview of the accused for the purpose of deciding whether to

approve Officer A.'s involvement in the plan to place explosives at certain locations. Another brother, Officer E., was also introduced to the accused as a person who would help the accused with their plan. After Officer D. left the motel, Officer E. filmed the accused in a testimonial video about his jihad beliefs. At the end of the day Nuttall gave to Officer A., three pressure cooker explosive devices, two timers and some garbage to be burned. Officer A. later provided these devices to RCMP officers who inserted C4 explosives and a larger quantity of modelling clay. The devices, as completed by the RCMP, were not capable of exploding.

[19] On June 30, 2013, Officer A. picked up the accused from the Sundance Motel and Nuttall took with him a bag of tools and leftover bomb parts, as well as some personal items. These items were left in the trunk of Officer A.'s vehicle on the understanding by the accused that they would be destroyed. They switched vehicles at a mall and then drove to the ferry terminal. Other officers retrieved the items from the trunk of Officer A.'s vehicle; these included all of the items that the accused had given to Officer A. on June 29 and 30 for the purpose of destroying.

[20] After the accused left the Sundance Motel room, the RCMP searched the room without a search warrant and seized additional items left by the accused.

[21] On arrival in Victoria, Officer A. checked the accused into a hotel in Sydney and on the evening of June 30, 2013, he drove the accused to Victoria to do reconnaissance on where to place the explosive devices. They ultimately chose the bushes at the Legislature as the appropriate location. In the early hours of the morning on July 1, 2013, Officer A. drove the accused from their hotel in Sydney to Victoria where they retrieved the pressure cooker devices from a vehicle that had been parked in that location by the RCMP. Officer A. drove the accused to the Legislature where they placed the devices in the bushes. When the last device had been placed in the bushes by Nuttall, Officer A. became aware that Nuttall had a folding knife on his person. They subsequently drove to the ferry terminal and, once in the Lower Mainland, Officer A. checked the accused into a room at the Best Western Bakerview Inn hotel in Abbotsford. Before Officer A. left the room, Nuttall gave him the hard drive from his computer for the purpose of destroying it. This hard drive was the same one that had been given to Officer B. earlier during the undercover investigation. The hard drive was again forensically analyzed by the RCMP without a search warrant.

[22] After Officer A. left the accused's room at the Best Western hotel, the RCMP continued to monitor the accused while plans were made for their arrest. Officer A. telephoned the accused on several occasions and led them to believe that he was in the

process of organizing their departure from Canada by air. He counselled them to leave all of their possessions behind, including their computers and his associates would arrange for these items to be destroyed to prevent the police from connecting the accused to the explosive devices. When the accused left the room upon instructions from Officer A., they left behind all of their possessions and immediately outside of the room they were arrested. The RCMP subsequently entered the hotel room without a search warrant, conducted a search and seized all of the items found in the room on the basis that it was abandoned. The RCMP subsequently obtained a warrant to search the hard drives of the two computers found in the room.

[23] The reports completed by the undercover officers shortly after the accused were arrested indicate that Officer A.'s instructions to the accused to leave all of their belongings in the room at the Best Western was intended to ensure Nuttall left behind the knife he had on his person when planting the explosive devices.

ARGUMENT

A. Position of the Accused

[24] The accused argue that they had a reasonable expectation of privacy in the items they handed over to Officer A. and the items that they left in the various hotel rooms at the direction of Officer A. A reasonable expectation of privacy exists when a person has a subjective expectation of privacy in the subject matter of a search and that subjective expectation of privacy is objectively reasonable in all of the circumstances: *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45; and *R. v. Tessling*, 2004 SCC 67 at para. 19.

[25] The accused at all times desired that the items seized by the police be destroyed and in this way remain confidential. Further, they expressed this concern to Officer A. and among themselves privately. This subjective privacy interest was maintained over the items given to Officer A. and left in the hotel rooms at his direction because the accused entrusted the items to him for the purpose of having them destroyed. Officer A. led the accused to believe that he would destroy the items given to him and left in the hotel room and, further, that he had special skills regarding this matter. They were brothers in arms and not simply drug sellers or purchasers that have become targets of an undercover police investigation. In these circumstances it was objectively reasonable for the accused to believe that their privacy interests would be preserved by Officer A. because he promised them, as a fellow terrorist, that he would destroy the items entrusted to him.

[26] The accused acknowledge that in some cases a person may abandon their privacy

interest in an item. The test applied is whether a reasonable and independent observer would conclude that a continued assertion of a privacy interest is unreasonable in all of the circumstances: *R. v. Patrick*, 2009 SCC 17 at paras. 22-25. However, the accused argue that they did not abandon the seized items based on an application of this test.

[27] In this regard, the accused maintain that they did not "consent" to the taking of the items by Officer A. in a legal sense because they were not aware that Officer A. was a police officer. Further, there was no informed consent because the accused were not aware that they could choose not to consent. Accordingly, consent cannot be invoked in an undercover police operation: *R. v. Roy*, 2010 BCCA 448 at para. 23. Moreover, an undercover officer is not free to intrude upon a person's privacy rights except insofar as the express or implied invitation of the targeted person permits: *Roy* at paras. 29-31 and *R. v. Evans*, [1996] 1 S.C.R. 8 at paras. 14-15, Sopinka J. The accused argue that the only invitation to intrude on their privacy rights that was accorded to Officer A., in his undercover capacity, was to take the items given to him for the purpose of destroying them. In failing to comply with the limited invitation to destroy the items, the police engaged in a search and intruded upon the privacy rights of the accused: *R. v. Tsekouras*, 2014 ONSC 2420 at paras. 46-47.

[28] Because the searches were warrantless, there is a presumption of unreasonableness and the onus rests with the Crown to establish on a balance of probabilities that they were reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278. In this case, none of the searches were authorized by law and therefore unreasonable. Accordingly, the defence argue the searches and seizures violated the accused's rights under s. 8 of the *Charter*.

[29] Lastly, the accused argue that the evidence obtained in violation of s. 8 of the *Charter* ought to be excluded from the trial pursuant to s. 24(2) of the *Charter*.

B. Position of the Crown

[30] The Crown argues that the accused abandoned any privacy interest they had in items left behind in hotel rooms or given over to Officer A. and thus the preservation of this evidence does not constitute a search or a seizure within the meaning of s. 8 of the *Charter*. The Crown maintains the accused dealt with the evidence in such a way as to forfeit any reasonable expectation of privacy, in an objective sense, in keeping the information they disclosed confidential: *Patrick* at paras. 22-25.

[31] The Crown argues that abandonment is a question of fact and the question is whether the accused have acted in relation to the subject matter of their privacy claims in a manner

that would lead a reasonable and independent observer to conclude that the continued assertion of a privacy right is unreasonable in all of the circumstances: *Patrick* at para. 25. The Crown says that the undercover officers, in taking possession of the items in dispute, did not act beyond what they were invited to do by the accused. The officers' conduct after taking possession of the items is not a factor to be assessed in judging abandonment: *Patrick* at para. 54.

[32] Moreover, the Crown argues that the undercover officers were no different from anyone else taking possession of potentially incriminating evidence based on lies told to the accused: *Lewis v. United States* (1966), 385 U.S. 206 at 5-6 (S.C.); *Roy*; *HMTQ v. Dallas, Hinchcliffe & Terezakis*, 2002 BCSC 760 at paras. 18-20; and *R. v. Felger*, 2014 BCCA 34. Where the accused trust false friends to throw out the evidence, the *Charter* does not protect their privacy interests.

[33] Lastly, the Crown argues that even if the seizure of the evidence constitutes a breach of s. 8, all of the factors relevant to an inquiry under s. 24(2) of the *Charter* favour admission of the evidence in dispute.

DECISION

[34] As Cory J. concludes in *Edwards* at para. 33, there are two distinct inquiries in any challenge to the admissibility of evidence pursuant to s. 8 of the *Charter*. First, the court must determine whether the accused had a reasonable expectation of privacy in the item that is alleged to have been searched or seized by the police. In most cases this question must be answered without reference to the conduct of the police during the impugned search. If the accused is not found to have a reasonable expectation of privacy in the item searched or seized, that is the end of the inquiry and the accused does not have standing to allege a breach of s. 8 of the *Charter*: *Edwards* at para. 45. Moreover, unless the state has intruded upon a person's reasonable expectation of privacy, there is no search that is protected by s. 8 of the *Charter: Evans* at para. 11. Second, if the accused did have a reasonable expectation of privacy, the court must determine whether the search was an unreasonable intrusion into the privacy rights of the accused. It is at this stage in the inquiry that the conduct of the police is relevant.

[35] Whether a person has a reasonable expectation of privacy in the subject matter of an alleged search or seizure is determined by examining "the totality of the circumstances". In *Edwards* at para. 45, Cory J. described several relevant factors including:

> (i) presence [of the accused] at the time of the search;

(ii) possession or control of the property or place searched;

(iii) ownership of the property or place;

(iv) historical use of the property or item;

(v) the ability to regulate access, including the right to admit or exclude others from the place;

(vi) the existence of a subjective expectation of privacy; and

(vii) the objective reasonableness of the expectation.

[36] In *Tessling*, Binnie J. refined the *Edwards* factors; the Court developed a test that reflected a need for a subjective expectation of privacy that was objectively reasonable. Relating this test to the facts in *Tessling*, Binnie J. described the inquiry as follows at para. 32:

1. What was the subject matter of the FLIR image?
2. Did the respondent have a direct interest in the subject matter of the FLIR image?
3. Did the respondent have a *subjective* expectation of privacy in the subject matter of the FLIR image?
4. If so, was the expectation *objectively* reasonable? In this respect, regard must be had to:
    a. the place where the alleged "search" occurred;
    b. whether the subject matter was in public view;
    c. whether the subject matter had been abandoned;
    d. whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?
    e. whether the police technique was intrusive in relation to the privacy interest;
    f. whether the use of surveillance technology was itself objectively unreasonable;
    g. whether the FLIR heat profile exposed any intimate details of the respondent's lifestyle, or information of a biographical nature.

[Emphasis in original.]

[37] In *Patrick*, Binnie J. specifically addressed the issue of abandonment. In *Patrick*, the police suspected the accused was operating an ecstasy laboratory in his home and they seized bags of garbage from the bins located at the rear of the accused’s property. The police had to reach into the accused’s air space to retrieve the bags but did not trespass on the property. The question for the Court was whether the accused had dealt with the items

placed into the garbage bins “in such a way as to forfeit any reasonable expectation (*objectively* speaking) of keeping the contents confidential”: *Patrick* at para. 13 (emphasis in original). Further, Binnie J. held that the objective reasonableness of a continuing expectation of privacy is judged from the perspective of “the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy”: *Patrick* at para. 14. In other words, the assessment is concerned with balancing the public’s interest in being left alone by the state with the public interest in the advancement of law enforcement goals.

[38] Binnie J. went on to describe the concept of abandonment in relation to a person’s privacy interest at para. 20 of *Patrick*:

> [20] The concept of abandonment is about whether a presumed *subjective* privacy interest of the householder in trash put out for collection is one that an independent and informed observer, viewing the matter *objectively*, would consider reasonable in the totality of the circumstances (*Edwards*, at para. 45, and *Tessling*, at para. 19) having regard firstly to the need to balance "societal interests in protecting individual dignity, integrity and autonomy with effective law enforcement" (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293); secondly, whether an accused has conducted himself in a manner that is inconsistent with the *reasonable* continued assertion of a privacy interest and, thirdly, the long-term consequences for the due protection of privacy interests in our society. [Emphasis in original.]

[39] Where it is found that a person has abandoned property, he ceases to have a reasonable expectation of privacy in it: *Patrick* at paras. 22-24. Abandonment is a question of fact as articulated by Binnie J. at para. 25 of *Patrick*:

> [25] Abandonment is therefore an issue of fact. The question is whether the claimant to s. 8 protection has acted in relation to the subject matter of his privacy claim in such a manner as to lead a reasonable and independent observer to conclude that his continued assertion of a privacy interest is unreasonable in the totality of the circumstances.

[40] In the case at hand, there are two distinct types of evidence claimed to have been seized by the police in contravention of s. 8 of the *Charter*: (1) items seized from hotel rooms that the accused occupied for a time and subsequently vacated; and (2) items that were given to Officer A. for the purpose of destroying them or given to another undercover officer. Each of these categories of evidence will be addressed separately. I note that the defence do not claim that the accused had a continuing expectation of privacy in the items left behind in the Sundance hotel room because these items were actually left as garbage to be thrown out by the hotel staff. Everything over which the accused want to assert a privacy interest was taken with them. However, the defence claim the accused had a continuing and

reasonable expectation of privacy in the items seized by the police from the Best Western hotel room in Abbotsford.

A. Hotel Room Items

[41] Applying the legal principles described earlier to the items left behind by the accused in the Best Western room rented by Officer A., it is apparent that the accused had a direct and substantial interest in the informational content of the items seized by the police. While there were some items that could only be characterized as garbage or waste, even these items had the potential to carry DNA of the accused and other highly personal information. There was a clear subjective privacy interest in these items and a concern to protect them from discovery by the police. As Binnie J. said in *Patrick* at para. 30, the so called garbage could "paint a fairly accurate and complete picture of the householder's activities and lifestyle." There were also computers included in the items seized by the police and there is normally a high expectation of privacy in the information stored therein: *R. v. Vu*, 2013 SCC 60 at paras. 40-45. Moreover, the accused had a subjective expectation of privacy in the items left behind in the hotel room as evidenced by their private discussions concerning the need to destroy the items to protect their confidentiality and by the concerns for confidentiality that were shared with Officer A. A subjective expectation of privacy is also presumed regarding activities that take place in one's home: *Patrick* at para. 37. A hotel room, particularly where the accused could control access, is tantamount to a private residence during their temporary stay regardless of who rented the room: *R. v. Wong*, [1990] 3 S.C.R. 36 at 50-51.

[42] The real question is whether the subjective expectation of privacy was objectively reasonable in all of the circumstances. On the one hand, the accused acted in a manner that demonstrated a continuing interest in preserving the confidentiality of the information contained in the items left in the hotel rooms. They left the items for the express purpose of ensuring their destruction by Officer A. and his associates. On the other hand, there are several factual circumstances that render any continuing expectation of privacy unreasonable. First, having left the hotel rooms with no expectation of returning (the accused believed they would be flown out of the country), the room was accessible to all employees of the hotel who could also authorize entry to the room by the police. Second, there is no evidence that the accused took any steps to prevent discovery of the items in the room; nothing was hidden from view or otherwise made inaccessible to the cleaning staff or third parties authorized by the hotel to enter the room. Third, the accused did not stand at the door of the hotel room to preclude entrance by hotel staff or anyone authorized by the

hotel to enter and did not ask a third party or Officer A. to do this in order to preserve the confidentiality of the items inside the room. Fourth, with regard to the laptops left at the Best Western hotel, there is no evidence that the accused protected the privacy of the information in their computers with a password or by any other means.

[43] Lastly, it cannot be said that the police tricked the accused into abandoning the hotel rooms by unlawful means or by investigative techniques that violated other *Charter*-protected rights such as s. 7, the right to life, liberty and security of the person, or s. 9, the right not to be arbitrarily detained. The objective of the police was to ensure that the accused did not exit the room in possession of a knife because the plan was to arrest them shortly after they left the room and this weapon could potentially present a danger to the arresting officers. Although the defence argued that Officer A.'s instructions to leave the room with only the clothes on their backs was a ruse to force them to abandon their privacy interest in the items left behind, I find this is inconsistent with the incident reports prepared by the police immediately before and after the arrest and actually made the seizure more complicated. Had the accused retained possession of the items after they left the hotel room, the police would have been able to search and seize these items lawfully as incidental to arrest.

[44] Even if one assumes the police tricked the accused in the manner argued by the defence, nothing that Officer A. did to convince the accused to comply with his instructions to leave everything behind was either unlawful or in violation of other *Charter*-protected rights. Officer A. did not threaten the accused or act in a manner that would have led them to believe their lives would be in danger had they chosen to ignore his instructions. Officer A. did not intimidate or coerce the accused into abandoning all of their property in the Best Western hotel room. Officer A. lied to the accused as part of a legitimate undercover police investigation and his actions went no further than a continuing insistence that he was part of their conspiracy and had their best interests at heart. He had the tools and the expertise to properly destroy the evidence and the accused believed Officer A.'s assertions. They trusted him and the fact that their trust was misplaced does not render the officer's conduct unlawful or otherwise objectionable from a public interest perspective.

[45] Although the defence argues that Officer A. acted beyond or outside of the implied or express invitation extended by the accused to be privy to their private activities by failing to destroy the property left in the hotel rooms, I am unable to accept that the undercover operation was subject to any limitations of this nature. This is not akin to a situation where the police, pretending to be customers, act in a manner that goes beyond what an ordinary

customer is implicitly invited to do when entering a store or an otherwise private space. In this case, the accused accepted Officer A. as a co-conspirator and there were no implied or express parameters to their relationship that went beyond what any other co-conspirator would be subject to. Officer A. could not lawfully search their residence or their hotel rooms under the guise of the undercover operation; however, to find that Officer A. was unable to secure evidence of an offence by convincing the accused that he knew what to do with any incriminating items unless he first secured an authorization would substantially defeat the purpose of the operation. Moreover, in *Roy*, the Court of Appeal rejected the notion that the express or implied invitation extended to an undercover officer who entered a private residence to view purchase money for a planned drug deal was breached because the officer's true purpose was to collect evidence against Mr. Roy. The police do not require an authorization to use information they properly obtain through an undercover operation: *Roy* at para. 32.

[46] For these reasons, I find that the accused abandoned any privacy interest in the items seized by the police from the hotel room at the Best Western in Abbotsford. As a consequence, the search and seizure of these items did not attract the protection of s. 8 of the *Charter.* Because the police obtained a search warrant to forensically examine the laptop computers left behind in the room, it is unnecessary to address whether the accused abandoned any privacy interest in the information contained on these hard drives.

B. Items to be Destroyed

[47] Turning to the privacy interest of the accused in the items given to Officer A. during the undercover operation, I am satisfied that the accused continued to have a subjective privacy interest in these items as a result of the terms upon which they transferred them to Officer A.'s possession and control. The accused gave up possession of the property for the express purpose of destroying it to maintain confidentiality over the information it may contain or the incriminating evidence it may harbour. This state of mind is evident in the recorded private conversations between the accused and in their conversations with Officer A. and the other undercover officers. Moreover, the accused had a direct interest in the informational content of the property that was accepted by Officer A. for the purpose of its destruction.

[48] The question is whether this continuing subjective expectation of privacy was objectively reasonable in all of the circumstances. This is not a case where Officer A. or any other police officer entered and searched premises or a vehicle in which the accused had a reasonable expectation of privacy in order to obtain the property. In each case, the accused

gave the items to Officer A. or another undercover officer directly or placed them in Officer A.'s vehicle for the purpose of having them destroyed.

[49] The informational content of the items was not left in public view; the accused either passed the item to an undercover officer posing as a co-conspirator or left the items in bags in Officer A.'s vehicle. The shopping list was left in the vehicle used by Officer A.; it was not placed in the trunk. The object itself, and implicitly its confidential informational component, were intended to be kept private as between the accused and the undercover officers. However, it was also by this means that the property, and its informational component, was placed into the hands of a third party with no corresponding control over what that third party did with the items. The accused took no steps to ensure their privacy interests were protected apart from trusting that the undercover officers would carry out their wishes regarding the property. It is irrelevant that the third parties were actually police officers because it is what the accused believed and did in regard to their privacy interests that is the focus of the objective portion of the test: *Patrick* at para. 54. In this case, the accused believed the undercover officers were co-conspirators in the proposed illegal activities and gave them complete control over the property. To assert a continuing expectation of privacy in property handed over to a third party in these circumstances is not objectively reasonable.

[50] The defence also argue that the undercover officers had possession of the accused's property subject to an obligation to preserve its confidentiality. I am unable to accept this characterization of the undercover officers' relationship with the accused. As discussed earlier, this was not a situation where the undercover officers violated an express or implied invitation extended to them by the accused in regard to their activities.

[51] Moreover, Officer A. had no obligation to retain the confidentiality of the property given to him by the accused for destruction. There is no common law or statutory duty placed on Officer A., in his capacity as an actor in an undercover criminal investigation, to follow through with promises or undertakings given to the targets of the investigation. Our system of justice sanctions undercover investigations, which necessarily involve a web of falsehoods communicated to the targets, provided the conduct of the police does not violate any of the accused's *Charter* rights. The fact that Officer A. lied to the accused about his intentions in connection with the items given to him for destruction violates no *Charter*-protected right, statutory provision or principles of the common law. As described earlier, Officer A. convinced the accused to trust him to destroy the items handed over to him without resort to coercive tactics that rendered the accused afraid for their safety if they refused his requests. Officer A. did not otherwise use tactics that violated the accused's

rights under s. 7 or s. 9 of the *Charter* and his tactics did not amount to an abuse of process or conduct that could bring the administration of justice into disrepute.

[52] For the same reasons, I must conclude that the accused abandoned any privacy interest in the items given to Officer A. and the other undercover officers. The accused gave up possession and control over the property as soon as it was given to Officer A. or was left in his vehicle. The accused were convinced that Officer A. would keep his promise to destroy the items and at one point asked him to confirm that he had in fact carried out this task. However, the accused took no measures to protect the confidentiality of the items, or the information they contained, beyond trusting Officer A. to keep his promise. In my view, the items given to Officer A. or left in his vehicle have no different status than the garbage Mr. Patrick left in the bins at the border of his property. Just as the garbage was unprotected and within easy reach of anyone walking by, including the police, the accused's items were also accessible by the undercover officers and any other officer authorized to enter Officer A.'s vehicle.

[53] Because the accused abandoned the property, there was no intrusion into their privacy interests by the subsequent seizure of the items by the police. Further, as described earlier, the police techniques used to obtain the property from the accused were objectively reasonable in that the legitimate demands of law enforcement were properly balanced against the public's concern that privacy interests be preserved in the circumstances of this case. The undercover officers sought to preserve evidence to support the prosecution of criminal misconduct but did not violate any *Charter*-protected rights in doing so.

[54] Accordingly, I find that the accused had no reasonable expectation of privacy in the items given over to Officer A., or any other undercover officer. There was thus no search or seizure that violated their rights under s. 8 of the *Charter.* There is no need to engage in an inquiry under s. 24(2) of the *Charter* in these circumstances. The disputed evidence is admissible at the trial.

"Bruce J."