

R. v. Cortes

Her Majesty the Queen vs. Juan Carlos Quintero Cortes. (Accused)

Alberta Provincial Court

Fradsham Prov. J.

Heard: October 12, 2000
Judgment: October 12, 2000
Docket: Calgary 06373591P10301-02

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Counsel: D.V. Misutka, for Crown

P.C. Fagan, for Accused, Cortes

P.C. Fagan (Agent for Ms M. Keelaghan), for Accused, Robles

P.C. Fagan (Agent for R.M. Birnbaum), for Accused, Corona

Subject: Criminal

Criminal law --- Pre-trial procedure — Release by judge of superior court — Show cause hearing — Reasons for detention — General.

Cases considered by *Fradsham Prov. J.*:

R. v. Johnsen (June 16, 1986), Blair J. (Ont. C.A.) — referred to

R. c. Lamothe (1990), [1990] R.J.Q. 973, 33 Q.A.C. 11, 58 C.C.C. (3d) 530, 1990 CarswellQue 168 (Que. C.A.) — referred to

R. c. Pearson (1992), 17 C.R. (4th) 1, [1992] 3 S.C.R. 665, 77 C.C.C. (3d) 124, 12 C.R.R. (2d) 1, 52 Q.A.C. 1, 144 N.R. 243, 1992 CarswellQue 17, 1992 CarswellQue 120 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Controlled Drugs and Substances Act, S.C. 1996, c. 19

s. 5 — referred to

s. 6 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 515(6)(b) — referred to

s. 515(6)(c) — referred to

Forms considered:

Criminal Code, R.S.C. 1985, c. C-46

Form 32 — referred to

Fradsham Prov. J.:

1

THE COURT CLERK: Juan Cortes in custody. As well there's two other co-accused on that matter, but we don't have counsel for those.

MR. FAGAN: Good morning, Your Honour. I'm actually appearing as agent for other counsel relative to the other two accused.

THE COURT CLERK: In custody. Ricardo Corona and Evelia Robles.

THE COURT: And we have a Spanish interpreter. I believe.

THE COURT CLERK: We do.

2 *TANYA del FABBRO*. sworn as an interpreter in the Spanish language.

THE COURT: Mr. Fagan, you appear as counsel. I gather, on behalf of Mr. Cortes, —

MR. FAGAN: Yes.

THE COURT: — and agent for counsel in respect of Mr. Corona and Mrs. Rangel (sic) —

MR. FAGAN: Yes.

THE COURT: Ms. Robles.

MR. FAGAN: Robles, yes.

THE COURT: Am I right?

MR. FAGAN: I appear as agent for counsel Margaret Keelaghan with respect to Ms. Robles, and as agent for counsel Michael Birnbaum with respect to Mr. Corona, and as counsel for Mr. Cortes.

Mr. Cortes is to the far left, Mr. Corona is in the middle, and Ms. Robles is to the far right.

THE COURT: Thank you.

MR. FAGAN: With your leave, sir, the first order of business should be to carry out the instructions of Mr. Birnbaum. He advises me that he's been dismissed by Mr. Corona as counsel relative to this matter; that his application is to be removed as solicitor of record.

THE COURT: All right. Mr. Corona, you understand that Mr. Birnbaum says that you have dismissed him and that he wishes to be removed from the record?

THE INTERPRETER: Yes.

THE COURT: And you agree with him being removed from the record?

THE INTERPRETER: Yes.

THE COURT: All right. Then that application is granted and Mr. Birnbaum is removed.

Do you know — have you been instructed as to whether or not Mr. Corona is seeking out counsel or has retained other counsel?

MR. FAGAN: It's my understanding that Mr. Corona has had communication with Mitch Stephensen. It's my further understanding that Mitch Stephensen is prepared to go on the record, and I expect the court will hear from him in due course.

THE COURT: As in go on the record today?

MR. FAGAN: I don't know.

THE COURT: I saw Mr. Stephensen in court sometime this morning. Perhaps we'll just leave that issue for a moment.

So, we have Mr. Birnbaum off, we might have Mr. Stephensen on. —

MR. FAGAN: Yes.

THE COURT: — but we'll deal with that when he shows up.

MR. FAGAN: Yes, sir.

THE COURT: All right. Do you have instructions from Miss Keelaghan?

MR. FAGAN: I do. She's simply asking, sir — I believe the matter was here for show cause this morning. She'd like the matter of show cause adjourned, sir, until next week. And I'm suggesting, sir, that the matter go over to next Friday, October the 20th in the morning to be spoken to at that time.

THE COURT: In respect of all counsel — I'm sorry, all accused?

MR. FAGAN: With respect to — ultimately that will be the situation, that they'll all go over to next Friday. Obviously I have the show cause matter to speak to with Mr. Cortes this morning, but yes, sir.

THE COURT: All right.

MR. MISUTKA: And, Your Honour. I can advise Mr. Corona is detained by order of Judge Maloney.

THE COURT: All right, thank you.

So in respect of Ms. Robles, she will go to October the 20th. nine o'clock, 411 for her show cause.

MR. FAGAN: Yes, sir.

THE COURT: Is the Crown ready to proceed on the show cause in respect —

MR. MISUTKA: We are, sir, yes.

THE COURT: — of Mr. Cortes?

MR. MISUTKA: Your Honour, at the beginning I will indicate that the Crown is opposed to the release of Mr. Cortes. And not to overemphasize the case, but the Crown is strongly opposed to the release of Mr. Cortes in this case, both on the primary and secondary grounds.

MR. FAGAN: I hate to interject, sir, but I note that the accused are still standing. Might they be seated in the dock during the course?

THE COURT: Certainly.

THE INTERPRETER: I'm sorry, I didn't catch that.

THE COURT: The accused persons may sit. In fact, wouldn't it be fair to say that we have dealt with Ms. Robles; that she is going over to a date and we don't need her any longer in the dock at all?

MR. MISUTKA: That would be fine, sir.

THE COURT: So, Constable, you can take her back, thank you.

MR. MISUTKA: Corona as well, sir, for that matter.

THE COURT: Yes. Because I gather that the application is going to be to have Mr. Corona go over to the 20th of October at nine o'clock in 411 as well?

MR. FAGAN: Yes, sir.

THE COURT: All right, then I think that we can say that we've dealt with him as well. And he, too, can go.

Constable, you can also take Mr. Corona back. So that leaves us only with Mr. Cortes.

I think you were saying that the Crown seeks detention on the primary and secondary grounds.

MR. MISUTKA: That's correct, Your Honour. The facts are going to be somewhat lengthy. Your Honour. They arose beginning on the 2nd day of September of this year where the two co-accused, Mr. Corona and Ms. Robles, had come into the Calgary International Airport from an American Airlines flight from Puerto Vallarta, routed through Dallas, Texas.

3 At the primary examination they gave inconsistent stories about their travel plans, and therefore they were detained for secondary investigation or secondary examination.

4 During the secondary examination the contents of their luggage, three pieces of luggage for those two individuals, were examined, and found inside the luggage were five stoneware dish boxes, each containing 12 plastic wrap packages. So that's 60 packages in all, sir. In each of those packages was one kilogram of cocaine. The importation of 60 kilograms of cocaine.

5 Members of the R.C.M.P. had been called down by Canada Customs as a result of this seizure, and in the late evening hours they observed Mr. Cortes, who was apparently waiting for passengers leaving Canada Customs. In the estimation of one of the R.C.M.P. officers he appeared to be nervous, and he appeared to be unable to locate his passengers.

6 In the early morning hours, about 45 minutes after 12 in the morning of September 3rd, he was then followed to the Delta Calgary Hotel at the airport, where he was observed taking the elevator to the 5th floor.

7 Two R.C.M.P. officers who were following him took another elevator to the 5th floor. They were unable to find him. They then made inquiries at the front desk of the hotel, and while they were doing so, they observed a folder sitting in the rack of the reception desk in the name of Rangel, who was one of the names of one of the co-accused, written on the exterior. They made some inquiries about that with the hotel clerk, advising that Mr. Rangel in fact was under arrest and being detained, and they were told that Mr. Rangel's room had been prepaid by a gentleman by the name of Cortes.

8 Mr. Cortes' room — also had a room in the hotel, room No. 605. Mr. Rangel's was No. 607.

9 Thereafter they observed Mr. Cortes coming off the 6th floor — or they observed the elevator from the 6th floor go down without stopping. Mr. Cortes gets off the elevator and then he goes back to the Canada Customs area, where he appeared to be looking for the arrival of an international passenger.

10 He then — they then observed Mr. Cortes reattend the area of No. 605 on the 6th floor of the Delta Hotel. This time is about one in the morning.

11 He was then heard exiting the room. He was approached by another member — or one of the members of the Royal Canadian Mounted Police and placed under arrest for importation of cocaine.

12 He gave — the personal information obtained for him was that he, in fact, sir, was a citizen of Mexico and was born in Puerto Vallarta. He was in possession of a passport issued at Guadalajara in Mexico on January 13th of 2000. The passport detailed some of the other travel of Mr. Cortes over the past year.

13 On January 15th he entered at the Canada — international airport at Pearson Airport in Toronto; March 5th he was in Canada through the Calgary International Airport; thereafter on March 7th he left through the United States through the Calgary International Airport; March 14th he again entered Canada at the Pearson International Airport; June 17th he entered Canada through the Calgary International Airport; and August 18th again entered Canada through the Calgary International Airport, and I'm going to give you some more details about those circumstances, sir.

14 They made some applications, the R.C.M.P. did, for the searches of the rooms, hotel rooms No. 605 and 607 rented to Cortes and Rangel. In No. 607 nothing was found. That was the room apparently to be occupied by Mr. Rangel Corona.

15 In room No. 605, that was Mr. Cortes' room, there was just a small amount of personal clothing seized, as well as Delta Calgary Airport Hotel portfolio information in the name of Ricardo Rangel and in the name of Juan Carlos

Cortes.

16 Some articles that were seized on the person of Mr. Cortes that morning, there was a small blue bag he had been carrying when he was a Canadian air — inside that bag, pardon me, was a Canadian airline ticket and a boarding pass, indicating that he had flown on a one-way ticket from Vancouver, British Columbia on September the 2nd; he paid cash, \$567.64 for that ticket; it was in his name.

17 If the flight had arrived on time in Calgary, it would have been a matter of 42 minutes after his arrival in Calgary that same day. Of note, the scheduled arrival for Mr. Corona's and Ms. Robles' flight was, in fact, 9:52 p.m. The scheduled arrival for Mr. Cortes' flight was shortly before that, less than an hour before that, sir.

18 Of note as well, Your Honour, Mr. Cortes was in possession of a WestJet airline receipt, which indicated that on August 26 he had made a reservation and he had used the address of 116 King George Highway, White Rock, British Columbia on that reservation. And that reservation, sir, is notable because certainly it's not a residential address in the City of Vancouver. In fact, the address 1160 King George Highway in the City of Vancouver is the address for the Aston Pacific Hotel in White Rock, British Columbia, I understand. And I'm going to give you some further information about Mr. Cortes staying at that hotel on some occasions throughout the year.

19 There is some — a search warrant revealed as well that Mr. Cortes, on August the 26th, made an advance cash purchase — or deposit on three rooms at the Delta Calgary International Hotel, airport hotel, for a check-in on August the 28th. He was also — he was in one of the rooms. Two other individuals were determined to be in two of the other rooms, at least their names were — one by the name of Rodolfo Hernandez, and another by the name of Ontiveros. But Rodolfo Hernandez's name is significant for some of the facts later on, sir.

20 It was later determined by the investigation that four individuals — I'm sorry, Your Honour, I failed to mention that the reservation that was made for the flight on August the 26th in the name of Mr. Cortes, using the address of — that I mentioned, 1116 (sic) King George Highway, was a reservation for four passengers to arrive — or to go from Calgary to Vancouver. One of those passengers was by the name of Rodolfo Hernandez; another was by the name of Ramirez, another Ontiveros and another Gonzalez.

21 As it later turned out, those individuals arrived in Calgary on August the 27th on American Airlines flight 867 routed through Dallas/Fort Worth, Texas, I understand. They also arrived from Puerto Vallarta, Mexico.

22 Thereafter — and I mentioned that some hotel reservations were made in some of those names and in fact appeared to be occupied.

23 There was also found a WestJet receipt in possession of Mr. Cortes, indicating that he flew to Calgary — or he departed Calgary — he had earlier flown to Calgary on August the 27th from Vancouver. When he flew from Vancouver to Calgary, he checked no bags. On August the 28th he flew back to Vancouver on the same flight as the four other individuals who it would appear he had made flight arrangements for, and he then had two bags that were checked.

24 One of those individuals was an individual by the name of, as I say, Rodolfo Hernandez.

25 Now, if I could indicate, Your Honour, that later on in this investigation — I'm trying to find the exact date, September 14th Rodolfo Hernandez, in the company of another individual, or somebody by that name, tried to enter Canada through Vancouver with the possession of a large sum of cash. He was turned back by Canada Customs.

26 The next day on September 15th a person by the same name tried to enter the United States through Los Angeles, California. He had a large sum of cash on his person, some \$25,000 in American currency. This was seized by the American authorities.

27 Interestingly enough, Mr. Hernandez was carrying a piece of paper with the name of "Corona" on that piece of

paper and the date of September the 2nd, which incidentally was the date of the arrest of Mr. Corona.

28 He indicated to the authorities in Los Angeles that he was coming up to bail out a friend.

29 In my respectful submission, given the fact that Mr. Cortes made the flight arrangements from Calgary to Vancouver, hotel arrangements apparently occupied by Mr. Hernandez, and apparently he was given some luggage from Mr. Hernandez, speaks to an association between Mr. Cortes and Mr. Hernandez, and obviously between Mr. Hernandez, because of that piece of paper, and Mr. Corona.

30 Mr. Cortes was, when arrested, also found in possession of a cellular telephone. Search warrants were conducted on the records of that cellular telephone. In the ten days before his arrest some 423 telephone calls had been made on that telephone. Interestingly enough, the last number of calls were made — a number of some ten or so were made to Calgary phone numbers.

31 Mr. Cortes gave a story to the officers, after being arrested and Chartered, indicating that he was coming here, and on the way — he was coming here to take his mother to Vancouver, I understand, for laser surgery of her eyes, or something to that effect. On the way over he was contacted to pick up these unspecified individuals, whom he didn't know, and he went on to make hotel arrangements for them.

32 It's apparent in the circumstances because of this receipt that was obtained in L.A. that there is more to the association between these two individuals than Mr. Cortes would have had the R.C.M.P. officers believe.

33 In the various travels in Canada that were mentioned in his passport, search warrants were executed on the Aston Pacific Hotel, which was discovered. Mr. Cortes stayed there on January the 18th, paying \$1,700 in cash as a deposit. He then stayed at the Aston Pacific Hotel on June the 19th, paying \$2,000 as a cash deposit.

34 On August the 20th he again stayed at the Aston Pacific Hotel. He booked it for, in fact, six nights; paid \$300 as a cash deposit. Later that day he booked the second room: later that day after he booked the third room. You will note, sir, that that was for a six-day reservation.

35 Upon Mr. Cortes travelling back to Vancouver on late August on the day I mentioned on the same flight as those four other individuals, it was apparent that rooms at the Aston Pacific were in fact occupied for the days they arrived back in Vancouver. So there is a certain pattern of meeting individuals. Certainly no drug seizures were made in respect of those visits, but there's a certain pattern of meeting other individuals, akin to the circumstances herein.

36 It's not possible, sir, in the respectful submission of the Crown, and certainly we'd be able to introduce evidence to this effect at the trial, for an individual to be getting access to the level of cocaine that Mr. Corona and Ms. Robles apparently imported into Calgary, without being plugged into some sort of large-scale organization. The seizure we're talking about here is, for the City of Calgary, what I understand an unprecedented amount of cocaine arriving.

37 I also understand, and what would be the evidence of the Crown at a trial of this matter through expert testimony, that commonly, almost exclusively that these importation schemes are effected through the use of couriers, with an individual who is at the higher level in the chain of importation meeting them upon their arrival at the site where the cocaine is being imported to.

38 Your Honour, my learned friend is going to submit to you a host of authorities, and he has been good enough to provide me with those authorities yesterday. This is a bail application, Your Honour, and I would only say that in any bail applications there are perhaps hundreds of thousands of these applications that go on on a yearly basis across Canada. Individuals get released in certain fact situations, and in certain fact situations they don't.

39 I am only presenting one decision, that being a decision from our Supreme Court of Canada in a case called *Pearson* [1992 CarswellQue 17 (S.C.C.)].

40 The *Pearson* case is that occasion where the Supreme Court of Canada had occasion to examine those provisions of the Criminal Code which made the **onus** on an accused when he's charged with a trafficking offence to **show** why he ought to be released. That **reverse onus** was charged — or was challenged under the Charter and upheld by the Supreme Court of Canada, largely because of the unique characteristics attenuate to drug trafficking offences.

41 If you look at page 144 and 145 of the decision of Justice Lamer in this case, he talks in paragraph (d) about the unique characteristics of offences subject to this reverse onus provision; that they are committed in a context very different than most other crimes: they're committed — most offences are not committed systematically, but by contrast, narcotic trafficking does occur systematically. "usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative." and there are huge incentives because of the fact that it's highly lucrative for an offender to flee.

42 This is something the Supreme Court of Canada found and had no difficulty finding. It was as a result of that, and other factors, that they held the special bail rules.

43 But in addition to that, they talked about — I'm sorry, that first point I made, the lucrative nature of the offence, according to the Supreme Court, leads to the fact — consideration that an individual, if released, would be inclined to continue that manner of behavior because of the profits that can be realized.

44 They go on in paragraphs (f), (g) and (h) and on to paragraph (sic) 145 and discuss the fact that in addition to that, because individuals who are part of these sorts of organizations can become in possession of very large sums of money, they have the means at their disposal to flee the country, or to flee from the charges, should they so wish.

45 At paragraph 145 — at page 145 paragraph (a), it indicates:

Most alleged offenders are neither wealthy nor members of sophisticated organizations. Drug importers and traffickers, however, have access both to a large amount of funds and to sophisticated organizations which can assist in a flight from justice.

That comment is no more apropos than individuals who are associated to an importation scale — or importation activity at the scale that you have in front of you.

46 Mr. Corona was denied bail, as I indicated. Your Honour, for exactly the same reasons by Judge Maloney earlier.

47 Now, I know the gist of my friend's submission is going to be to the effect that the case against Mr. Cortes is very different; it's more of a circumstantial case. Certainly that is an issue on a bail hearing, the strength of the case. But the strength of the case in a case of this nature shouldn't be so unduly — have such an undue bearing on the determination of the court as to whether this accused ought to be released or not, given the fact of what we are talking about here.

48 We're talking about a very, very extremely large scale importation of heroin (sic). We're talking about three individuals who are Mexican nationals. None of these individuals have ties to this country.

49 We're talking about an individual, who in the allegation of the Crown, is at a level up from Mr. Corona and Ms. Robles, to the effect that the risk to continue this type of behavior, and the risk to not show up in court is even greater; it's even more pronounced.

50 Your Honour, in the Crown's respectful submission, Mr. Cortes will simply not come back to court in these circumstances. There's a very real danger of that. There is no amount of cash, given the type of activities we're talking about here, that can guarantee that Mr. Cortes will come back to court.

51 Subject to any questions, Your Honour, and any comments my friend may have, those are my submissions.

THE COURT: I think I have to ask the question, because the way the Code is drafted, if I were not to detain him, I gather the Crown would seek a cash bail before it would seek recognizance.

MR. MISUTKA: Certainly.

THE COURT: All right.

MR. MISUTKA: If the court is mindful to do that.

THE COURT: No, and I am not prejudging this, but —

MR. MISUTKA: Yes. No, I appreciate that.

THE COURT: — I can't impose cash unless I have your consent. —

MR. MISUTKA: Oh, yes.

THE COURT: — for reasons that I don't understand in Parliament's mind, but that's what they've done.

MR. MISUTKA: And we would seek, of course, a considerable amount of cash, but we're not suggesting that at all, sir.

THE COURT: And if we get to that stage, I'll be back to you.

MR. MISUTKA: Yes, thank you.

THE COURT: Mr. Fagan.

MR. FAGAN: Yes, sir.

My friend has made reference to the fact that the co-accused Corona was detained by Judge Maloney. It's my understanding, and my friend can correct me if I'm wrong, but counsel for Corona did not seriously oppose the detention of his client. I don't know if he made a single submission on behalf of the release of Corona.

MR. MISUTKA: Your Honour, I nevertheless went through the same circumstances with Judge Maloney and outlined the whole facts, and I presented him the Pearson decision.

THE COURT: Okay, thank you.

MR. FAGAN: Yes. But it's my understanding that counsel merely acquiesced.

My friend also made reference to the drug heroin. I think that was a slip of the tongue.

MR. MISUTKA: Oh, I'm sorry.

MR. FAGAN: We're dealing with the drug cocaine in this situation.

52 On this application, Your Honour, the defence acknowledges that it bears the **onus** of establishing that Mr.

Cortes' detention is not justified. This **reverse onus** arises under Section 515(6)(b) of the Criminal Code, by virtue of the fact that he is not ordinarily resident in Canada.

53 It also arises under Section 515(6)(c) of the Criminal Code, by virtue of the fact that he faces charges under Section 5 and 6 of the *Controlled Drugs and Substances Act*. This procedural reality is acknowledged and conceded.

54 The burden which rests upon the applicant in these proceedings, however, is the absolute minimum which exists in criminal law; proof on a balance of probabilities. I think you'll find, Your Honour, that in all the circumstances of this case that this is not a difficult burden to discharge.

55 Yesterday I provided this court and my friend with a binder of highlighted authorities, along with case summaries. Those summaries appear just inside each numerical tab.

56 I attempted to locate cases, Your Honour, where bail was sought for accused persons in circumstances similar to those that Mr. Cortes finds himself in: specifically persons who are **foreign nationals**, with no roots in this country, charged with drugs offences involving substantial drug seizures.

57 Now, my friend says there are hundreds of thousands of cases decided on a regular basis. I wish that were so, because I can tell the court that it took me a couple of weeks to find the cases, primarily unreported decisions, in the binder before you.

58 My efforts met with some success and I trust the authorities will be of assistance to you, and with your leave I'll be referring to those cases in greater detail during the course of my submissions.

59 The essence of my friend's position, the Crown's position with respect to primary grounds, and his submission that Mr. Cortes should be detained is that because Mr. Cortes is a Mexican citizen with no roots in Canada, there is a risk that he will not appear in court to face this most serious prosecution.

60 The test, Your Honour, is not whether a risk of flight exists. If that were the test, then no **foreign national** charged with an offence in this country need apply for bail. There is also a risk that a nonresident will abscond.

61 The courts who released the multiple accused in the cases that I have provided recognized that risk in each and every case, and yet they still ordered the release of those accused on appropriate conditions. And I will be asking you to do the same thing in the case at bar.

62 In those cases you may have noted that the courts often look to the circumstances of apprehension to give them some insight into the mind — of the inclination of the accused. Did this accused present himself or conduct himself as one who would fail to appear in court as and when required? Did he use an alias; did he endeavour to mislead the police with respect to who he was? Does the accused have a criminal record for similar offences or a history of failing to appear or failing to abide by court orders? Does the accused have a solid defence to the charge?

63 By way of background, sir, Mr. Cortes is a young man. He's 27 years of age. He's a Mexican citizen. He was born and raised in Puerto Vallarta, Mexico. He lives in Puerto Vallarta with his common-law wife and eight-year-old son at his mother's home.

64 He's completed two years of university at the University of Guadalajara. He works in real estate. He sells and he rents property.

65 His family owns and operates four jewelry stores in Puerto Vallarta and a leatherwear Mexican arts and crafts store. He buys and sells for the stores.

66 I am advised that he was in Canada and has been in Canada for some time, exploring the feasibility of expanding the family business.

67 Also on this trip, and my friend has alluded to this fact, he was making arrangements for his mother to attend a Vancouver clinic for eye surgery.

68 My client, Your Honour, and this is significant, has absolutely no criminal record in this country, in Mexico, or anywhere else. Now, the police, of course, have the means and the technology through CPIC, and their American counterpart criminal database, NPSIC; through Interpol and R.C.M.P. foreign liaison officers, and they have foreign liaison officers in Mexico, to confirm otherwise. And I expect they have found nothing to the contrary.

69 When Mr. Cortes was arrested by the R.C.M.P., he promptly identified himself orally and with supporting official documentation, including a passport. As you have heard, police investigation has revealed that Mr. Cortes did not travel under an alias, but under his true identity. He flew under his own name, he registered in hotels under his own name, and he gave his own name to the police when arrested.

70 It's also significant to note, sir, that when interviewed by the police, he waived his right to consult with a lawyer and he answered their questions as best he could. He denied any involvement in or knowledge of the cocaine. In fact — and this is rather unusual — when the police weren't getting the answers they were looking for, they asked him if he was prepared to take a lie detector test, a polygraph. And from the notes of R.C.M.P. Corporal Grant MacPhee, the following passage appears. This is from Crown disclosure.

Q Would you take a polygraph or lie detector test relating to this matter and your involvement?

A I've never done it, but if it's necessary.

71 Now, the police, for some reason, did not see fit to follow up on that golden opportunity. Perhaps, Your Honour, they accepted his willingness to take a lie detector test as evidence of the veracity of his nonculpability relative to their investigation.

72 My client's personal antecedents and the circumstances surrounding his arrest go, in my respectful submission, considerable distance in allaying undue concern on the primary grounds. In addition, Your Honour, there's no good reason for this young man to be a fugitive from justice for the rest of his life, when charges that are, with all due respect to my friend and my past colleagues in the Mounted Police, weak in the extreme.

73 The evidence of the Crown against Mr. Cortes is one, that he was observed at the Calgary airport ostensibly awaiting the arrival of someone; and two, that he had booked a room at the Delta Airport Hotel for the co-accused. That's it. The other submissions that you heard from my friend with respect to the booking of rooms for other people, this Hernandez, so on and so forth, in my respectful submission there is no legal correlation between that evidence, if it is evidence, and the issues that arise on the information before you.

74 He was thoroughly searched, as was his room, and the police found nothing, other than the booking of the rooms, which would link him to the illegal activity of the co-accused. No cocaine, not a trace; no score sheets, no packaging material, no drug paraphernalia, no large sums of money such as to give rise to an inference of involvement in this matter. No evidence of intended concealment or transport. Nothing.

75 In this case we have, as we often have in situations of this nature, no intercepted private communications, no witnesses implicating my client. None of the usual damning evidence.

76 Now, at the end of the day, unless the Crown comes up with much more than it has now, the Crown is going to have to try and convince a court to find, beyond a reasonable doubt, that the only reasonable inference to be drawn from Mr. Cortes' presence at the airport and the booking of the rooms is that he was a party to the importation of cocaine. That is going to be, in my respectful submission, an insurmountable task for the Crown on the evidence that they have at their disposal at this point in time.

77 An innocent explanation was actually offered by Mr. Cortes during the course of his interrogation by the police, and my friend alluded to this. And again, this passage is from the notes of Corporal MacPhee.

Q We're investigating a large shipment seized at the airport of cocaine and we would like to know your involvement.

A I was waiting for my mom to come in to get her eye fixed here while at the airport. While at the airport, got a call from Mexico that two cousins were coming from Mexico and if he could look after them.

He provided that explanation. He was in the area, he got a phone call. Somebody told him that there were a couple of people coming in, to look after them, book a room for them. He did that and he finds himself here today.

78 A judge, Your Honour, in my respectful submission, sitting at a preliminary inquiry may well find that the evidence is not sufficient to satisfy the test in *Sheppard*.

79 Now, as proof, Your Honour, of my client's resolve to deal with this matter as and when required, he has authorized me to advise this court that he is prepared to take the unusual step, as a condition of his release, to sign an extradition waiver as between his home country of Mexico and Canada.

80 Now, this was, in fact, Your Honour, a condition of release imposed by Justice Blair of the Ontario Court of Appeal, B-L-A-I-R, in chambers back on June the 16th, 1986 in a case called *R. v. Johnsen* [(June 16, 1986), Blair J. (Ont. C.A.)], J-O-H-N-S-E-N and *Kear*, K-E-A-R. That was a case as well involving **foreign nationals**.

81 Now, I was unable to obtain a copy of that ruling, but it is referenced, sir, in the annotation to Gary Trotter's text, *The Law of Bail in Canada*, second edition, 1999 at page 130, footnote No. 31.

82 As for the secondary ground, Your Honour, Mr. Cortes' detention is not, in my respectful submission, necessary for the protection or safety of the public. There is no substantial likelihood that he will, if released, commit a criminal offence or interfere with the administration of justice.

83 His high ground position with respect to secondary grounds is that he did not offend in the first place, and that he is, as he is constitutionally presumed to be, innocent.

84 When is the last time, Your Honour, I ask you somewhat rhetorically, that a suspect under similar circumstances has offered to undergo a polygraph test? I am not aware of another case, and I challenge my friend to refer the court to one. Certainly none of the multiple nonresidents released in the cases that I have provided in the binder appear to have extended such an invitation.

85 My low ground position with respect to secondary grounds is that if released, conditions appropriate to the circumstances can be imposed to provide the requisite level of comfort.

86 I would suggest a local residency requirement. His family, I understand, is prepared to rent an apartment for Mr. Cortes in the City of Calgary for the duration of these proceedings.

87 Two, a reporting requirement, as the Crown recommends and the court deems fit; significant cash bail; four, a geographical restriction; five, an undertaking not to apply for a passport. The police have already seized the passport that he was carrying on him at the time of his arrest. There should be an undertaking not to apply for another passport.

88 Six, a noncontact provision, again as the Crown deems appropriate and the court deems fit.

89 And a condition, if you deem it necessary, Your Honour, that he submit his person and residential premises to search by a peace officer on request.

90 As for the tertiary ground, Your Honour, my submissions thus far have, I hope, addressed to some extent this third and final legal condition precedent; the apparent strength, or in this case weakness, of the Crown's case; the circumstances surrounding the alleged commission of the offence; the gravity of the alleged offence, including potential penalty.

91 At the heart of this so-called tertiary ground is the perception of the public. What would the public think if a particular accused is released, or more accurately, would public confidence in the administration of justice be undermined if Mr. Cortes is released.

92 In my respectful submission, Your Honour, a reasonably informed member of the public, and that's who we're talking about here when we talk about the public, not some character in a local watering hole who believes everything he reads in the paper or hears at the local watering hole, but a reasonably informed member of the public, in my respectful submission would not lose confidence in the administration of justice in all the circumstances of this case if Mr. Cortes was released. And perhaps if they knew all of the circumstances, as they've been related this morning, their confidence in the administration of justice would be enhanced, because they, too, would believe that a person presumed to be innocent, one who has professed his innocence to the police, should be released on reasonable terms.

93 The best judicial pronouncement of the public interest that I've been able to find was given by Mr. Justice Baudouin in *R. v. Lamothe*, L-A-M-O-T-H-E, a 1990 decision of the Quebec Court of Appeal, citation, Volume (1990), 58 C.C.C. (3d) 530 (Que. C.A.), at 530 .

94 And if you will allow me, sir, just to quote from a passage at page 541. It appears at Tab 9 of the binder, sir.

95 The entire page 541 to 542 is instructive with respect to the tertiary ground, in my respectful submission, but if you'll allow me, I would like to quote from 18 lines from the bottom, starting with the line, "An informed public." "Informed" is in italics, about halfway down the page.

An informed public must understand that the existence of the presumption of innocence at all stages of the criminal process is not a purely theoretical notion, but a concrete reality and that, despite what may happen, in its perception, for certain inconveniences with respect to effectiveness in the repression of crime, it is the price that must be paid for life in a free and democratic society. Therefore, the perception of the public must be situated at another level, that of a public reasonably informed about our system of criminal law and capable of judging and perceiving without emotion that the application of the presumption of innocence, even with respect to interim release, has the effect that people, who may later be found guilty of even serious crimes, will be released for the period between the time of their arrest and the time of their trial. In other words, the criterion of the public perception must not be that of the lowest common denominator. An informed public understands that there exists in Canada a constitutionally guaranteed presumption of innocence (s. 11(d) of the Charter) and the right not to be denied reasonable bail without just cause...

96 No basis, in my respectful submission, Your Honour, for detention on primary grounds, secondary grounds, or this third so-called tertiary ground.

97 Your Honour, I've provided you with a binder containing nine cases. Each case, in my respectful submission, is relevant and instructive with respect to the issue now before you in the case at bar. I know this court. I know that you will, if you haven't already — I realize I just gave you the binder yesterday — read each and every case before rendering a decision.

98 If it would be of assistance to the court, I'm prepared to relate to the court the salient facts and relevant legal principles arising from each decision. If you don't think that would be of assistance to you, I can simply leave the authorities in your hands.

THE COURT: And I can tell you that I have gone through them before coming down this morning.

MR. FAGAN: All right. Then I really see no need for me to go through them.

99 Again, in my respectful submission, they're highly instructive authorities. The circumstances in some of those cases are far more aggravating in terms of counsel being able to satisfy the burden which exists at this stage of the proceedings. Some of those cases people were on parole: in violation of their parole from other jurisdictions. They had prior criminal records for related offences. Most of the people, as the facts indicate, had no roots in this country, just like Mr. Cortes. And those people were released on appropriate conditions.

100 Mr. Cortes' situation is far removed from that of his co-accused Corona and Robles. Those two are in trouble. They come into the Calgary International Airport and they're caught with a large quantity of cocaine. The case against Mr. Cortes is circumstantial, and unless the Crown can come up with more than what it has right now, again in my respectful submission the Crown is going to have a hard time getting a committal at the end of a preliminary inquiry.

101 Is there a risk associated with —

THE COURT: Maybe Mr. Cortes won't elect a preliminary inquiry.

MR. FAGAN: He may not. He may not.

Is there a risk associated with releasing a nonresident like Mr. Cortes? Of course there is. There always is.

THE COURT: There is always a risk. It's a question of whether you can manage the risk.

MR. FAGAN: Exactly.

THE COURT: And there is a risk whether or not the person has lived here all their life. I mean there is always a risk, and we're just in the business of managing it.

MR. FAGAN: Exactly.

THE COURT: Assessing and managing.

MR. FAGAN: In conclusion, Your Honour, in my respectful submission, the burden, the low burden of proof on a balance of probabilities has been more than satisfied in the circumstances relative to Mr. Cortes, and I ask that he be released on appropriate terms.

THE COURT: Thank you very much.

Any Crown reply?

MR. MISUTKA: Your Honour, my friend alluded to the court bearing in mind how the accused presented himself on arrest. Quite simply, the Crown does not accept Mr. Cortes' version that he has this company or this is why he was in Canada. In fact, the details he provided were inconsistent and sparse.

Surely an individual with a business interest of that sort, of four different outlets, as my friend suggested, would have been able to provide a phone number for that business outlet in Mexico when asked.

He claims, while he was at the airport, he received this phone call. I would note, sir, I didn't clearly establish this earlier when I went through the facts: he was in Vancouver on a flight to arrive in Calgary at 8:23 p.m. on September 22nd — or September 2nd. Co-accused's flight was scheduled to arrive at 9:52 p.m. The coincidence

is entirely discreditable; that in that period of time he would go up and make a hotel reservation in the name of individuals he doesn't even know. In fact, as I alluded to earlier, given his association with this Mr. Rodolfo Hernandez, it's apparent he did have more than he let on to the R.C.M.P. officers in terms of his knowledge of these individuals.

THE COURT: The principles, regardless of the case one is dealing with, remain the same; the process by which I have to first of all consider whether there are reasons to detain the accused on the primary ground. I acknowledge that the accused, in this case, bears the onus because of his lack of residence in this country and because of the nature of the offence which is alleged against him.

102 When I look at the primary ground, in my view I am entitled to look at a number of things, including the strength of the Crown's case, not because it is my function to adjudicate on the guilt or the ability of the Crown to prove the guilt of the accused; rather, it is my function to determine whether or not the strength of the case is such that it would lead to an inference that a normal, rational person might flee in order to avoid what he or she might consider to be a substantial likelihood of conviction.

103 I am entitled to look at the past conduct of the accused in terms of promises he may have made to the court and whether he kept them. In this case the accused has no record, and therefore has no positive track record of keeping his promises because he's never even been in the position of having to make any promises. And surely, that individual can't be in a worse position than someone who has had to make promises to the court and then kept them.

104 So there is nothing in his background which would tell me that he would break promises made to the court.

105 I am mindful of the two different versions and the inferences drawn by both Crown and defence from those versions of the facts. And I am not, sitting as a bail judge, required to adjudicate and make findings of fact, as would a trial judge be.

106 The defence says that this is a very weak case. The Crown says that it's not as weak as it first appears, but it clearly is not the sort of case which seems, on what I have been told, to exist against at least one of the co-accused, the individual for whom Judge Maloney issued an order of detention.

107 There are some issues that are live issues for resolution, but this is not, in my view, a case which of itself is so strong that it causes me unmanageable concerns about a risk of flight.

108 The accused has no ties to this community. The cases which have been provided by Mr. Fagan talk about, as indeed did Chief Justice Lamer, the fact that most people do not want to live their lives as being a fugitive from any particular jurisdiction's system of justice.

109 If the accused were to flee this jurisdiction, it is a reasonable inference to draw that he would return to the jurisdiction with which he has the most significant connection, and that is Mexico.

110 There has been a comment made by Mr. Fagan about an extradition waiver, and I took that to be an offer made on behalf of Mr. Cortes to execute such an extradition waiver, and I look to the Crown now for some guidance as to whether Canada has an extradition treaty with Mexico that covers the offences with which the accused is charged. And I confess my extradition law is not particularly solid, but I am hopeful that —

MR. MISUTKA: I can't give you a hundred percent, sir. I'm pretty sure, but...

THE COURT: It would seem logical to me that we would have a treaty with one of the other countries on this continent. I am going to work on that assumption.

111 So on the primary ground, has the accused discharged its onus in terms of the concern of risk of flight. I reiterate something that I said to Mr. Fagan during the course of submissions, and that is that bail hearings are

always about the assessment and possible management of risk. There are no guarantees that anyone will show up for the trial, with the exception of those who are detained. Clearly the law doesn't require that degree of certainty. What it requires is a rational assessment, and if possible, a reasonable management of whatever risk is determined.

112 There is some risk of flight in respect of Mr. Cortes, but in my view that risk of flight is manageable by appropriate conditions.

113 I go to the secondary ground. Is the detention of Mr. Cortes necessary in order to deal with a substantial likelihood that if released he would commit an offence? There is no criminal record. In my view there is nothing before me which would allow me to detain him on the secondary ground.

114 And then I go to the tertiary ground. Would the public's confidence in the administration of justice be undermined if I were to release Mr. Cortes? I start by the statement that the public, about whom I must be concerned, is a reasonably informed public which subscribes to the law as it is embodied in the Criminal Code and the overarching constitutional document, the Charter of Rights. The public is not to be measured by those who would amend the law, and they are entitled to their view, of course, but until such time as that view prevails through Parliament, I am required to apply the law that Parliament gives me.

115 In my view, in these circumstances, a reasonably informed public, believing in the principles enshrined in the Code and the Charter, would not have their confidence in the judicial system undermined by an appropriate release order. And accordingly, I am going to release Mr. Cortes on the following conditions:

116 First of all, he will be released in respect of each of the two counts on a Form 32. It will be secured by a cash deposit, and I have not had any guidance from counsel in terms of the amount of cash deposit, but I am mindful of the representations made to me by Mr. Cortes through counsel about his significant family holdings in Mexico, and indeed, his protestation that the trip here was at least in part a reconnaissance in respect of setting up business here. So it seems to me that the amount of cash has to be reflective of his elevated economic status if it is to have any sort of binding power on his activity.

117 I require in respect of each of the counts a deposit of \$30,000 Canadian, making a total deposit of \$60,000 Canadian.

118 I require him to report once per week in person to the community release officer —

MR. MISUTKA: Your Honour, I'm sorry to interrupt the court. I was hoping to make some submissions on the reporting, if I could.

THE COURT: Yes. I can tell you what my inclination was, and then you can tell me if that meets.

MR. MISUTKA: Thank you.

THE COURT: — or at such times and in such manner as — and such frequency as directed by the community release officer.

So, I was going to initially put a once per week in person and then leave it to community release to choose how and how often he was to report. If that is not in keeping with what the Crown wanted, I'm happy to hear from you.

MR. MISUTKA: Thank you, sir.

Your Honour, given what my friend has suggested this individual is prepared to do if released, I see no reason Mr. Cortes can't report daily in person. He is going to be in Calgary. I see no reason he has any need to leave Calgary until these charges are concluded, especially if, as my friend has suggested, he is prepared and his

family is prepared to rent him an apartment here.

THE COURT: Mr. Fagan, do you wish to make representations in respect to report?

MR. FAGAN: I wonder, Your Honour, if my friend might be satisfied if Mr. Cortes could report daily by phone and once weekly in person.

MR. MISUTKA: I'm not personally satisfied with that, sir, but of course it's up to the court.

THE COURT: Of course, yes.

119 I understand the concern of the Crown. I will amend the reporting condition. He will report once per day in person. If he establishes a track record that is comfort or foundation to either side to change the order, then an appropriate application can be made.

120 So the reporting condition will be once per day in person.

121 There will be a condition that he will reside in Calgary at an address approved by community release, and that he will not change his residence without the prior written consent of community release.

122 He will remain within the geographic confines of the City of Calgary, and he will not travel outside those confines without the prior written approval of community release.

123 He will file an undertaking satisfactory to the Crown not to make application to any nation, including his own, for any passport or travel documents.

124 He will execute in a form satisfactory to the Crown the waiver of any extradition process, should the Crown be required in relation to the charges before the court to commence extradition proceedings against him in any country.

125 He will — and I assume in terms of no contact, the Crown would seek a no-contact order with respect to the co-accused persons?

MR. MISUTKA: Yes, sir.

THE COURT: Anyone else?

MR. MISUTKA: Not that I can think of off the top of my head, sir, thank you.

THE COURT: There will be a condition that he will have no contact, directly or indirectly by any means with either Ricardo Rangel Corona, or Evelia Barreto Robles.

He will consent to the search of either his person or his place of residence by members of either the Calgary Police Service or the Royal Canadian Mounted Police, if members of those agencies have reasonable grounds to suspect that he is in possession of any illegal substance.

Any other conditions sought by the Crown? And I just accepted the accused's representation through counsel that the authorities have his passport.

MR. MISUTKA: They do, sir, yes. I take it they don't have to give it back.

THE COURT: I beg your pardon?

MR. MISUTKA: I take it we don't have to give it — they don't have to —

THE COURT: No. In fact, to clarify that, he will continue to surrender his passport to the authorities.

MR. MISUTKA: Your Honour, in terms of the reporting, I'm going to ask if that might be directed to be reporting to the R.C.M.P. in Calgary, rather than —

THE COURT: You then wish all of the conditions in which I have referred to "community release" to instead refer to the R.C.M.P.?

MR. MISUTKA: That would be my preference, subject to my friend's submissions.

THE COURT: Mr. Fagan.

MR. FAGAN: I have none.

THE COURT: All right. Madam clerk, I apologize. Those conditions where I have referred to "community release," we will substitute — I assume then the Calgary detachment of the R.C.M.P.?

MR. MISUTKA: Yes, sir, thank you.

THE COURT: The Calgary detachment of the R.C.M.P. So the reporting and the approvals that he needs all will have to come from the R.C.M.P. detachment at Calgary.

Anything else from the Crown?

MR. MISUTKA: No, Your Honour, thank you.

THE COURT: Thank you. Mr. Fagan, anything further from you?

MR. FAGAN: No, sir.

THE COURT: All right. This matter then ought to go to October 20th, nine o'clock in 411 so that he may join up with his co-accused.

MR. FAGAN: Yes, sir.

THE COURT: Thank you very much.

MR. FAGAN: Thank you, sir.

THE COURT CLERK: Sir, just to reiterate one of the conditions, there was the undertaking not to make application to any nation, including...

THE COURT: Mexico, for passport or travel documents.

THE COURT CLERK: Okay.

END OF DOCUMENT