POLICEPWRSNWS 2015-6
**Police Powers Newsletter**
June 1, 2015

# — Police Powers—

Justice Michelle Fuerst, Michal Fairburn and Scott Fenton



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**Table of Contents**



## *1. Medical Marihuana Legal Even When in Liquid Form*

**Facts:** Owen Smith worked at the Cannabis Buyers Club of Canada. The Club sold marihuana and cannabis derivatives, distilled into various products, including cookies, gel capsules, rubbing oil, topical patches, butters and lip balm. The Club sold to members who were prior approved upon satisfaction that they had a *bona fides* medical condition for which marihuana may provide relief. This determination was made on the basis of a doctor’s diagnosis or a laboratory test.

The Club sold both dried marihuana and cannabis products made from dried marihuana. The police searched the Club and found dried marihuana and tetrahydrocannabinol (”THC) in various products. Mr. Smith was charged with trafficking contrary to s. 5(2) and possession of cannabis contrary to s. 4(1) of the *Controlled Drugs and Substances Act* (”CDSA)”. The *Marihuana for Medical Purposes Regulations* (”MMPRs”) exempt approved medical marihuana patients from criminality under the *CDSA* where they are using “dried marihuana”. There is no exemption under the *MMPR* for the possession of THC from the marihuana plant. Only dried marihuana meets the regulatory exemption. Mr. Smith challenged the constitutionality of the *MMPR* regulations, suggesting that they were overly narrow. He argued that confining the exemption to dried marihuana compromises the liberty and security of the person under s. 7 of the *Charter* and the limitation is not in accordance with the principles of fundamental justice. He succeeded in this argument both before his trial judge and a majority of the British Columbia Court of Appeal.

The Crown appealed on the dissenting judgment in the Court of Appeal.

**Held:** The Supreme Court of Canada released a unanimous judgment authored by the Court. They first dealt with a standing issue that had arisen in the court below. The Court concluded that Mr. Smith had standing to raise the s. 7 argument.

The fact that Mr. Smith was not a medical marihuana user himself, and did not possess a licence to produce under the regulatory regime, did not preclude him from challenging the constitutionality of the scheme that he was charged under: “[a]ccused persons have standing to challenge the constitutionality of the law they are charged under, even if the alleged unconstitutional effects are not directed at them [para. 12]”. While Mr. Smith was charged under the *CDSA*, the constitutionality of the provision is entirely dependent upon the constitutionality of the *MMAR* exemption and, as such, he was entitled to challenge the provision.

Both liberty interests and security of the person are engaged by the limitations imposed under the *MMAR*s. Any offence that includes incarceration within the range of acceptable sanctions will engage a liberty interest. Here, liberty interests are engaged because people are liable to imprisonment if convicted for possessing or distributing outside of the strict limitations within the *MMAR* (*e.g.*, possessing non-dried marihuana).

Liberty interests are also engaged by the fact that the *MMAR* forecloses reasonable medical choices by threat of criminal sanction. People who have an already established medical need for marihuana are precluded from choosing how they wish to administer the substance. There was evidence in this case, accepted by the trial judge, that smoking dried marihuana carries with it adverse health implications that do not arise with other forms of administration of the substance. By using oils and other products, distilled by the marihuana plant, the person can avoid the higher risk of cancer and bronchial infections that may arise more frequently by smoking dried marihuana. The evidence was that cannabis derivatives are a more effective and less dangerous manner of using medical marihuana than smoking or otherwise inhaling dried marihuana. The Court concluded that in these circumstances, the criminalization of access to alternative forms of treatment infringes upon the liberty of the individual and his or her security of the person.

This infringement was found not to be in accord with the principles of fundamental justice. The Court found no connection between the prohibition on non-dried forms of medical marihuana and the health and safety of those who are authorized to use it. Indeed, the prohibition on non-dried marihuana serves to undermine the health and safety of the authorized users. As such, the legislation fails to further the objectives of the legislation. Instead, it forces people with an already recognized legitimate health condition, sufficient to permit the use of medical marihuana, to risk harm by forcing them into a situation of chronic smoking.

There was also no connection between the impugned restrictions and attempts to curb diversion into the illegal markets.

The Court concluded that the provision compromised individual liberty and security of the person and was not in accord with the principles of fundamental justice. Nor is the provision saved under s. 1 of the *Charter*. As for remedy, the Court concluded that a declaration that ss. 4 and 5 of the *CDSA* are of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes. This declaration is effective immediately.

As for Mr. Smith, his acquittal was affirmed.

**Commentary:** This is an interesting case on a number of levels. It is a succinct approach to a s. 7 analysis, commencing with an important discussion about standing. To the extent that it was not clear before, the Court has quite clearly said that s. 7 of the *Charter* is available to anyone charged with an offence. It would appear that accused people will always have standing to challenge the law under which they are been charged: *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

In addition, the Court has again clarified the fact that potential imprisonment is sufficient to trigger the right to liberty. This would appear to be an easy threshold to meet when the crime is punishable by imprisonment: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 515. What will create more of a challenge is whether the deprivation, or potential deprivation, of liberty will accord with the principles of fundamental justice. This is determined by assessing the objectives of the legislation, which in this case were determined to be entirely arbitrary in nature.

*R. v. Smith* (2015), 2015 SCC 34, 2015 CSC 34, 2015 CarswellBC 1587, 2015 CarswellBC 1588 (S.C.C.)

***2. Correctional Officer Exercises Search Power in Anticipation of Warrant***

**Facts:** The accused, Mark Johnston, was detained at Maplehurst Correctional Facility. The police contacted the correctional authorities and informed them that they would be arriving with a search warrant to seize certain personal items from Mr. Johnston and from his institutional file. In anticipation of the search warrant, a correctional officer went to Mr. Johnston's cell. Correctional Officer Jones gave evidence on the s. 8 application that he asked the accused to pack his own things. The officer then moved the accused to a segregation cell and secured the personal items until the police arrived the next day with a search warrant. The items were then retrieved and provided to the police.

Later, the Crown embarked on a voluntariness *voir dire*, seeking the admission of the accused's statement by conduct. The Crown took the position that Mr. Johnston had admitted ownership of the items, having packed them at the request of the correctional officer. The correctional officer testified again on this *voir dire*, only this time he said that he could not remember whether the accused had packed his own things. Instead, he testified that he would normally ask an inmate to pack their own things, but had no specific recollection of having done that in this case.

The voluntariness application was dismissed, as the trial judge was left with uncertainty as to whether there had even been a statement by conduct. The accused then sought to re-open the s. 8 application on the basis of the changed evidence of the correctional officer. He was granted leave to re-open the application.

**Held:** The application was dismissed.

The trial judge concluded that despite the fact that the officer could not remember whether he had asked or directed Mr. Johnston to pack his own things, before being moved to segregation, this did not impact on the s. 8 finding. People who are detained within correctional facilities have a diminished reasonable expectation of privacy. They cannot reasonably expect that state agents will not inspect their things and sometimes seize them

without prior authorization. What they can expect, though, is that the police will obtain a search warrant before taking their things from the possession of the correctional institution.

The *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22 and Regulation 778 grants responsibility for all correctional facilities to the superintendent of each institution. The superintendent's powers may be delegated to any person or persons for the effective administration of the Act. Where requested, personal property must be deposited with the superintendent (or his or her delegate). As well, searches may be carried out within the institution.

Justice Forestell concluded that Correctional Officer Jones was acting pursuant to his delegated authority when he seized Mr. Johnston's belongings. His discretion was exercised for a valid purpose because he knew the search warrant would be executed by the police the next day and he was simply having the items moved in anticipation of the warrant to maintain order and control within the institution. The fact that the officer had no recollection of whether he had Mr. Johnston pack his own items did not render the search unreasonable.

**Commentary:** This case represents a common sense approach to searches within correctional facilities. It has been long recognized that an individual has a lesser expectation of privacy while detained in custody. As noted by Cory J. in *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 61: "Obviously an accused person will have a lower expectation of privacy following his or her arrest and subsequent custody." This was supported by Rosenberg J.A. in *R. v. Blais* (2004), 182 C.C.C. (3d) 39 (Ont. C.A.), at para. 13, where he held that a detained individual cannot "reasonably expect" that state agents working within custodial institutions will not inspect "goods". What the individual can expect, though, is that the "police [will] obtain a search warrant before actually taking them out of the possession of the gaoler who was under a duty to safeguard them". See also: *R. v. Finnegan*, 2014 ONSC 2032, at paras. 18-27.

This case draws the important distinction between the relaxed powers of search, enjoyed by correctional officers, and the need for the police to remain vigilant about obtaining prior judicial authorization before seizing something from those officers. In other words, while the individual may have a diminished reasonable expectation of privacy when it comes to correctional officers, police officers cannot benefit from the accused's diluted s. 8 interests while held in custody. For purposes of the criminal arm of the state, the custodial institutional is like the individual's home away from home and prior judicial authorization is required.

*R. v. Johnston* (2015), 2015 ONSC 3486, 2015 CarswellOnt 8002 (Ont. S.C.J.)

***3. Evidence From iPhone Admissible Despite Section 10(b) Charter Breach***

**Facts:** Mr. Aguas was a nurse at the Toronto Western Hospital. The complainant arrived at the hospital one night and was seen by Mr. Aguas. He took her to an examination room, had her undress, and took photos of her, including of her vaginal and anal areas. These areas appear to have had nothing to do with her complaints. A few days later, the complainant attended at the Toronto Police Service ["TPS"] and reported the matter, thinking that what Aguas had done was wrong. While the complainant was with the police, Mr. Aguas texted her. With her permission, the police took over her phone and adopted her identity. They discovered that he was working that evening and so they attended at the hospital.

Once at the hospital, the police located Mr. Aguas in the emergency room area. They told him the general reason that they were there and that he was going to be arrested and leaving with them. He was not provided with his right to counsel at this time. He was asked where his cell phone was and he eventually directed the police to a desk. They retrieved the phone and left with Mr. Aguas. On route to the police station, the accused was formally arrested, cautioned and given his right to counsel. The police witnesses testified that, among other considerations, they did not formally arrest the accused at the hospital in order to minimize disruption to the

hospital and to save the accused embarrassment.

A search warrant was obtained for the iPhone and it was eventually searched under that authorization. Pictures of the complainant were found. As well, the police located a picture of another patient at the hospital, in a similar state of undress to the first complainant. The accused was charged in respect to both complainants.

At trial he alleged that he had been unlawfully arrested, unlawfully searched incident to arrest, and deprived of his right to counsel. He also said that the Information to Obtain ["ITO"] the search warrant was deficient. He sought exclusion of the evidence obtained from the iPhone and his statement to the police at the hospital (particularly as it related to the location of the iPhone). The Crown conceded that his s. 10(b) rights had been infringed and agreed that his statement was inadmissible. Nonetheless, the Crown said that the iPhone — and all evidence derived from the iPhone — should not be excluded under s. 24(2).

**Held:** Justice Campbell concluded that while the accused's s. 10(b) rights had been infringed, the evidence should not be excluded. He dismissed all other *Charter* complaints.

The trial judge concluded that the arrest was lawful and in compliance with s. 495(1) of the *Criminal Code*. In order to effect a proper and constitutionally compliant arrest, the police only need reasonable grounds to believe that an offence has been or is about to be committed. Reasonable grounds contain both subjective and objective components. The officer must subjectively believe that he or she has reasonable and probable grounds to arrest and the belief must be objectively reasonable in the circumstances. This means that a reasonable person, standing in the officer's shoes, must be able to conclude that there are reasonable and probable grounds for the arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 249-51. The complainant's statement, combined with the supporting evidence from her cell phone, provided more than ample grounds to justify an arrest under s. 495 of the *Code*.

As for the s. 10(b) matter, Justice Campbell concluded that the police should have granted Mr. Aguas his right to counsel as soon as he was detained. Section 10(b) requires the police to provide the right to counsel "without delay" upon arrest or detention. Relying upon *R. v. Suberu*, 2009 SCC 33, the trial judge reinforced the concept that "without delay" has been interpreted to mean "immediately". Although he was not formally arrested until they left the hospital, there was no dispute that from the moment the police approached Mr. Aguas he was detained. As such, he should have been provided with his right to counsel when the police approached him. The Crown was right to concede the s. 10(b) breach.

Despite the s. 10(b) breach, the ITO in support of the search warrant for the phone was constitutionally sufficient. There were no "material" omissions by the police and no s. 8 breach was found.

The admissibility of the iPhone was considered under s. 24(2) seeing as it had been seized following upon the accused's s. 10(b) rights having been infringed. The police conduct was serious in the sense that they were "careless" in violating the accused's *Charter* rights. Despite this fact, the trial judge concluded that the police had not willfully or intentionally violated the accused's rights. There was no bad faith involved. The police had a *bona fides* concern that the data on the iPhone may be destroyed if it was not seized immediately and it was this that drove them to act so quickly.

As for the accused's *Charter* protected interest, the second consideration under *R. v. Grant*, 2009 SCC 32 analysis, Justice Campbell found that it was serious in the sense that it involved an electronic device with a great deal of private information. With that said, the iPhone was clearly discoverable without the *Charter* breach. Mr. Aguas' arrest was entirely lawful. As such, the police were entitled to search Mr. Aguas and his close surroundings. Whether he told them where the iPhone was or not, they would have located it pursuant to a search incident to arrest: *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at pp. 180-82. It was only a matter of time. In the end,

the trial judge concluded that the second prong of the *Grant* analysis favoured both exclusion (in the sense that the breach had serious implications for the accused) and inclusion (in the sense of discoverability).

As for the third prong, the truth-finding function of the trial, the impugned police conduct triggered a brief utterance from the accused and the statement itself was not a critical piece of evidence in the case and should be excluded. The iPhone, on the other hand, contains critical and reliable evidence. It strongly favours inclusion. The exclusion of the phone and evidence from it would bring the administration of justice into disrepute. The application was dismissed.

**Commentary:** This judgment provides a helpful and detailed analysis of a number of *Charter* provisions: ss. 8, 9, 10(b) and 24(2). As for s. 9, the trial judge lists a number of helpful principles that amplify upon the objective approach to determining the lawfulness of an arrest. The principles include consideration of the meaning of "reasonable and probable grounds" and how to practically apply that concept. For instance, there is a discussion about the fact that this threshold eschews any notion of a *prima facie* case or even one that requires proof on a civil standard of a balance of probabilities. Rather, it is the point at which credibly-based probability replaces suspicion, requiring "reasonable probability". In forming these grounds, the judgment acknowledges the appropriateness of taking into account the fact that a "trained and seasoned police officer is entitled to draw inferences and make deductions drawing on his or her years of experience".

The judgment also adds to the body of jurisprudence respecting s. 24(2) admissibility considerations. Discoverability is not a concept that is often discussed in the jurisprudence. This is despite the fact that in *Grant*, McLachlin C.J. and Charron J. left this concept as a relevant consideration: "Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused." In the context of a statement obtained by way of a s. 10(b) breach, this means that the more likely the evidence seized as a result of the statement (the iPhone here) would have been obtained without the statement, the "lesser the impact of the breach on the accused's underlying interest against self-incrimination". This case demonstrates an effective use of the doctrine of discoverability.

*R. v. Aguas* (2015), 2015 ONSC 3462, 2015 CarswellOnt 7849 (Ont. S.C.J.)

***4. Strip and Anal Cavity Search Found Constitutional***

**Facts:** Mr. Johal sold crack cocaine to an undercover officer. He was arrested, cautioned and provided the right to counsel. He said that he might speak to a lawyer from the police detachment. He was transported to a nearby parking lot and his car was searched for drugs. The car revealed nothing. Mr. Johal was asked if he secreted away or ingested drugs. He was told that if he refused to answer that he may not be released. He did not respond.

He was then transported to a police station where a single male officer conducted a strip search in a private room. Mr. Johal's clothes were removed and replaced so that he was not entirely naked all at once. His anus had an appearance of white powder around it and there was blood noted in his underwear. The searching officer was concerned that the accused had ingested drugs and the packaging around the drugs had broken. Another officer entered the search room and made similar and confirmatory observations. It was accepted as a fact that the officers were concerned for the accused's health and safety.

The accused was transported to a local hospital where a physician conducted an internal examination of Mr. Johal's anus by placing his finger inside of it. Prior to leaving the accused with the physician, the police reminded him of his right to counsel and he declined to exercise this right. A medical student was present for the examination and it was conducted in the privacy of an examination room. The police were not present for the examination, but the accused's handcuffs remained on. Mr. Johal was then x-rayed. Neither the internal

examination nor the x-ray revealed any sign of drugs.

At trial, the accused argued that his ss. 8 and 10(b) rights had been infringed. He sought a stay of proceedings under s. 24(1) of the *Charter*. The application was dismissed and he was convicted. He appealed to the British Columbia Court of Appeal.

**Held:** Chief Justice Bauman, on behalf of the Court, concluded that there was no *Charter* breach. In order to conduct a strip search, it must be incidental to arrest and the police must have reasonable and probable grounds that they will discover evidence relevant to the arrest and the search must be conducted in a reasonable manner. Mr. Johal was lawfully arrested and the strip search was conducted in an effort to find drugs. The Court noted that the officers' had the grounds to search because, while the accused was caught selling drugs, the police could not find any additional drugs in his car or anywhere else. In these circumstances, it was reasonable to believe that he may have drugs in his underwear or rectum, where drugs are sometimes hidden.

*R. v. Golden*, 2001 SCC 83 sets out the rules governing strip searches and the things that should be taken into consideration in determining whether they are reasonable. Given the privacy accorded to Mr. Johal in the circumstances, the fact that a single officer of the same sex conducted the search, and the fact that not all of his clothes were removed at once, the search was executed reasonably. While the officers did not take notes respecting the strip search, this did not render it unreasonable, nor did the fact that a second officer entered the room to confirm the observations of the first officer respecting the white powder. The strip search was reasonable and s. 8 compliant.

As for the internal examination and x-ray conducted by the physician, the medical doctor was not acting as a state agent. Importantly, the police did not take the accused to the hospital to have a doctor collect evidence. Instead, as the trial judge accepted, the police took him to see a doctor because of a *bona fides* concern about his health and safety. While they would have seized evidence if it had been extracted and offered to the police, this was not the objective of the police in attending at the hospital.

It was up to the doctor and accused as to whether an anal examination was done. If the doctor failed to get the permission of the accused, this was strictly a matter of medical ethics and had nothing to do with state conduct or the *Charter*. While the police should have informed the accused that he did not have to submit to an anal examination, the failure to tell him this did not result in a breach of his *Charter* rights.

As for s. 10(b), the Court summarily concluded that the accused had been offered opportunities to consult with counsel and chose not to do so. There was no s. 10(b) breach.

**Commentary:** This is an interesting case. The searches conducted were highly intrusive. The Court of Appeal gives a nice distillation of the things to take into account whether determining the reasonableness of a strip search. Importantly, while strip searches fall under the search incident to arrest ("SIA") doctrine, they are one of the only SIAs that require actual "reasonable grounds to believe" that evidence will be found before the search can proceed. Any officer considering conducting a strip search *must* read *Golden* as it provides one-stop shopping for the threshold test to conduct a strip search and a laundry list of considerations that will invariably be taken into account after-the-fact when considering the reasonableness of the search. To conduct a strip search without a keen appreciation for and understanding of *Golden* could visit serious difficulties on any subsequent prosecution.

The *Johal* case is helpful in setting out some of the considerations to take into account when taking an accused to the hospital for a search. As evidenced in this case, it is important not to turn medical staff into state agents by directing searches. It is critical that any medical treatment be administered for medical and not criminal investigative purposes.

Interestingly, the Court noted that the police would have seized drugs if they had been located by the physician. Query whether the police could have simply taken the drugs or whether, if drugs had been found and extracted, they should have first received prior judicial authorization to take the evidence. The latter approach would certainly be the safest manner in which to proceed.

*R. v. Johal* (2015), 2015 BCCA 101, 2015 CarswellBC 587 (B.C. C.A.)

***5. Search Conducted Before Arrest Can be Incidental to Arrest***

**Facts:** A known, reliable confidential informant gave the Ontario Provincial Police (the "OPP") information about a cocaine dealer in Leamington. The informant told police the dealer's nickname, physical description and the kind of car he drove. A member of the OPP spoke to a police officer in Windsor who recognized the nickname provided by the information as one used by the appellant. Using the name, the OPP officer obtained a description of the appellant as well as a photograph. The officer showed the informant the appellant's photo and confirmed that he was the Leamington dealer. The informant went on to say that the appellant was going to travel to Toronto to pick up cocaine, returning on a Greyhound bus at 5 a.m. and that a Leamington taxi cab would be waiting for the appellant at the Windsor bus station to bring him back to Leamington. The OPP officer confirmed that there was a bus from Toronto scheduled to arrive in Windsor at 5 a.m. the next day and attended shortly before 5 a.m. to conduct surveillance.

On arrival, officers observed a Leamington taxi cab parked close by. When the bus from Toronto arrived, a short man exited the bus with a backpack and a plastic bag, and walked directly to the waiting taxi. The OPP followed the taxi for a time, eventually relaying to the Leamington police that there were reasonable and probable grounds to believe that the appellant was in possession of crack cocaine, and requested that the taxi be stopped and the appellant arrested. Two Leamington officers on patrol received the information, and were directed to conduct a traffic stop of the taxi when it came into their area. These officers were also advised that the appellant was on a recognizance with a condition prohibiting him from possessing any cell phones or electronic devices.

The taxi was observed and the traffic stop conducted. There were three people inside: the driver, a female with whom the officers had some contact in the past and the appellant, who was asleep in the backseat, using a backpack as a pillow. The officer opened the backdoor and began to speak to the appellant, who identified himself. On the *voir dire*, the officer testified that although he believed he had reasonable and probable grounds to arrest the appellant for possession of a controlled substance, he wanted to gather his own grounds for arrest. In conversing with the appellant, he noticed a fairly large bulge in the appellant's jacket, patted it, and asked what was inside. The appellant reached in and pulled out 3 cellphones, and was arrested for breach of recognizance. Shortly after, a Leamington sergeant arrived on scene. The arresting officer reiterated that he had reasonable grounds to believe the appellant was in possession of a controlled substance.

The backpack was seized from the backseat. At this point, the female passenger stated that the backpack belonged to her and was arrested for possession of a controlled substance. At the station, the female passenger advised that the backpack did not belong to her. The backpack was searched and found to contain 28.5 grams of crack cocaine, hidden in a pair of tube socks. A number of items of men's clothing and documents belonging to the appellant were also located inside. The appellant was then re-arrested for possession for the purpose of trafficking.

At trial, the appellant alleged a breach of his rights under s. 8 of the *Charter* and sought the exclusion of the cell phones and cocaine under s. 24(2). The trial judge disagreed and convicted the appellant, who appealed.

**Held:** Appeal dismissed.

Even if the officer did not subjectively believe he had grounds to arrest the appellant at the moment of the traffic stop, he had a lawful basis to conduct an investigative detention, and was entitled to rely on the direction and information given to him from his superior officer. The officer was also entitled to conduct a brief pat-down search of the appellant's jacket pocket while he was in the backseat of the taxi, in order to ensure officer safety. In *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 34, the Supreme Court stated that an investigative detention must be premised on reasonable grounds. On an objective view of the totality of the circumstances, the officer must have a reasonable suspicion that the particular individual is implicated in the criminal activity under investigation and that the detention is necessary: *Mann*, at paras. 34, 45. In this case, the Court held that it was reasonable for the officer to be concerned that the bulge in the jacket pocket was a weapon.

The search of the appellant's backpack at the station was not unlawful. A search conducted prior to arrest will nonetheless be incidental to arrest if: (1) prior to the search, the police had reasonable and probable grounds for the arrest and (2) the arrest occurs quickly after the search: *R. v. Polashek* (1999), 134 C.C.C. (3d) 187 (Ont. C.A.), at para. 21; *R. v. Grant and Campbell*, 2015 ONSC 1646, [2015] O.J. No. 1229, at paras. 87-88. Here, the grounds for the arrest arose from the sufficiently detailed, compelling and corroborated information obtained from a trusted, reliable informant. The arrest was made shortly after the search.

**Commentary:** This case represents a straightforward application of the decision in *R. v. DeBot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), aff'd [1989] 2 S.C.R. 1140, which holds that an officer is entitled to rely on the information and direction of another officer in formulating reasonable and probable grounds to arrest. On the facts, there was a strong basis to conclude that, on the "totality of the circumstances", including the credibility of the informant, the compelling and detailed nature of the information disclosed by the informant and the additional information that the police obtained that corroborated the informant's tip, that the police had reasonable and probable grounds to arrest the appellant. See *R. v. Lewis* (1998), 38 O.R. (3d) 540 (C.A.), at p. 546.

*R. v. Richards* (2015), 2015 ONCA 348, 2015 CarswellOnt 7077 (Ont. C.A.)

***6. "Exigent Circumstances" Justify Pat-Down Search During Arbitrary Detention***

**Facts:** The Toronto Anti-Violence Intervention Strategy ("TAVIS") is a community policing program in "priority" areas of the City of Toronto. Officers attached to the TAVIS unit randomly approach individuals and engage them in conversation which may reveal information of a general or investigative interest. Officers usually fill out a Field Investigation Report ("FIR" or "208 card") to build and maintain a database of individuals and their associates. The practice is colloquially known as "carding".

The appellant and another young black male were walking past a police car when two TAVIS officers called them over for questioning. The officer testified that he had dealt with the appellant and his brother before, and knew that both had criminal histories. The officer confirmed the appellant's identity (that he was not his brother), and confirmed that there were no outstanding warrants for the appellant. The officer then turned to filling out a 208 card. As he did so, a third man, unknown to the officer or the appellant, walked up behind the TAVIS officers and began interrogating the officers about what he perceived to be harassment of the appellant. The appellant abruptly turned sideways, "blading" his body. He appeared to be nervous, took two steps back and placed his left arm on his left hip. The TAVIS officer commanded that the appellant show his hands, but the appellant failed to do so. The officer then reached out and patted the appellant's side. The officer felt a hard object and yelled "gun." The appellant fled and a gun "fell" out of his jacket as he mounted a fence. Police eventually apprehended the appellant and arrested him for possession of a firearm.

At trial, the appellant argued that he was arbitrarily detained by police and as such, the officer's pat down search was unreasonable. The trial judge disagreed, finding that the search was justified on the basis of exigent circumstances. The trial judge went on to find that even if the firearm was "obtained in a manner" that infringed

the appellant's *Charter* rights, he would not exclude the evidence under s. 24(2).

**Held:** Appeal dismissed.

The appellant was unlawfully detained from the moment the TAVIS officer called out to the appellant. As found by the trial judge, the interaction was not a random stop, but a "focused, investigative engagement" to determine whether the appellant was the wanted brother. The officer did not tell the appellant that he was free to leave. A reasonable person in the circumstances would have felt compelled to obey the officer: *R. v. Grant*, 2009 SCC 32.

The trial judge did not err in applying the doctrine of exigent circumstances to the pat-down search of the appellant. While warrantless searches are presumptively unreasonable, a warrantless safety search may be reasonable in appropriate circumstances: *R. v. MacDonald*, 2014 SCC 3, at para. 31. For a safety search to be lawful, an officer must have "reasonable grounds to believe that there is an imminent threat" to police or public safety. Even if a safety search takes place in the context of an unlawful detention, exigent circumstances can still justify the search: *R. v. Blackwood*, [2009] O.J. No. 5393 (S.C.), aff'd 2013 ONCA 219. The appellant's reaction to the interjection by the third party was equally important, if not more important, to the officer's decision to search the appellant than the actions of the third party. The officer had reasonable grounds to conduct the safety search.

The temporal connection between the appellant's unlawful detention and lawful pat-down search was sufficient to have warranted consideration as to whether the evidence ought to be excluded under s. 24(2). As observed by Doherty J.A. in *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.), there need not be a causal connection between a breach of the *Charter* and the discovery of the evidence to warrant an analysis under s. 24(2), so long as there is a temporal connection that the evidence "was obtained in a manner" that infringed the *Charter* rights of an accused. However, the appellant has not established any error of law or unreasonable finding sufficient to disturb the deference owed to a trial judge's analysis: *R. v. Peterkin*, 2015 ONCA 8.

**Commentary:** This case arises out of the factual circumstance of the controversial Toronto Police Service practice of "carding." Given the larger social context and widespread critique of the practice of carding, it is difficult to understand where the courts draw the line between criminally suspicious behavior, and behavior which is equally consistent with an innocent reaction to a charged interaction: a reasonable member of the community might conceivably appear nervous and step back from an interaction between a member of the TAVIS unit and an unknown third party who is engaged in a vocal critique of the interaction. The Court of Appeal's reliance on the doctrine of exigent circumstances to justify a search for officer safety was an application of the recent decision of the Supreme Court of Canada in *R. v. MacDonald*, 2014 SCC 3, and the proposition that a safety search will be authorized by law, if the officer suspects, on reasonable grounds, that their safety or that of the public is at stake.

*R. v. Fountain* (2015), 2015 ONCA 354, 2015 CarswellOnt 7105 (Ont. C.A.)

***7. Warrantless Search of Cell Phone Months After Arrest Does Not Result in Exclusion of Evidence***

**Facts:** On July 1, 2011, members of the RCMP on highway patrol stopped a minivan travelling at 144 kilometers per hour in a 100 kilometer per hour zone. A database check revealed that there was a warrant for the arrest of the driver. A search of his person incident to arrest revealed three small bags of white powder, which appeared to be cocaine. At this point, the passenger was asked to step out of the minivan. A search of the passenger was conducted and revealed a cell phone and $1,444.71 in Canadian currency. Officers then conducted a search of the minivan and discovered two more cell phones, and a duffle-bag containing 33 Ziploc bags containing 7,692 grams of marihuana. The passenger was then arrested for possession for the purpose of trafficking. The officers conducted a cursory search of the passenger's cell phone but did not discover anything of consequence to their investigation.

The arresting officer examined one of the cell phones retrieved from the minivan approximately six weeks later. The delay in examining the cell phones was explained in part by a leave of absence to attend his wedding. In late September 2011, one of the cell phones located in the minivan was revealed to contain text messages relevant to the investigation.

Approximately six months later in January 2012, the seized cell phones were sent for analysis. A "data dump" report with respect to one of the cell phones retrieved from the minivan suggested that one of the additional cell phones belonged to the passenger, and that the passenger was connected with the marihuana located in the duffle-bag.

At trial, the passenger applied to exclude all the information obtained by police from the search of the cell phone. In his decision at the conclusion of the *voir dire*, the trial judge quoted long passages from *R. v. Larose*, 2013 SKQB 226, 422 Sask. R. 194; *R. v. Fearon*, 2013 ONCA 106, 296 C.C.C. (3d) 331; *R. v. Ormston*, 2013 ONCJ 437; and *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657. The trial judge held that the subsequent searches were too far removed in time to be considered incidental to the passenger's arrest, such that there was a violation of s. 8. However, the trial judge declined to exclude the evidence under s. 24(2) and *R. v. Grant*, 2009 SCC 32, finding that the *Charter*-infringing conduct of the police was not sufficiently serious. The passenger was convicted and appealed.

**Held:** Appeal dismissed.

An appellate court owes a reasonable measure of deference to a trial judge's assessment under s. 24(2): *R. v. Côté*, 2011 SCC 46. However, an appellate court should intervene where a trial judge has made an error in principle, overlooked relevant factors or made clear errors of fact: *R. v. Cole*, 2012 SCC 53.

The Court of Appeal here held that the trial judge misapprehended the evidence of the investigating officer, who did not testify that he believed the cell phone was seized under a warrant to search the minivan. Rather, the officer testified that he believed he had a right to search the cell phone because he was investigating a drug offence. Given that this error may have affected the trial judge's analysis, it was appropriate to conduct a fresh assessment of the test for exclusion under s. 24(2).

The officer's *Charter*-infringing conduct was not serious. First, at the time of the breach, the law regarding searches of cell phones was unsettled. Second, the officer honestly believed that he had lawful authority to conduct the searches in question, and in a manner that was consistent with the general policy of his RCMP detachment. Third, there were compelling reasons to search cell phones in connection with drug arrests and there was no doubt that the officer could have obtained a warrant to search the cell phone if one had been sought. Fourth, a reasonable explanation was offered for the delay in conducting a forensic search of the cell phone.

The impact of the breach on the *Charter*-protected interests of the appellant was significant, and the manner of search via a "data dump" particularly intrusive. However, the evidence in question was reliable, real evidence of the offence, and was essential to the Crown's case. There was a clear societal interest in adjudicating the case on its merits. The truth-seeking function of the criminal trial process would be better served by admission of the evidence: *R. v. Vu*, 2013 SCC 60, at para. 73.

**Commentary:** The Court of Appeal's decision relied heavily on the fact that the law with respect to cell phone searches was unsettled at the time of the appellant's arrest. There were conflicting approaches to the proper interpretation of law across the country. The police acted in good faith based on their understanding of their legal obligations at the time of the searches. Further, the trial judge did not have available the reasons for decision in *R. v. Fearon*, 2014 SCC 77.

*R. v. Adeshina* (2015), 2015 CarswellSask 178, 2015 SKCA 29 (Sask. C.A.)

***8. 911 Dropped Call Leads to Lawful Entry and Search of Home***

**Facts:** The British Columbia ambulance service received an incomplete or "dropped" 911 call. Both ambulance services and police were dispatched in response to a particular location. Police were informed that the female 911 caller was crying and apparently injured. Police were advised to meet one Ms. Wallace near the location of the call. Ms. Wallace received a call from the ambulance services informing her that an incomplete call was received from her cell phone. Ms. Wallace advised that she did not know anything about the call as she had given her daughter her cell phone. Ms. Wallace called her daughter's place of employment and was told that her daughter had not shown up for work. Ms. Wallace then drove to the apartment building where her daughter's boyfriend resided and located her daughter's car. Further calls to the cell phone went unanswered. Ms. Wallace told police that there was a "previous history" between the two, and that her daughter's boyfriend owned a shotgun.

Police spoke to the manager of the apartment building and obtained the apartment number of the boyfriend. They learned that Ms. Wallace's daughter had been transported to hospital with unknown injuries. Police concluded that the 911 call came from the apartment, and sought to determine if anyone in the apartment needed assistance.

Police knocked at the door of the apartment and announced "police". No one answered. The door to the apartment was unlocked, but police could see a light underneath the door. A pass key was obtained from the apartment manager. As police inserted the key into the lock, the door was opened and police could smell the odor of raw and smoked marihuana.

The man who answered the door was questioned about the 911 call. At first he said he didn't know anything about it, then said that he exited the shower to find Ms. Wallace's daughter on the bathroom floor. He said that he helped her up and out of the apartment. Police began to question the man about the odor of marihuana emanating from his apartment. He advised that he had recently smoked marihuana and had a few "roaches" lying around. Police decided to seize the "roaches" and be on their way; both officers testified that they did not intend to arrest the occupant.

The man attempted to close the door while he retrieved the roaches, but one of the officers put his foot in the door and said he would not let the man out of his sight for fear that he would destroy evidence, as well as for officer safety concerns, as police had been advised that there was a shotgun in the apartment. At this point, the man told police they could enter the apartment. Police later testified that they considered getting a search warrant, but decided not to as they were not going to arrest the occupant.

Both officers entered the apartment and the man picked up a baggie on the kitchen counter. At this point, police observed a bullet-proof vest in the living room, a handgun on an end table and a bag of pills on a speaker stand. The occupant was placed under arrest and searched. Police located a cell phone and $4,655 in his possession. The premises were then "cleared" for other occupants, and for officer safety. In a closet, police located two large bags of orange and blue pills they believed to be ecstasy and a bag of what appeared to be crack cocaine.

An "Information to Obtain" was prepared to facilitate a search warrant for the apartment. It included statements provided by the occupant. On a subsequent search of the apartment, police located three more handguns and another bag of narcotics.

At trial, the occupant argued that the warrantless entry into his apartment constituted a violation of his rights under s. 8 of the *Charter*. The trial judge found that there were clearly grounds to arrest the appellant and to obtain a warrant to search his premises, based on the odor of marihuana and the appellant's admission to the presence of

marihuana in his apartment. The requirements of s. 11(7) of the *Controlled Drugs and Substances Act* applied. However, the trial judge further found that it was impracticable for the police to have done so in the circumstances of this case.

**Held:** Appeal dismissed.

The appellant submitted that the existence of "exigent circumstances" to search the apartment were created by police as a result of their approach to the investigation. The trial judge considered this possibility and rejected it, accepting the evidence of the officers that they decided to effect a "no case" seizure. There is no reason to interfere with this factual finding. The trial judge accepted that in these circumstances, where police did not intend to arrest the appellant, that it would have been "impracticable" to obtain a warrant to search the apartment. To obtain a warrant, it would have been necessary to place the appellant under arrest, which would have constituted a greater interference with his liberty, in circumstances where police had determined that the arrest of the appellant was not necessary. It was appropriate for police to accompany the appellant into his apartment in order to ensure that the evidence was not destroyed.

**Commentary:** While the circumstances of this case originate from an incomplete 911 call, the facts of the entry into the appellant's apartment do not fit neatly within the framework of exigent circumstances as set out in *R. v. Godoy* (1998), [1999] 1 S.C.R. 311. It is clear from the Court of Appeal's reasons for judgment that police did not intend to arrest the appellant for possession of marihuana, and it was clear that the 911 caller was no longer on the premises. The appellant does not appear to have taken the position that the action of propping the door open constituted a search for the purposes of s. 8, as found in *R. v. MacDonald*, 2014 SCC 3.

*R. v. Paterson* (2015), 2015 CarswellBC 1256, 2015 BCCA 205 (B.C. C.A.)

***9. Police Officer's Comments During Taking of Statement Did Not Constitute Improper Denigration of Counsel***

**Facts:** The accused was contacted by a police officer and asked to come in for an interview with respect to allegations made by the complainant, a 14-year-old girl, whom the officer named. When the accused attended the station, he was arrested for sexually assaulting the complainant. The accused had been told by his lawyer not to say anything to the police. He asserted this to the officer. The officer acknowledged that this was so, but proceeded to conduct a video recorded interview of the accused that lasted over three hours. He told that accused that he had one side of the story from the complainant, and now wanted to hear the accused's side of the story. The accused did not confess, but made both inculpatory and exculpatory statements as the interview unfolded.

During the interview, the accused said that his lawyer told him not to say anything and that was what he was going to do, and further that it could all be explained and his lawyer knew full details. The officer made the following responses:

- "That person, that individual offering that advice isn't sitting in your chair with you currently";
- "Your lawyer's not the one that's sitting in this chair, facing these charges right now, okay? So if there's a way for you to explain this to me, I'm a reasonable guy, okay? There's nothing that says you have to walk out of here being charged with these offences";
- "It's unfortunate that . . . you're going to have to spend that kind of money to get the truth out, but that's your choice not mine".

At trial, the accused argued that the officer denigrated his lawyer and undermined the solicitor-client relationship,

in breach of his *Charter* s. 10(b) right to counsel. He applied to exclude the statement under s. 24(2).

**Held:** Application dismissed.

The trial judge found that the interview was conducted professionally and respectfully by the officer. She concluded that the officer did not make comments that belittled or denigrated the accused's lawyer. The officer acknowledged that the accused had spoken to a lawyer and that the lawyer told the accused not to say anything to the police. The trial judge found that the officer was simply pointing out that the lawyer was not the one facing questions, and that the officer was seeking the accused's side of the story. The comments that the defence took issue with were few in number, and there was no evidence that they did or would undermine the accused's confidence in his lawyer.

**Commentary:** The comments made by the police officer in this case are of a kind that are not uncommon in police interviews. In *R. v. Burlingham*, [1995] 2 S.C.R. 206, the Supreme Court of Canada pointed out that the right to counsel makes no sense if the authorities are able to undermine an accused's confidence in his or her lawyer by belittling that lawyer. It is not always clear, however, when an officer crosses the line and moves from asking the accused to give his or her side of the story, to improperly undermining the accused's relationship with counsel and the advice given by counsel. Here, the trial judge noted that *Burlingham* involved the offer to an accused of a plea bargain that was only open for a short time when the accused's lawyer was unavailable, and also badgered the accused about the reliability of his lawyer. While the trial judge did not explicitly say so, it appears that she considered the conduct complained of in this case to be qualitatively different from that engaged in by the police in *Burlingham*.

*R. v. J. (C.J.)* (2015), 2015 ABQB 291, 2015 CarswellAlta 820 (Alta. Q.B.)

***10. Forfeiture Order Made Without Jurisdiction Where Police Failed to Take Steps Under Criminal Code s. 490***

**Facts:** The accused was charged with threatening. He was released on a promise to appear and undertaking to a police officer. One of the conditions of the undertaking was that he not possess any firearms. He had a collection of firearms, which the police seized, under s. 499(2) of the *Criminal Code*, which provides that an undertaking can require that the accused surrender any firearms in his or her possession. Among the firearms seized were three handguns that were prohibited firearms. The accused did not have a licence to possess the handguns.

After the accused entered into a s. 810 peace bond, the threatening charge was stayed, and the undertaking was cancelled. The Crown sought and obtained forfeiture of the handguns, by order of a Provincial Court judge who purported to act under s. 490(9) of the *Criminal Code*.

The accused appealed that order.

**Held:** Appeal dismissed, but order of forfeiture stayed pending further order of the Court.

The appeal court judge found that the firearms were surrendered not to further an investigation or proceeding under s. 490, but as a condition of release under s. 499(2). After the firearms were surrendered, they were never brought before a justice by the police or ordered detained under s. 490 of the *Criminal Code*. Accordingly, once the threatening charge was stayed, there was no statutory basis for the continued detention of the firearms. Section 490 was inapplicable. The continued detention of the firearms was unlawful. The forfeiture order of the Provincial Court judge was made without jurisdiction. The proper challenge to that order was not by way of an appeal, but rather by way of an application for *certiorari*.

The appeal court judge exercised his inherent jurisdiction and stayed the order of forfeiture so that the proper

application could be brought. He noted that the firearms could not be returned to the accused because the accused was not licensed to possess them, but suggested the possibility that they could be released to an appropriately licensed third party acting on behalf of the accused.

**Commentary:** The decision contains a helpful analysis of the rather confusing provisions contained in ss. 490 and 491 of the *Criminal Code*. It underscores the importance of the police moving under s. 490 for an order of detention of things seized, in any case where forfeiture may be sought at a later stage in the proceedings.

*R. v. Weatherill* (2015), 2015 BCSC 566, 2015 CarswellBC 928 (B.C. S.C.)

***11. Delay in Facilitating Contact with Counsel Breach of Charter s. 10(b)***

**Facts:** The accused was observed by a civilian as he drove erratically with his vehicle's airbags deployed and both front tires flat. The civilian contacted police and, after the accused stopped his vehicle, waited at the scene until an officer arrived. A police constable and a sergeant came to the scene. They both smelled an odour of alcohol emanating from the accused. The accused was given the roadside screening device test, which he failed. The sergeant arrested him and gave him his right to counsel. The accused said that he wished to contact a lawyer. He was then put in the back of the constable's cruiser. The sergeant told the constable to contact duty counsel.

The accused remained at the scene for another forty-five minutes, while the constable inventoried the contents of the accused's vehicle, made towing arrangements, and completed a new computerized arrest screen with which he had problems. After he arrived at the police station with the accused, he contacted duty counsel and left a message.

The constable did not attempt to contact duty counsel while at the scene. He testified at trial that the accused did not ask to contact counsel at the scene, that he was not prepared to give an accused person his cell phone as it was an officer safety issue, that there was no privacy because there was a video recording in the cruiser, and that to take the time to call counsel at the roadside would delay breath testing.

At trial, the accused sought the exclusion of the breathalyzer results, on the basis that his *Charter* s. 10(b) right to counsel was violated when the police did not attempt to facilitate contact with counsel while waiting to leave for the station.

**Held:** Application dismissed.

The trial judge found that the accused was properly informed of his right to counsel following his arrest at the roadside. However, the delay at the scene of forty-five minutes was more than ample time to allow the accused an opportunity to consult with counsel. The accused expressed his desire to speak with a lawyer when informed of his rights. He had a cell phone with him. The audio and video equipment in the cruiser could have been turned off, which would have given him privacy to consult counsel. There were no specific officer safety concerns which could justify a delay in implementing the right to counsel. The trial judge found that neither officer provided a reasonable explanation as to why no efforts were made to facilitate the accused's contact with counsel at the roadside. Section 10(b) was violated.

The trial judge also agreed with defence counsel that the accused's s. 8 right was violated when he was held in the back of the police cruiser, handcuffed, during the forty-five minute delay at the scene.

On the issue of s. 24(2), the trial judge found that the breaches of the accused's *Charter* rights were serious, and that the police were either negligent or wilfully blind of them. However, while at the scene, the police did not question the accused, and because the breath samples would have been taken irrespective of the breaches, the

evidence would have been lawfully discovered. The breath test results were very reliable evidence and necessary to proof of the Crown's case, so there was a societal interest in adjudication of the case on its merits. Balancing the s. 24(2) factors, the evidence was admissible.

**Commentary:** The trial judge did not specifically reference the Supreme Court of Canada's decision in *R. v. Taylor*, 2014 SCC 50, although her reasoning was consistent with it. In *Taylor*, the Supreme Court of Canada held that the duty to inform a detained person of his or her right to counsel arises immediately upon arrest or detention, and the duty to facilitate access to a lawyer in turn arises immediately upon the detainee's request to speak to counsel. There is a constitutional obligation on the police to facilitate the requested access to a lawyer at the first reasonably available opportunity. While there is no legal duty on a police officer to provide his or her own cell phone to a detainee given privacy and safety issues, there is a duty to provide telephone access as soon as practicable.

*R. v. Egeli* (2015), 2015 CarswellOnt 7736, 2015 ONCJ 271 (Ont. C.J.)

***12. Identity Theft Offence Ruled Constitutional***

**Facts:** The accused was stopped by police while driving a motor vehicle. The police searched the vehicle. They found in the trunk a driver's licence and social insurance card, both in a name other than the accused's. The accused was charged with procuring, possessing, transferring, or selling identity documents contrary to s. 56.1 of the *Criminal Code*.

At trial, the accused argued that s. 56.1 infringes the presumption of innocence in s. 11(d) of the *Charter*, and applied to have it declared unconstitutional. He contended that the provision is unconstitutional because it makes it an offence to, without lawful excuse, procure to be made, possess, transfer, sell or offer for sale an identity document that relates or purports to relate to another person. He asserted that the provision places an evidential burden on the accused without requiring the Crown to prove dishonest intent.

**Held:** Application dismissed.

The application judge found that the provision does not infringe the presumption of innocence under s. 11(d) of the *Charter*. She concluded that the phrase "without lawful excuse" in s. 56.1 of the *Code* places nothing more than an evidential burden on the accused. That burden requires the accused to point to evidence in the Crown's case, or lead evidence as to the excuse. There is no onus of proof placed on the accused. The persuasive or legal burden remains on the Crown throughout, to prove all essential elements of the offence beyond a reasonable doubt, and to prove beyond a reasonable doubt that the lawful excuse raised by the accused does not exist in the circumstances.

**Commentary:** There is, at the moment, limited jurisprudence about the situations in which it may be appropriate for the police to lay a charge under s. 56.1. In the course of her decision, the trial judge observed that the aim of Parliament in enacting this provision was to address the entire chain of conduct contributing to or constituting unlawful possession or use of identity documents. She noted that the provision is distinct from s. 402.2, which is aimed at actual theft of a much broader category of identity information.

*R. v. Plowman* (2015), 2015 ABQB 274, 2015 CarswellAlta 769 (Alta. Q.B.)