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— Police Powers—

Justice Michelle Fuerst, Justice Michal Fairburn and Scott Fenton

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1. Coercive Undercover Operation Found to be an Abuse of Process

Facts: The accused was identified as a person of interest in a murder investigation in Halifax. Police suspected that Steven Skinner shot and killed a man and that the accused, Ms. Derbyshire, drove Mr. Skinner to the airport after the shooting to make good his escape. In an attempt to locate Mr. Skinner, police obtained a judicial authorization under Part VI of the *Criminal Code* to intercept the private communications of the accused, but they were not successful in obtaining any relevant wiretap intercepts to advance their investigation. In a further attempt to stimulate conversation, police designed a 'one-shot' undercover operation to obtain information and stimulate

conversations involving the accused.

The undercover operation involved two male members of the RCMP posing as “associates” of Mr. Skinner from an outlaw motorcycle gang in Montreal. The undercover officers initially intended to approach the accused in that role and advise her that the gang’s illegal business was being “adversely affected” by the murder investigation. The officers intended to admonish the accused that they needed to know everything she knew so that, in turn, the outlaw motorcycle gang could “clean up” loose ends.

Once the plan was put in place, however, the undercover officers proceeded to execute the plan but in a wholly more aggressive manner. The two undercover officers, dressed in role, arrived at the accused’s apartment building in a large SUV and waited for her outside. At 10:56 a.m., the accused drove into her parking garage. The two undercover officers followed her through the open garage door on foot and ordered her to get back in her car. The accused got back into the driver’s seat. One officer sat in the passenger seat, while the other stood outside the driver’s side door. The officers told her that they were from Montreal, and that “business” was being affected by the murder investigation. They told the accused, in menacing tones, that they were there to take care of a “rat.” They demanded that the accused tell them everything she knew. The lead officer stated firmly, “Don’t fucking bullshit me. Don’t fucking lie to me. I want to know what happened”. The accused immediately provided significant information about the murder and her involvement. She drew two rough maps, identifying where evidence was located. Less than twenty minutes later, the accused left with the officers and traveled to Moncton, where she was persuaded to point out locations where evidence was disposed. During this time, the undercover officers continued to remain in role as menacing members of a biker gang and continued to yell at the accused and admonish her to cooperate with them. On returning at approximately 6:30 that evening, the officers accompanied the accused inside her apartment and took the clothing she wore on the day of the murder.

On the *voir dire* at the trial, the accused testified that she was terrified the entire time of what the bikers would do to her if she did not play along and tell them everything she knew. After the undercover operation concluded and the accused was permitted to return to her home, she was arrested and charged as an accessory to murder.

At trial, the accused argued that the undercover operation was an abuse of process and the charges should be stayed, or alternatively, that her statements made to the undercover officers and the physical evidence obtained as a result ought to be excluded. The trial judge held that the undercover operation constituted an abuse of process and excluded the evidence, ordering an acquittal. The Crown appealed.

Held: Appeal dismissed.

The common law doctrine of abuse of process has not been entirely subsumed by the *Charter of Rights and Freedoms*. In *R. v. O’Connor*, [1995] 4 S.C.R. 411, 1995 CarswellBC 1098, the Supreme Court observed the parallels between state conduct that infringes the rights of an accused under the *Charter* and state conduct that amounts to an abuse of process, holding that the only instances in which there may be a need to distinguish between a *Charter* remedy and a remedy for abuse of process will be those in which the *Charter* does not apply. In *United States of America v. Cobb*, 2001 SCC 19, 2001 CarswellOnt 964, the Court confirmed resort to the doctrine of abuse of process as an alternative to *Charter* relief. There are instances where state conduct does not necessarily engage the *Charter*, but the common law abuse of process doctrine may nonetheless be engaged. Fundamentally, these involve police conduct that goes beyond what is acceptable in protecting society from criminal conduct. (See also: *USA v. Shulman*, 2001 SCC 21, 2001 CarswellOnt 962; *R. v. Mack*, [1988] 2 S.C.R. 903, 1988 CarswellBC 701; *R. v. Campbell (R. v. Shirose)*, [1999] 1 S.C.R. 565, 1999 CarswellOnt 948 at para. 21.)

In *R. v. Hart*, 2014 SCC 52, 2014 CarswellNfld 215 (and the companion case of *R. v. Mack*, 2014 SCC 58, 2014 CarswellAlta 1701, the Supreme Court of Canada held that the right to silence in s. 7 is not engaged by

undercover police operations. However, in *Hart* and *Mack*, the Supreme Court held that the common law doctrine of abuse of process is applicable to these types of investigations. The focus of the analysis in *Hart* and *Mack* was the conduct of the undercover operation and the coercive power of the implied or indirect threats of harm.

The Court of Appeal held that trial judge did not err in finding that the conduct of the undercover operation amounted to an abuse of process. The trial judge made clear findings of fact, amply supported by the evidence, of both the respondent and the undercover officers. The trial judge accepted the evidence of the respondent that she was petrified of the undercover officers, and tried to portray an outward calm and willingness to cooperate so that they would not believe that she was another "problem" to get rid of. The evidence before the trial judge was that the officers were specifically chosen for their ability to convincingly portray intimidating members of an outlaw motorcycle gang.

The trial judge did not err in finding that the exclusion of the evidence was an appropriate remedy in this case. A judge who finds police conduct constitutes an abuse of process is required to consider and fashion a remedy and, where the judge exercises discretion to do so, deference is owed to that decision: *R. v. Babos (R. v. Piccirilli)*, 2014 SCC 16, 2014 CarswellQue 575 at para. 48; *R. v. Bellusci*, 2012 SCC 44, 2012 CarswellQue 7206. After citing the relevant authorities of *R. v. Piccirilli*, 2014 SCC 16, 2014 CarswellQue 575; *R. v. Regan*, 2002 SCC 12, 2002 CarswellNS 61 and *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CarswellBC 1098, the Court found that the trial judge was correct in finding that this was not one of the clearest of cases that required a stay of the proceedings. While the state misconduct could be categorized as offensive to notions of fair play and decency, the trial judge found that the lesser remedy would be the exclusion of the evidence obtained, including the statements to the undercover officers and the related physical evidence retrieved. (See *R. v. Bjelland*, 2009 SCC 38, 2009 CarswellAlta 1110.)

Commentary: This is an important case, confirming the application of the principles regarding the potential for abuse of process in Mr. Big operations as established in *R. v. Hart*, 2014 SCC 52, 2014 CarswellNfld 215, to a factual scenario involving an undercover operation outside the typical "Mr. Big" investigative technique. The Nova Scotia Court of Appeal confirmed that confessions and other evidence obtained where the s. 7 right to silence and voluntariness rules are inapplicable, may nonetheless be the product of coercion and other abusive police tactics that the courts are not prepared to countenance. Finally, the Court conferred that the remedy of exclusion of evidence is available after a family of common law abuse of process.

R. v. Derbyshire, 2016 NSCA 67, 2016 CarswellNS 737 (N.S. C.A.)

2. Failure to Facilitate Access to Counsel of Choice Results in Exclusion of Evidence (Again)

Facts: Shortly after 2:00 p.m. on Christmas Day, a pick-up truck left the roadway on residential street and struck the backyard fence of a home in the Municipality of Peel, Ontario. The driver of the truck abandoned it, only to return a short time later, and abandon it again. While there were no witnesses to the accident itself, one person observed a man returning to the truck, and abandoning it again. This man was arrested for failing to remain at the scene of an accident a short time later. In directing the driver to the cruiser, the officer noticed that the man was wearing a sweater for a particular company and asked if he worked there. The man replied that he worked at "Blue Dragon Paving." During this interaction, the officer observed that the man had red-rimmed, watery eyes and also detected the odour of an alcoholic beverage on his breath. The officer received information that the truck involved in the accident with the fence was registered to Blue Dragon Paving. The officer placed the man under arrest for impaired driving. Following this arrest, the officer informed the man of his right to counsel. The accused responded by indicating that he wanted to call a particular lawyer, and gave the name to the officer.

At 3:09 p.m., an officer placed a call to the lawyer's office phone number. The officer then placed a second call to a number that he believed to be the lawyer's cell phone number. The officer left voice mail messages at both,

requesting a call back. At 3:12, the officer offered the accused the opportunity to speak to duty counsel. The accused declined, preferring to wait to speak to counsel of choice. The same two numbers for the lawyer were called again at 3:24 and 3:34 p.m.

At 3:38, the accused was moved to the breath room. Another officer explained to the accused the efforts that had been made to get in touch with his counsel of choice. The accused was again offered the opportunity to consult with duty counsel. The accused declined again. The officer went on to explain the consequences of failing to provide a breath sample, including that waiting to speak to a lawyer was not a reasonable excuse. Again the accused indicated that he wished to speak to his lawyer of choice before providing the sample. After some back and forth, the officer eventually informed the accused that he would be charged with the failure to provide a breath sample.

At trial, the officer explained that he had obtained one telephone number for counsel of choice from the Law Society of Upper Canada's website, and that the alternate number was obtained by "Googling" the lawyer, but could not recall what website he consulted to obtain the alternate number. The officer conceded that he did not consult the lawyer's professional website and conceded that he did not ask the accused whether he had a number for his lawyer, or whether he knew someone who might be in a position to assist. The accused applied for the exclusion of the evidence of the refusal to provide the breath sample on the basis that police failed to facilitate his right under s. 10(b) to consult with counsel of choice.

Held: Application allowed.

Based on the evidence at trial, it appeared to be the practice of Peel Regional Police to make telephone calls to counsel on behalf of persons requesting to speak to specific lawyers of choice. Detainees are not personally provided with a telephone book, access to the Internet, or a cell phone in order to contact counsel of choice.

In *R. v. Ross (R. v. Leclair)*, [1989] 1 S.C.R. 3, 1989 CarswellOnt 67 and *R. v. Willier*, [2010] 2 S.C.R. 429, 2010 CarswellAlta 1974, the Supreme Court of Canada held that s. 10(b) of the *Charter* protects the right of a detainee to consult with counsel of choice. In *Ross*, the Court held that a detainee can only be expected to consult with another lawyer if their chosen lawyer is not available within a reasonable period of time. In *Willier*, the Court clarified that the right to consult counsel of choice imposes a positive duty on police to facilitate that contact, including waiting a reasonable period of time for counsel to return a telephone call. In assessing how long the police can be expected to wait for a detainee to contact counsel of choice, the Court suggested that the availability of free legal advice is a relevant consideration. However, what constitutes a reasonable period of time before turning to duty counsel will depend on the circumstances of the particular case.

In this case, the accused was clear from the moment of his arrest that he wished to consult with a particular lawyer. The accused was diligent in asserting his desire to consult with counsel of choice throughout his interaction with police. Because the accused was not permitted to make, or even assist in making, inquiries to track down his lawyer, the police assumed the responsibility of contacting counsel on behalf of persons in custody. The standard for assessing police efforts to contact counsel of choice ought to be the same as that imposed on an accused person in asserting the right to counsel: reasonable diligence. (See *R. v. Traicheff*, 2010 ONCA 851, 2010 CarswellOnt 9501; *R. v. Vernon*, 2016 ONCA 211, 2016 CarswellOnt 3887.)

The Court found that common sense suggested that reasonable diligence should include asking a detainee if they have a number(s) for the lawyer, or know someone who might have that number; allowing access to a cellular phone to retrieve that number; conducting an Internet search to determine whether the lawyer has a website with contact information; using the Internet to search online directories; and using conventional paper directories, like a telephone book, to look for a number. The lawyer could also be emailed if an email address became known.

In an era when practically every lawyer and law firm has a website, the most sensible place to find contact information for a particular lawyer is that website. The failure to consult the lawyer's own website for contact information falls below reasonable diligence. In addition, the officer's failure to ask the accused if he knew his lawyer's number, or the number of someone else who might, fell below the standard of reasonable diligence. Beyond the failure to take reasonable steps to determine the telephone number for counsel of choice, the officers waited only 25 minutes for the lawyer to return the call. In the circumstances, the officers were constitutionally obliged to wait for the accused's lawyer to return his call.

In all the circumstances, including the seriousness of the *Charter*-infringing conduct in this case, which suggests a pattern of behavior in the Peel Regional Police Service, the exclusion of the evidence will better serve the long term repute of the administration of justice.

Commentary: This case is an interesting example of the growing body of case law with respect to the right to consult with counsel of choice. Here, the choice of the accused not to consult with duty counsel was not a bar to a finding of a breach of *Charter*, likely because the officers only waited 25 minutes for counsel of choice to return the call. This case is also unique in setting out a common sense guideline to what will constitute reasonable diligence on the part of the police when they assert control over the process in attempting to contact counsel of choice. Essentially, the police must take the same reasonable steps that an accused person is expected to take in order to obtain contact information for a lawyer.

R. v. Maciel, 2016 ONCJ 563, 2016 CarswellOnt 14481 (Ont. C.J.)

3. Tracking Warrant Provisions Constitutionally Valid

Facts: In June 2013, the Combined Forces Special Enforcement Unit began to investigate the accused for trafficking in cocaine. Officers received information that the accused used a red Chevrolet Cavalier registered to his girlfriend to conduct his business and swore an Information to Obtain a cell phone tracking warrant under s. 492.1(1); a number recorder warrant under s. 492.2(1), and; a production order for call and text message records under s. 487.012 of the *Criminal Code*. Police also conducted surveillance of the accused. The accused was eventually arrested while in the possession of two one-kilogram bricks of cocaine. The arrest was based on information obtained from a confidential informant, surveillance observations, and an "uncharacteristically" late call between the accused and his father.

At trial, the accused attacked the constitutionality of ss. 492.1, 492.2 and 487.012 of the *Criminal Code*, as they existed at the time of the offence, on three bases: first, that provisions contravene s. 8 of the *Charter*, in that these sections permitted warrants to issue on a standard of "reasonable suspicion" rather than "reasonable grounds to believe"; second, that the warrants provided for the collection of "core biographical data", as defined in *R. v. Plant*, [1993] 3 S.C.R. 281, 1993 CarswellAlta 94 at p. 293 [S.C.R.], on the basis of reasonable suspicion alone, and; third, that Parliament's subsequent amendments to these sections of the *Code* to require "reasonable grounds to believe" should be applied retrospectively.

The tracking warrant in this case permitted police to direct Telus to "ping" the location of the cellular telephone associated with the accused, to determine the cell phone tower that the telephone was exchanging signals with, and to provide an approximate radius of the cell phone tower as to the location of the accused's cell phone. The tracking warrant was not capable of tracking the telephone of the accused at all times, and did not operate like a GPS to fix the location of the cell phone precisely. Over the 60 days of the authorization, police directed Telus to "ping" the cell phone 25 times.

A tracking device affixed to the Chevrolet Cavalier was used on two occasions. On both occasions, police used the information to obtain to locate the Cavalier and the accused in order to conduct further surveillance.

The number recorder warrant permitted police to gain access to telephone numbers called by the accused, or that called him. The warrant also collected the numbers of text messages, but did not permit the collection of the content of the messages themselves.

Held: Application allowed in part; s. 487.012 held to be constitutionally invalid.

Reasonable grounds to believe is an objective test, requiring the affiant to articulate why they believe an offence has been committed: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 1984 CarswellAlta 121. It is also commonly referred to as credibly-based suspicion. (See *R. v. Ballendine*, 2011 BCCA 221, 2011 CarswellBC 1069; *R. v. Vu*, 2013 SCC 60, 2013 CarswellBC 3342 at paras. 9-18.)

By contrast, a reasonable suspicion requires grounds to *suspect* that an offence may have occurred, or that there is a *possibility* of finding evidence of an offence. Reasonable suspicion is a lower standard of proof than reasonable and probable grounds to believe. In *R. v. Chehil*, 2013 SCC 49, 2013 CarswellNS 693, the Supreme Court held that the standard of "reasonable suspicion" was found to be constitutionally compliant. The standard of reasonable suspicion has been typically applied where the individual's reasonable expectation of privacy is lower, as in *Chehil*, involving a sniffer dog search at the border, or in the case of investigative detentions as in *R. v. Mann*, 2004 SCC 52, 2004 CarswellMan 303.

In *R. v. Wise*, [1992] 1 S.C.R. 527, 1992 CarswellOnt 71, it was held that the warrantless installation of a tracking device on a vehicle constituted an unreasonable search for the purposes of s. 8, but held that information capable of being obtained from a tracking device was limited, and minimally intrusive. In *Wise*, the Court encouraged Parliament to enact legislation that would provide supervision for the issuance of electronic tracking warrants, resulting in ss. 492.1 and 492.2 to be obtained on the lower standard of reasonable suspicion.

The evidence on the application did not support the accused's claim that the use of the tracking warrants allowed police to "ping" the telephone in order to make a record of all of the accused's movements. While the device in question was more technologically advanced than the device considered in *Wise*, the kind of information capable of being collected is not such as to constitute "biographical core of personal information": *R. v. A.M.*, [2008] 1 S.C.R. 569, 2008 CarswellOnt 2257. Section 492.1 authorized only the collection of "transmission data" and specifically provided that the data collected must not reveal the substance, meaning or purpose of any communication. In all the circumstances, the standard of reasonable suspicion was held to be constitutionally sound.

A number recorder warrant was not capable of revealing the identity of the person using the telephone, or whether a conversation even occurred: *R. v. Mahmood*, 2011 ONCA 693, 2011 CarswellOnt 12654. As such, the collection of the numbers called by an individual (or that call him) did not constitute personal information that was so private as to require the higher standard of reasonable grounds to believe: *R. v. Cody*, 2007 QCCA 1276, 2007 CarswellQue 8780.

Finally, the production order in this case permitted police to obtain the content of the accused's text messages for a period of four months. There was no question that there was a high expectation of privacy in the content of the text messages. In this case, the standard of reasonable grounds to believe had to apply: *R. v. Fedossenko*, 2014 ABCA 314, 2014 CarswellAlta 1704; leave to appeal refused [2014] S.C.C.A. No. 516, 2015 CarswellAlta 502. As it existed at the time of these offences, s. 487.012 violated s. 8 of the *Charter*.

Commentary: The amendments to the *Criminal Code* in 2014 raised the standard of proof required to obtain a cell phone tracking warrant to "reasonable grounds to believe" and as such, this decision will be of value only to those warrants issued prior to the amendments. All three warrants concerned "informational privacy"; for these types of investigative techniques, the s. 8 analysis must begin with the nature of the information capable of being

obtained via the authorization: *R. v. Tessling*, 2004 SCC 67, 2004 CarswellOnt 4351. In this case, the application judge found that the technology authorized by the tracking warrants in this case did not disclose information relating to the biographical core of the individual and as such, justified the lower standard of reasonable suspicion. Had the evidence on the application been different, and the technology capable of disclosing more detailed private information, the result may well have been different.

R. v. Grandison, 2016 BCSC 1712, 2016 CarswellBC 2600 (B.C. S.C.)

4. Fruits of Illegal Cell Phone Search Excised from ITO; Evidence Not Excluded

Facts: On December 8, 2015, members of the Durham Regional Police received a tip from a confidential informant that the accused was in possession of a handgun. Acting on the tip, police began surveillance of the accused, and followed him to various locations. Eventually, he picked up a woman and travelled to a parking lot. Officers observed the accused and his passenger putting their heads down towards the center-console area of the vehicle. Based on his experience, the officer concluded that the two were using drugs, and concluded he had reasonable grounds to arrest both for possession of controlled substances. The accused was arrested, and found to be in possession of drug paraphernalia as well as white powder (cocaine) in dime-sized bags.

One of the officers observed a cell phone in the foot-well of the driver's seat. He conducted a cursory search of the cell phone for evidence in relation to the information provided by the informant that the accused was in possession of a firearm. He did so as a result of his experience that persons in possession of a firearm often take "trophy pics" of their guns. He viewed the photos folder and viewed several pictures of guns, some of which included the female passenger.

After these events, officers swore an Information to Obtain ("ITO") for two search warrants: one for the residence of the accused, and one for the residence of the female passenger. The ITO included information from the confidential informant, information about the arrests, and the images from the cell phone. On execution of the warrant, officer seized marihuana, and a firearm.

At trial, the accused argued the warrantless search of his cell phone, and the subsequent warranted searches of his home, constituted violations of his rights under s. 8 of the *Charter* and sought the exclusion of the evidence obtained. The Crown conceded the cell phone search was unconstitutional and agreed to the excision of the information obtained as a result of that search from the ITO. The Crown conceded that the ITO as disclosed to the defence in a heavily redacted format could not support the issuance of the authorization, and sought to rely on the procedure known as "Step Six" in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CarswellOnt 119. (See also: *R. v. Crevier*, 2015 ONCA 619, 2015 CarswellOnt 15760.)

Held: Application dismissed.

The role of a reviewing justice is to determine whether, based on the information available to the issuing justice, as amplified on review, the ITO discloses reasonable and probable grounds for the which the warrant could have issued: *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 CarswellBC 2440. After excising the fruits of the cell phone search, the ITO consisted of information received from a confidential informant and information obtained via surveillance of the accused. Where information is obtained from a confidential informant, the analysis must consider three factors: whether the information provided is compelling; whether police were able to sufficiently corroborate that information, and; whether the source is credible: *R. v. Debot*, [1989] 2 S.C.R. 1140, 1989 CarswellOnt 111.

The trial judge found that the information provided by the confidential informant was compelling and credible. The informant provided specific, first-hand information of serious criminal activity. The informant was credible. The ITO

contained the financial motivation for the informant to provide information to police, which was in itself capable of enhancing the informant's credibility: *R. v. Nascimento*, [2014] O.J. No. 2470, 2014 CarswellOnt 6942 (S.C.J.). Moreover, the ITO demonstrated that the informant had a history of providing reliable information to police, including that on six occasions the information provided by the informant resulted in arrests and the seizure of contraband. While police were only able to corroborate basic biographical details about the accused, it was not necessary to corroborate every detail provided by an informant, or confirm the criminal activity in question: *R. v. Caissey*, [2008] 3 S.C.R. 451, 2008 CarswellAlta 1769. In this case, the limited confirmatory evidence was held to be sufficient, given the compelling quality of the information received and the positive reliability of the informant. In all the circumstances, the trial judge found that the unredacted ITO provided sufficient grounds for the warrant to have issued, such that there was no breach of s. 8.

In the event that the warrant should not have issued, such that the search of the accused's home was without prior authorization and a breach of s. 8, the evidence ought to be excluded under s. 24(2). Consideration of the first factor in *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 CarswellOnt 4104, the seriousness of the *Charter*-infringing conduct, demands the exclusion of the evidence. The decision of the Supreme Court of Canada in *R. v. Fearon*, 2014 SCC 77, 2014 CarswellOnt 17202 was issued a full year prior to the search in this case. There was simply no permissible, constitutionally compliant justification for the cell phone search conducted. The accused had a high expectation of privacy in his residence, also favoring the exclusion of the evidence. In all the circumstances, if there had been a breach of s. 8, the evidence would have been excluded.

Commentary: This case contains a succinct summary of the procedures to be followed when the Crown relies on "step six" from *Garofoli*: see *R. v. Crevier*, 2015 ONCA 619, 2015 CarswellOnt 15760. The case also provides a succinct summary of the factors from *Debot* regarding reliance in ITOs upon information from confidential informants. Here, weakness in one area (lack of any meaningful corroboration) was shored up by considerable strength in two other areas (compelling nature of the tip and credibility of the informer due to past reliability and reliance).

R. v. Moreau, 2016 ONCJ 564, 2016 CarswellOnt 14482 (Ont. C.J.)

5. Attempt to Clarify Accused's Response to Right to Counsel did Not Contravene "as Soon as Practicable" Requirement

Facts: The accused was stopped by a police officer who was part of a drinking and driving Checkstop program. The accused exhibited signs of alcohol consumption, although he denied that he had been drinking. The officer made the roadside demand and administered the roadside test. The accused registered a "Fail". The officer arrested the accused for impaired driving, put him in a police vehicle, and read him his rights to counsel. When asked if he wanted to call a lawyer, the accused said "Not at . . . not at a time." The officer thought that the response was other than an unequivocal yes or no. He made the breath demand, arranged for the accused's car to be towed, and then drove the accused to a Checkstop bus. They arrived at 2:06 a.m.

At the bus, the officer opened the door to one of the telephone booths and told the accused to get in and phone his lawyer. The accused said, "Not at a time" and sat down on a chair outside the booth. The officer made his notes, then read the accused a formal waiver and asked if he wanted to waive his right to call a lawyer. The accused said, "Not at a time. Not at this time. Not at any time." The officer wanted a definitive yes or no answer before he proceeded to take breath samples. Absent an unequivocal answer, he felt that the accused should be given an opportunity to call a lawyer. At that point, however, both of the telephone booths were occupied.

At 2:25 a.m., when there was a telephone booth available, the officer put the accused in it. He pointed out to the accused the Legal Aid telephone number on the wall and the telephone book on a shelf. He told the accused to knock on the door when he was done, and then shut the door to the booth. The accused remained seated on the

floor. He made no attempt to pick up the telephone or look at the telephone book.

At 2:34 a.m. the officer opened the door of the telephone booth. The officer told the accused that if he was not going to be diligent about contacting a lawyer, he would proceed with the investigation. The officer closed the door again. The accused remained seated on the floor as before.

At 2:39 a.m. the accused knocked on the door. When the officer opened the door, the accused said, “Can we do the test now?” The officer said that the breath technician was not quite ready, and closed the door.

At 2:40 a.m. the breath technician told the arresting officer that he was ready to proceed with the test. The arresting officer brought the accused from the telephone booth to the rear of the bus, where the breath technician administered the breath test. The accused spit into the first mouthpiece, and declined to provide a sample of breath into a second mouthpiece. He was charged with refusal to provide a breath sample.

At his trial, the accused argued that he should be acquitted because the first breath sample was not taken as soon as practicable.

Held: Accused found guilty.

The trial judge noted that the “as soon as practicable” requirement in s. 254(3)(a) of the *Criminal Code* is an essential pre-condition of a lawful breath demand. In this case, the accused never asserted his right to counsel. His response, “Not at a time” was not in law an assertion of his right to counsel. There was no duty on the arresting officer to give the accused a reasonable opportunity to contact counsel, or to read him a formal waiver. The accused could have been taken to the breath technician when he and the arresting officer arrived on the bus at 2:06 a.m. Instead, the officer did not put the accused before the breath technician until 2:40 a.m. In the interim, the officer wasted approximately half an hour attempting to provide the accused with an opportunity to contact counsel and reading him a formal waiver, when he had no duty in law to do so.

Nonetheless, the trial judge rejected the defence argument that the delay in taking the first breath sample was unreasonable. The delay was not caused by any deliberate misconduct on the part of the investigating officer. At the time, the law concerning an accused’s response, such as “Not at this time” when asked whether he wished to speak to a lawyer, was not settled. Some courts had held that such a response was ambiguous and required a formal waiver by the accused. Subsequently, the law was clarified and rendered those cases wrongly decided. The officer, however, did what the law required at the time. His mistake in law was made in good faith, and for the benefit of the accused. The officer could not be faulted.

The trial judge concluded that there was a reasonable explanation for the delay in attempting to obtain the first breath sample. The attempt was made as soon as practicable.

Commentary: The decision the trial judge relied on as support for his assertion that the law had been clarified was *R. v. Owens*, 2015 ONCA 652, 2015 CarswellOnt 14602. In that case, the accused said when asked whether he wished to call a lawyer “now”, “No, not right now”, and followed it subsequently with the comment, “No, I have nothing to hide”. The trial judge in that case found that the accused had not invoked his right to counsel, and so the issue of waiver did not arise. The Court of Appeal for Ontario noted that the question of whether a detainee asserted a desire to consult with counsel is essentially a finding of fact, that the trial judge made a factual finding that the accused did not invoke the right to counsel, and that finding was entitled to deference. The Court of Appeal did not suggest, however, that it was establishing any general principle concerning police duties in response to arguably ambiguous answers by detainees about the exercise of their rights to counsel. For that reason, the appellate decision should be applied cautiously.

R. v. Gregory, 2016 ABPC 216, 2016 CarswellAlta 1839 (Alta. Prov. Ct.)

6. No Standing to Challenge Search of Abandoned Backpack

Facts: Transit officers conducting routine fare inspections of passengers on a rapid transit system came upon the accused. She had a backpack slung over her shoulder. She was unable to produce proof of payment, and was asked to leave the train. She did so, taking the backpack with her. The transit officer then asked her for her name and date of birth, so that a ticket could be prepared and served on her. The accused lied about her identity, and refused to give truthful information. Only after she was arrested and handcuffed did she finally give her true name and date of birth. The transit officer made inquiries, and discovered that there were outstanding warrants for the accused's arrest.

The officers intended that the backpack would go with the accused to the police station, where it would be inventoried and stored until her release. However, a friend of the accused tried to collect the backpack, and kept circling around it even after being told to leave. In response, the officers secured the bag. One of them thought that the bag was heavy and made a clunking noise when set down. It looked to him as though something was poking through it from the inside. He looked inside the bag and discovered a loaded, sawed-off shotgun and ammunition.

The accused was charged with various weapons offences. At trial, she sought the exclusion of the shotgun and the ammunition on the ground that her *Charter* s. 8 right was breached by the warrantless search. She testified on the *voir dire* that before boarding the train, she found the backpack near the train platform. She looked inside it. When she saw the gun and the ammunition, she decided to keep the bag, take it on the train with her, and turn it over to the authorities after calling them from a friend's hotel room.

Held: Application dismissed.

The trial judge concluded that the accused did not have standing to assert a s. 8 breach in respect of the search of the backpack. He applied the *Edwards* analysis. Even based on the accused's testimony, she did not have a reasonable expectation of privacy in the backpack that she said she found abandoned just a few minutes before she was stopped by the transit officers. She was only a very temporary safe-keeper of the bag, until it could be turned over to the authorities due to her concern for public safety. She held onto it only to prevent it from falling into the hands of others. There was no historical use of the backpack by her. The trial judge did not accept that a person who found the backpack could regulate access to it, unless to keep it away from known criminals or irresponsible citizens. He found that there could be no subjective expectation of privacy in an article by someone who wanted only to turn it in to the authorities.

Commentary: This decision illustrates the difficulty that an accused has when he or she seeks to argue a s. 8 breach arising from the search of a place or thing that is asserted to belong to, or in respect of which access is controlled by, a third party. In this case, the short time span from the finding of the backpack by the accused to its search made it particularly difficult for her to establish a sufficient connection to it to ground a reasonable expectation of privacy in it.

R. v. Medicine Traveller, 2016 ABPC 217, 2016 CarswellAlta 1812 (Alta. Prov. Ct.)

7. Absence of Comprehensive Police Notes did Not Justify Stay of Proceedings

Facts: The accused was charged with drug and firearm offences. In the course of pre-trial applications, the lead investigator gave detailed evidence about the accused's movements on the day of his arrest. This included several suspicious meetings, the last of which prompted the arrest. The lead investigator, as well as members of

the surveillance team that watched the accused, testified, however, that they had not made any detailed notes of the day's events.

The defence sought a stay of proceedings, arguing that the failure of the police to make notes breached the accused's *Charter* s. 7 right to make full answer and defence. The defence contended that a reliable record of what occurred before the arrest was crucial to confirm that the investigating officer believed that he had reasonable and probable grounds to direct the accused's arrest, and that the absence of a sufficient contemporaneous record of the events leading up to the accused's arrest would not permit effective cross-examination of the officer.

Held: Application dismissed.

The trial judge was not satisfied that the lack of contemporaneous notes precluded the accused from making full answer and defence or rendered the trial unfair such that there was a s. 7 breach. He went on to say that even if he found a s. 7 breach, he would not order a stay of proceedings. While he found that it was no accident that the investigating officer did not make notes of the accused's activities on the day of the arrest, he was not persuaded that the investigating officer did so with the intention of frustrating the legal process. This was not one of the clearest of cases demanding a stay, nor would there be irreparable harm or prejudice to the legal system if the trial proceeded.

The trial judge accepted the alternative submission of the defence that there was a breach of the accused's s. 8 right. The lack of notes undermined the reliability of the investigating officer's testimony as to his grounds for directing the accused's arrest. The trial judge was unable to accept the reliability of the officer's testimony about the accused's suspicious meetings prior to the arrest. He was not satisfied that the Crown established the police had reasonable and probable grounds for the accused's arrest. As a result, he found that the police breached the accused's s. 8 right when they searched him following his arrest.

Commentary: The trial judge noted that he had not been provided with any cases that suggested that a police officer's failure to make adequate notes automatically breached the accused's s. 7 right to make full answer and defence. However, the decision sets out a series of helpful references to the importance of police officers' notes, and the adverse inferences that may arise when officers fail to make comprehensive notes.

R. v. Whitton, 2016 BCSC 1799, 2016 CarswellBC 2735 (B.C. S.C.)

8. Breath Test Results Excluded on* Grant *Analysis

Facts: A police officer noticed a vehicle weaving within its lane, and partially crossing over into another lane. When the officer drove up alongside the vehicle, he saw the accused at the wheel and ending a cell phone call. He stopped the vehicle and went to the passenger side window, which the accused rolled down. He observed that she had red glassy eyes. She told him that she had just had an argument with someone and was very upset about it. She looked as though she had been crying or was just starting to cry. In answer to a question, she said that she had consumed alcohol earlier. The officer did not clarify what she meant by that response.

Because the accused had a large dog in the car, the officer did not stick his head inside the vehicle. He did not smell any odour of alcohol coming from the accused or the car. He did not note any problems with the accused's speech, or her ability to understand him or provide him with her documents. He made the approved screening device demand based on her admission of alcohol consumption, her red, glassy eyes, and the weaving of the vehicle. The accused registered a "Fail". She was taken to a police station where breath tests were administered. Her readings were 190 milligrams of alcohol in 100 millilitres of blood.

At trial, she argued that her s. 8 *Charter* right was infringed because the officer did not have the reasonable suspicion necessary to make the screening device demand, and that the breath test results should be excluded.

Held: Application granted and breath test results excluded.

The trial judge found that the officer did not subjectively have a reasonable suspicion that the accused had alcohol in her body. Further, any such suspicion would not have been objectively reasonable. There was no basis for an opinion that the weaving of the accused's vehicle was more consistent with impairment than with distracted driving. The red glassy eyes were consistent with recent crying or with impairment. The officer did not smell an odour of alcohol. He should have clarified the accused's answer that she had consumed alcohol earlier. He did not have grounds to make the approved screening device demand. In the absence of its result, he did not have grounds for the intoxilyzer demand. There was a breach of s. 8.

Turning to s. 24(2), the trial judge found that the *Charter* breach was serious. The proper use of the approved screening device is central to the constitutional integrity of the two-step legislative scheme designed to combat drinking and driving offences. The officer made the approved screening device demand without the requisite suspicion. While the ensuing breath test was minimally intrusive, the accused was kept in police custody for two hours. Her liberty was interfered with to such a degree that the second branch of the *Grant* analysis also weighed in favour of exclusion of the breath test results. The trial judge acknowledged that given the high blood alcohol concentration readings, and the reliability of the breath test results, the truth seeking function would be better served by admission of the evidence than by its exclusion. He concluded, however, that the long term interests of the administration of justice required exclusion of the evidence.

Commentary: This is an excellent example of a case that likely would have had a very different result under the s. 24(2) analysis prior to the *Grant* "recalibration". Instead, the trial judge's approach to the first two *Grant* factors resulted in the exclusion of blood alcohol concentration readings that he acknowledged were high, that constituted reliable evidence, and that resulted from a minimally intrusive test.

R. v. Eastwood, 2016 ONCJ 583, 2016 CarswellOnt 15066 (Ont. C.J.)

9. Man Found Guilty of Internet Luring Not Entrapped

Facts: The accused entered an Internet chat room. So did a Peel Regional Police officer. The accused's username was "respect_power". The officer's name was "mia_aqt98". The officer testified that her handle was meant to convey that her name was Mia, she was a cutie, and born in 1998. This would have made her 14 years of age at the time of the offence in 2012.

The accused started the communication. He said "hi" and "asl", meaning age, sex, and location? Mia said "14, f and Brampton". She soon reiterated that she was 14 years old. The accused introduced sexual topics to the conversation, including whether Mia had been sexually involved with guys and whether she masturbated. After three conversations, they agreed to meet at Mia's apartment building. When the accused arrived he was arrested for Internet luring.

After being found guilty, the accused applied for a stay of proceedings on the basis of entrapment. He argued that the police had no prior reasonable suspicion that he was engaged in criminal activity and that the officer was not engaged in the course of *bona fide* investigative activity. He argued that the police improperly created an opportunity to commit the crime and had engaged in random virtue testing. While the applicant initiated the conversation, Mia provided her age and guilt flowed from the accused taking up the "offered opportunity to communicate with responses prohibited by s. 172.1(1)(b)."

Held: The application was dismissed.

Mr. Justice Durno reviewed the law of entrapment, including the situations in which it can arise: (a) where the police provide an opportunity to commit a crime without first having reasonable suspicion about the target or where an offer is not made in the course of a *bona fide* inquiry; or (b) in circumstances where the police have reasonable suspicion or are acting in the course of a *bona fide* inquiry, but they go beyond simply providing an opportunity to commit the offence: *R. v. Mack*, [1988] 2 S.C.R. 903, 1988 CarswellBC 701.

The onus is on the accused to establish entrapment on a balance of probabilities. In considering whether an accused has been entrapped, the police are to be given "considerable latitude" in enforcing the criminal law: *Mack*, at para. 17.

Justice Durno emphasized the importance of considering the context in which entrapment is alleged. He said "leeway may be granted to the police methods directed at uncovering criminal conduct that is simply not capable of being detected through traditional law enforcement techniques." It is not improper to offer an opportunity to people reasonably suspected of being involved in criminal activity or to people at locations suspected of being used for criminal activity: *Mack*, at para. 115. When either of these preconditions prevail, concerns over random virtue testing fade.

Even where the preconditions prevail, the court must remain mindful of the distinction between providing an opportunity to an individual and the state creating a crime in order to prosecute. The latter involves police behaviour that will not be countenanced.

The court draws upon *R. v. Levigne*, [2010] 2 S.C.R. 3, 2010 CarswellAlta 1348 in characterizing the Internet as a place in which child predators lurk and a place where "lurking predators can be expected to take the bait". The Internet is an area where criminal activity, particularly that related to child luring, takes place. The police are expected to undertake *bona fide* inquiries targeting those who may be involved in this type of conduct.

While the police did not have reason to suspect the accused when the chat began, simply by providing her age to the accused upon his request, the officer did not give the accused an opportunity to commit the offence. It was the accused who asked "asl" (age, sex, location) and the officer who simply answered "14, f, and Brampton". It is unlike a situation where an undercover officer calls an accused and asks for drugs. In addition, it was the accused that turned the conversation to sexual matters. He was clearly leading the conversation.

In the end, Durno J. was not persuaded on a balance of probabilities that the officer had created the opportunity to commit Internet luring simply by answering that she was 14 years of age.

The trial judge also reached the conclusion that the officer was engaged in a *bona fide* inquiry when she chatted with the accused on-line. Criminal activity is reasonably expected to take place in chat rooms and random virtue testing is not of concern where the police target a location where a particular type of criminal activity is likely occurring. The police may present anyone in such locations with the "opportunity" to commit the particular targeted activity known to be associated with the location.

Internet chat rooms are places where luring is likely occurring. Relying upon *Levigne*, Durno J. found that the legislation governing child luring is designed for the very purpose of capturing predatory adults who use the Internet to attract vulnerable youth. While the Internet offers anonymity to the child predator, the Supreme Court has recognized that the same anonymity allows the police, posing as children, to enter chat rooms "where lurking predators can be expected to take the bait": *Levigne*, at para. 25.

The application was dismissed.

Commentary: This ruling offers an excellent overview of the general law of entrapment and its specific application to the Internet context. In particular, it provides a practical approach to the application of the doctrine of entrapment in the child luring context. The judgment makes clear that while the police cannot engage in random virtue testing, even on the Internet, this does not mean that the Internet must be left as a police-free zone. Being a place where child predators gather and do their bidding, the judgment makes the practical observation that it must be open to the exercise of proper police powers.

As such, even if the police do not have a reasonable suspicion in respect to a particular individual, a reasonable suspicion that the Internet is being used for a particular purpose can give rise to a *bona fide* inquiry justifying the police providing an opportunity to lure: *R. v. Clothier* (2011), 266 C.C.C. (3d) 19, 2011 CarswellOnt 112 (Ont. C.A.) at paras. 18-19. Simply adopting a username with a particular date of birth, or holding oneself out to be a particular age (when asked), does not create an inducement to commit a crime.

R. v. Ghotra, 2016 ONSC 5675, 2016 CarswellOnt 14383 (Ont. S.C.J.)

10. Breach of Section 8 When Police Search Home with Child Protection Workers

Facts: The Department of Child, Youth and Family Services received a telephone call reporting that a one-year-old child may be in need of protection. The caller said that the mother's partner had a grow-op in the home where the child was living. The social worker contacted the RCMP and asked that she and a colleague be accompanied to the home for the Department's investigation. An RCMP officer drove them to the home in a marked police cruiser and attended at the door.

Upon entering the home, the social worker testified that she smelled a strong odour and told the mother that she believed it was marihuana. The worker did not believe the mother's denial and said that she wanted to look around the house. When Mr. Notfall protested and asked if they had a warrant, she told him that she could search without one because she was investigating a child protection matter. The officer confirmed the authority for the search. One of the workers and the officer attended to the bedroom and found marihuana plants and a firearm in the cupboard.

The officer confirmed the strong odour of marihuana, acknowledging that he smelled it as soon as he entered the home. He claimed that his authority to go into the bedroom rested in the fact that he was merely assisting the social workers who were investigating a child protection referral under their legislation.

Following the discovery, the accused was arrested. The child was removed from the home. The police obtained a search warrant and came back to seize the evidence.

The trial judge concluded that Mr. Notfall's s. 8 *Charter* rights had not been breached. He concluded that the *Children and Youth Care and Protection Act* requires an investigation in circumstances where a complaint such as this is received. They could not fulfill their mandate without looking to see if anything that could compromise the child's safety was present. The police were in attendance merely to assist the Department in fulfilling its mandate. When the grow-op was discovered, the police retreated and obtained a warrant.

Mr. Notfall was convicted and appealed.

Held: Justice Welsh, for the court, found that the trial judge had erred in failing to find a s. 8 breach.

While the court accepted that the police had lawfully entered the home, and could have lawfully stayed in the home until the social workers completed their investigation, the search of the residence crossed the line.

The smell of marihuana is a factor that can be taken into account in assessing police conduct under s. 8 of the

Charter. While the smell of marihuana in the home was a sufficient basis for the social workers to continue with their investigation, the court observed that it is unclear whether the social workers should have obtained a warrant to proceed further into the home. That question was left for another day.

As for the police officer, he had two separate mandates: (1) protecting the social workers; and (2) investigating a possible offence. Welsh J.A. found that the power to protect could not be used to justify an investigation without warrant. When the officer smelled the marihuana he should have proceeded in a manner "consistent with both his mandates by asking all present to remain in the kitchen while he took action to obtain a search warrant".

The court notes that a telewarrant could have been obtained. By failing to proceed in this way, Mr. Notfall's s. 8 rights were breached. Despite the breach, the evidence was not excluded under s. 24(2). The appeal was dismissed.

Commentary: This case highlights the tension that frequently confronts police officers requested to assist with protecting those who have to enter residential addresses. The police could not say no to the Department when asked to attend for purposes of protection. Indeed, one might think it a dereliction of duty had they refused to go. Once in the home, they were confronted with evidence pointing toward a possible criminal offence. This evidence corroborated the information that had already been provided to the Department.

There are a host of constitutional issues embedded in the practical solution offered by the court. The suggestion of obtaining a telewarrant is a good one, but necessarily involves detaining people in their own home or forcing them to leave the home. While an investigative detention can ensue in circumstances where the police have reasonable grounds to suspect an offence is being committed, it is intended to be fleeting in nature. Assuming a telewarrant could be obtained in short order, an investigative detention may not lead to a s. 9 breach. If it took much time, as it often does (at least in some parts of the country), s. 9 *Charter* issues may loom.

It will be interesting to see how this issue evolves.

R. v. Noftall, 2016 NLCA 48, 2016 CarswellNfld 371 (N.L. C.A.)

11. Man Selling Drugs to Undercover Officers Not Entrapped

Facts: The police had a basis to suspect that cocaine was being trafficked at the Rogues Tavern in Prince Albert. Officers attended in their undercover capacity. Two of them struck up a conversation with Mr. Franc. They engaged in a discussion about marihuana being smoked on the patio and Mr. Franc offered them a marihuana pipe. One of the officers hinted that they wanted another type of narcotic and Mr. Franc said he could get them two grams of cocaine at $100 per gram.

Mr. Franc told them that the cocaine had arrived and they all left the tavern and entered a car. A man in the car gave them a gram of cocaine and took $200. They all exchanged numbers. The officers then exited the car.

Mr. Franc was charged with trafficking in cocaine.

Mr. Franc was found guilty but the proceedings were stayed because the trial judge found that he had been entrapped by the police. The trial judge focused on the fact that the Crown had failed to satisfy him that the police held a reasonable suspicion that the tavern was a physical location where drug trafficking activity was taking place. He entered a stay of proceedings.

The Crown appealed.

Held: The appeal was allowed, Mr. Franc was convicted and the matter was remitted to the trial judge for

sentencing.

The court reviewed *R. v. Mack*, [1988] 2 S.C.R. 903, 1988 CarswellBC 701 and the test for determining when the police may lawfully provide an opportunity to an individual to commit a crime. Where the police have a reasonable suspicion that an individual is committing a crime, they may offer an opportunity. In addition, where the police reasonably suspect that certain criminal activity is occurring at a particular location, it is permissible to provide opportunities to people associated with that location. In relation to this latter context, the police may only offer opportunities to people in the course of a *bona fide* investigation and must not engage in random virtue testing.

This rule was summarized in *R. v. Barnes*, [1991] 1 S.C.R. 449, 1991 CarswellBC 11, where the Court held that "the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion that he or she is already engaged in the particular criminal activity. An exception to this rule arises when the police undertake a *bona fide* investigation directed at an area where it is reasonably suspected that criminal activity is occurring."

No one suggested that Mr. Franc aroused suspicion. This case was about whether the police reasonably suspected that the bar was a location where drug trafficking was occurring. The trial judge was concerned with the officers' lack of specific knowledge about drug trafficking at the location. The trial judge erred in requiring the Crown to prove the *probability* that drug trafficking was taking place at the tavern. The question was whether Mr. Franc had demonstrated that the evidence fell short of establishing the police had a reasonable suspicion trafficking was occurring at that location.

A suspicion is a lower threshold than a belief. In this case, the police clearly had a reasonable suspicion that drug trafficking was taking place and, as such, they were entitled to offer an opportunity to a person associated to that location as they were involved in a *bona fide* investigation.

Commentary: This judgment provides a nice review of the law on entrapment. It emphasizes the important point that the police do not need to have reasonable grounds to believe that a location is being used for a particular crime. A reasonable suspicion will suffice. While the trial judge must be satisfied on a balance of probabilities that the accused was entrapped, this threshold test is not to be applied to the justification for offering the opportunity in the first place.

R. v. Franc, 2016 SKCA 129, 2016 CarswellSask 621 (Sask. C.A.)

12. Traffic Stop Leads to Lawful Arrest

Facts: A police officer saw someone with whom he was familiar in the passenger's seat of a vehicle. The officer did not recognize the driver. He knew that the passenger had been involved in a variety of criminal offences in the area. The car was a "Cirrus" and easy to steal. The officer testified that they get stolen "quite a bit". There was nothing about the driving that caused concern. Moreover, the officer ran a record check and the vehicle did not come back as stolen.

Despite this fact, he pulled the car over "to see what Mr. Fearon was up to" and to check to see if the vehicle had been stolen. When the appellant rolled down the window, the officer smelled marihuana. The driver was arrested for possession of a controlled substance and was asked to step out of the vehicle. A spitball was seen on the seat and he was arrested for that as well. A search incident to arrest revealed marihuana and crack cocaine in his socks. Just prior to the strip search another bag of drugs was handed over. Then a similar bag was found in the appellant's anus.

The trial judge found the searches were lawful. He concluded that the type of vehicle being driven was easily

stolen and does not always show up on the database right away. In addition, the officer stopped the vehicle to "check up" on the passenger. It was considered a "legitimate and lawful stop" under the *Traffic Safety Act*, R.S.A. 2000, c. T-6.

Mr. Ali was convicted. He appealed.

Held: The appeal was dismissed. The Court relied heavily upon *R. v. Nolet*, 2010 SCC 24, 2010 CarswellSask 368. Recognizing that a random vehicle stop on the highway is by definition an arbitrary detention, justified under s. 1 only where the police act within their limited powers for purposes of vehicle stops, the Court focused on those powers.

The appellant argued that the officer was really engaged in a disguised criminal investigation and without grounds to stop the vehicle. In rejecting this submission, the Court deferred to the trial judge's finding of fact. He found that there was a dual purpose for the stop, to check the ownership of the vehicle and to check on the passenger. The former was a valid reason to stop the vehicle and no reviewable error was shown.

Section 166(1) of the Act allows an officer to stop a vehicle to check for documentation in order to administer and enforce the Act. There need not be any form of suspicion about illegal activity before the police can engage these powers: *R. v. Dhuna*, 2009 ABCA 103, 2009 CarswellAlta 367. As long as the reason for the stop is rooted in the statute and is "reasonable and can be clearly expressed", the stop will be lawful: *R. v. Wilson*, [1990] 1 S.C.R. 1291, 1990 CarswellAlta 63.

Stopping the vehicle to check for ownership meets the first part of the *Nolet* test, requiring that the search is authorized by law. Once a stop is authorized by law, unrelated criminal activity that may be discovered in the context of the lawful stop is not of constitutional concern.

Here, the initial stop was lawful. The interaction at the window was lawful. Having Mr. Ali step out of the vehicle was lawful. Once lawfully arrested, the subsequent searches were lawful. This chain of investigative activity was constitutionally compliant.

Commentary: This judgment provides a brief glimpse into the constitutional issues engaged in average traffic stops. It shows the power of provincial legislation granting the police broad powers to stop vehicles without the need for reasonable grounds to suspect or believe.

The key is that the police not get ahead of themselves in terms of infringing on other constitutional interests unless grounds present themselves. In this case, the grounds presented themselves incrementally and the police only acted as they arose. The lawful stop led to the lawful engagement, led to the lawful arrest, led to the lawful search of the car, led to the lawful search incident to arrest and ultimately the lawful strip search.

R. v. Ali, 2016 ABCA 261, 2016 CarswellAlta 1688 (Alta. C.A.)

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