Case Name:

R. v. Calderon

Between
Her Majesty the Queen, and
Ponce Franklin Ernesto Calderon and Michael Stalas, defendants

[2002] O.J. No. 2583
Court File No. 01-0107

Ontario Superior Court of Justice
Thunder Bay, Ontario
Kurisko J.

Heard: April 2-5, 2002.
Judgment: June 10, 2002.
(112 paras.)

Counsel:

Fawzia Saeed-Cockar, for the Crown.
Joseph A. Neuberger, for the defendant, Ponce Franklin Ernesto Calderon.
David S. Rose and Joseph LaLeggia, for the defendant, Michael Stalas.

¶ 1 **KURISKO J.**:— On September 22, 2000 at 3:06 a.m. a late model Lincoln Townhouse with British Columbia licence plates was stopped while traveling 10 kilometers per hour (kph) over the speed limit in an unpopulated sector of Trans-Canada Highway 11/17 near Nipigon in Northwestern Ontario. Suspecting there might be drugs in the trunk, Ontario Provincial Police (OPP) officer William Osborne (Osborne) asked the driver to step outside. He then asked for permission to search the vehicle and the driver refused. Osborne went around to the passenger door and asked the passenger for permission to search. The passenger said "Sure, go ahead and look". As the passenger exited the car Osborne detected a fresh smell of cannabis marijuana (marijuana) through the open door. He started to search inside the vehicle but before anything was found the passenger clearly revoked his permission. However, Osborne continued to search and discovered two duffle bags in the trunk containing 22.04 pounds of marijuana. The driver and passenger were arrested at 3:17 a.m. and charged with possession of marijuana for the purpose of trafficking contrary to ss. 5(2) of the Controlled Drug and Substances Act. They were then read their right to counsel. A speeding ticket was never issued. The street value of the marijuana by the gram is $200,000.

¶ 2 These seemingly simple and straightforward events give rise to a tangled web of complex questions and issues under the Canadian Charter of Rights and Freedoms (Charter). Counsel for the defendants say the stop for speeding was an excuse to conduct a drug investigation that had the effect of arbitrary detention contrary to s. 9. The failure to immediately advise the defendants of their right to retain and instruct counsel was a violation of s. 10(b). The search of the Lincoln that preceded the discovery of the marijuana was unlawful and therefore unreasonable, contrary to s. 8. Evidence of the marijuana would bring the administration of justice into disrepute and must be excluded pursuant to s. 24(2) of the Charter.

¶ 3 The Crown takes the position there were no Charter violations. Osborne had articulable cause justifying the request for permission to search the car. During the brief period of investigative detention the obligation to advise the defendants of the right to retain counsel was not operative. The smell of marijuana was discovered

when the passenger was exiting the vehicle, i.e. before the search started. The search was consensual. Discovery of the marijuana was inevitable because if the defendants had been informed and then exercised their right to counsel at the scene of the stop, the police would have smelled the marijuana in the process of securing the Lincoln while the defendants called counsel from the detachment. Even if there was a Charter violation (which is denied) the fairness of the trial would not be affected by the admission of the marijuana which is real, non-conscripted evidence critical to proof of the extremely serious charge. Exclusion of that evidence could bring the administration of justice into disrepute.

¶ 4 Prior to the commencement of the trial counsel for the defendants filed a Notice of Application for an order excluding the evidence of the marijuana pursuant to subsection 24(2) of the Charter. At the opening of trial all counsel agreed to hold a voir dire to determine the Application. They further agreed that the evidence would consist of the oral testimony of Osborne and the transcript of the Preliminary Hearing held on June 18, 2001. Counsel for the defendants stated that there is no issue as to the informational content of the Charter right to counsel, the continuity of the exhibits or proof of the analysis of marijuana.

Decision

¶ 5 The Application is dismissed. The evidence of the marijuana is admissible. In accordance with the agreement of counsel the evidence on the voir dire shall be applied on the trial. This constitutes the case for the Crown. The trial will continue on June 24, 2002 at 10 a.m.

¶ 6 Following is a summary of the detailed reasons for decision contained in PART I. Viewing the facts and circumstances as a whole rather than isolating each in turn, there was a constellation of objectively discernible facts that gave Osborne articulable cause to detain the defendants and then search the Lincoln, in particular the trunk. Thus, although the defendants were detained, their detention was not arbitrary and although their vehicle was searched, the search was not unreasonable. The right to counsel did not arise until the defendants were arrested after the marijuana was found in the trunk. They were then immediately advised of their right to retain and instruct counsel. Shortly thereafter they contacted counsel by telephone.

¶ 7 In PART II dealing with s. 24(2) of the Charter, I conclude that even if the breaches alleged by the defendants occurred, the administration of justice would be brought into disrepute by exclusion of real evidence essential to substantiate the extremely serious charge in this case.

PART I

Review of the evidence and findings of fact

¶ 8 Osborne testified that in 1997 he attended an OPP drug interdiction course (Drug Interdiction Course) at the Provincial Police Academy in Brampton. This Course dealt with drug courier "indicators" and other drug related matters. He was told that a large-size, late-model car is often rented by couriers to avoid the financial loss of forfeiture resulting from seizure of an expensive car. The large trunk provides additional space for contraband. Luggage in the back seat indicates the trunk is being used for something other than luggage (drugs). The presence of an open road map is consistent with the driver wanting to know where he is going. Fast food wrappers inside the car suggest the occupants are staying with the vehicle because of the drugs. Cell phones and pagers are used to keep in touch with clients for whom the courier is working.

¶ 9 On September 22, 2000 Osborne was on night shift patrol on Highway 11/17 accompanied by OPP Officer Scott Rome (Rome). About four kilometers west of Nipigon, Osborne saw a 2000 Lincoln Townhouse (Lincoln) with British Columbia licence plate AGB 613 traveling in an easterly direction. As he followed the vehicle he ran the Lincoln through the Canadian Police Information Centre (CPIC) and learned that the Lincoln was owned by Budget Car and Truck Rentals out of Richmond British Columbia (Budget). While doing this he noted that the Lincoln was traveling 10 kilometers per hour over the 90 kph speed limit.

¶ 10 The fact that the Lincoln was a large rental vehicle from British Columbia piqued Osborne's interest. In cross-examination he acknowledged that when he pulled the Lincoln over for speeding at 3:06 a.m. the far more

serious offence of a possible drug courier was in his mind.

¶ 11 Rome went to the passenger side where Calderon was seated and Osborne approached the driver, Stalas. While asking Stalas for his driver licence and the Budget Rental Agreement Osborne observed two duffle bags and an open road map on the back seat. Osborne testified that "with such a large trunk I could not understand why that baggage could not have been in the trunk." He saw food wrappers on the floor. There was a cell phone on the front seat between Stalas and Calderon. He noticed a pager. Osborne observed another cell phone in the glove compartment when it was opened to obtain the Budget Rental Agreement. Osborne said he thought the Lincoln was "an expensive vehicle to be renting for what the driver and the passenger looked to me."

¶ 12 Osborne said that since the Drug Interdiction Course he has conducted between ten and twenty investigations without success. He said the scenario in this case provided more indicators than any of his previous investigations. Acting on suspicion that Stalas and Calderon were "possible drug couriers" Osborne shifted the focus of the detention for speeding to an investigative detention for drugs.

¶ 13 Osborne asked Stalas to step outside the car so he could question him beyond Calderon's hearing range. Osborne asked Stalas why the luggage was in the back seat and whether there was anything in the trunk. He asked Stalas if he would mind opening the trunk. Stalas immediately replied that he knew his right to privacy and did not want the police looking in the car.

¶ 14 Osborne then looked at the Budget Rental Agreement and saw that the Lincoln was rented from September 16 to September 30 by Calderon for use only in British Columbia. He went to the passenger door and spoke to Calderon at very close range, with his nose inches from the open window and asked if there were any drugs, guns, or tobacco in the vehicle. Osborne then asked if Calderon would mind if he searched the car. Osborne told Calderon that if he let him look and anything illegal was found Calderon would be charged. He also told Calderon he could withdraw his consent at any time. (In meticulous cross-examination of Osborne on the subject of consent, Mr. Neuberger established that Osborne had provided the same information to Stalas.) Calderon said "Sure, go ahead and look" Osborne then asked Calderon to stand at the front of the Lincoln.

¶ 15 As Calderon was getting out of the car in response to this request Osborne detected an odour of marijuana from the interior of the car which he described as a "fresh smell". In cross-examination Osborne said it was a smell of fresh marijuana "meaning it's not burnt." Osborne said he was familiar with the smell of fresh marijuana from his training as well as coming into contact with marijuana while assisting other officers on numerous occasions over a period of seven years. Apart from saying this had occurred "quite often" he could not state the number of occasions.

¶ 16 Shortly after starting the search "for drugs and firearms" Osborne heard Stalas say "Don't let the police search the vehicle." At that point Calderon said "Okay, I don't want you searching now because my buddy knows more about the law." On the basis of the smell of fresh marijuana and the foregoing indicators Osborne said he concluded he had reasonable and probable grounds to arrest the defendants for possession of marijuana. Because he wanted to be one hundred per cent sure there was something in the car before doing so, he continued the search notwithstanding the withdrawal of permission by Calderon.

¶ 17 Osborne found a blue hardcover book above the visor on the driver's side showing the cost of plane tickets, airport taxes, lunches and taxis. Inside the blue book there were three different receipts for hotel rooms at Best Western in Vancouver covering the period between September 15 and September 18, 2000. Osborne did not find anything else. However, the smell of marijuana persisted. He pressed the trunk release button and went to the back of the car. There was a "very, very strong smell" of marijuana coming from the open trunk. Inside were two duffle bags. Osborne asked Stalas and Calderon who were then standing beside him if either of them owned the bags. Both said "No". Osborne asked the defendants if they would mind if he took a look inside since neither of them owned the bags and they both said "Sure, go ahead". Upon doing so he found 40 pounds of packaged marijuana.

¶ 18 Immediately thereafter at 3:17 a.m. the defendants were placed under arrest for the offence now before the court. They were promptly read the right to retain and instruct counsel without delay plus other standard warnings. The informational contents are not in issue. At 4:15 a.m. the defendants tried to phone counsel from the Detachment Office which was directly across the highway from where the Lincoln had been stopped. At 4:56 a.m. they spoke to duty counsel.

Articulable cause and investigative detention

¶ 19 When Osborne asked Stalas to step outside the Lincoln to question him beyond the earshot of Calderon, he suspected the defendants were possible drug couriers and decided to investigate. The Crown maintains there was articulable cause for this investigation. Before considering the Charter violations claimed by the defendants, the law regarding articulable cause and investigative detention will be reviewed.

Summary of articulable cause and investigative detention

¶ 20 Where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some "articulable cause" for the detention, namely a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The standard for reasonable suspicion is less demanding than that for reasonable belief and can arise from information that is less reliable than that required to show reasonable belief. A reasonable suspicion of the possibility of a crime is sufficient.

¶ 21 The courts must act as the gatekeeper regulating the police power for investigatory detention so that street detentions do not end up being non-stationhouse incommunicado arrests. Each case depends on its own facts. The constellation of facts and circumstances must be viewed as a whole, rather than isolating each in turn. The inquiry into the existence of an articulable cause is the first step in the determination of whether the detention was justified in the totality of the circumstances. The next step is to determine whether the investigatory action of the police (in this case, the search of the Lincoln) was justified and therefore reasonable.

¶ 22 If there is articulable cause that justifies the detention and the search, the detention is not arbitrary, the search is not unreasonable and there is no breach of s. 8 or s. 9 of the Charter.

Case law establishing principles of articulable cause and investigative detention

¶ 23 In determining whether or not a police officer's detention of a vehicle and its driver and passenger could be authorized by common law in the absence of statutory authority, Doherty J.A. said in R. v. Simpson [See Note 1 below]:

> In my opinion, where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some "articulable cause" for the detention. [See Note 2 below]

Note 1: (1993), 12 O.R. (3d) 182; for an excellent exposition of this case see the reasons of Ryan J.A. in R. v. Ferris (1997), 126 C.C.C. (3d) 298 (B.C.C.A.).

Note 2: Ibid at p. 200.

¶ 24 After reviewing the American authorities concerning the constitutionality of investigative detentions Doherty J.A. formulated the following test for articulable cause:

> These cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The requirement that the facts must meet an objectively discernible

> standard is recognized in connection with the arrest power: R. v. Storrey, [1990] 1 S.C.R. 241 at p. 251, 53 C.C.C. (3d) 316 at p. 324, and serves to avoid indiscriminate and discriminatory exercises of the police power. A "hunch" based entirely on intuition gained by experience cannot suffice, no matter how accurate that "hunch" might prove to be. Such subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria detentions could be based on mere speculation. A guess, which proves accurate, becomes in hindsight a "hunch". [See Note 3 below]

Note 3: Ibid at p. 202.

¶ 25 In R. v. Jacques [See Note 4 below] the appellants were charged with failing to report to customs and smuggling. An acquittal at trial was reversed by the New Brunswick Court of Appeal. In his majority decision dismissing the appeal (3:2) Gonthier J. analyzed the meaning and scope of s. 99(1)(f) of the Customs Act which authorizes the stop and search of a vehicle where an officer suspects on reasonable grounds that the vehicle is or might be involved in a breach of the Act. In the course of his reasons he said:

> Scanning s. 99(1)(f) reveals, therefore, that police are authorized to stop and search a vehicle once an officer has formed a reasonable suspicion that there is a possibility that the vehicle is being used to smuggle or to attempt to smuggle contrary to the Customs Act or regulations thereunder. Parliament has used language which requires the officer neither to believe on reasonable grounds that there is a possibility of smuggling nor to suspect on reasonable grounds that smuggling is, in fact, taking place. A reasonable suspicion of the possibility of smuggling or even of the possibility of an attempt to do so suffices. [See Note 5 below] [emphasis added]

Note 4: [1996] 3 S.C.R. 312.
Note 5: Ibid at para. 14.

¶ 26 Gonthier J. said that one of the problems with the trial judge's analysis of articulable cause was that in assessing the officer's actions, he "adopted a dissecting approach to evidence when, instead, he should have measured the totality of the circumstances" [See Note 6 below]. He then said:

> A sound approach to the assessment of evidence was canvassed by Doherty J.A. of the Ontario Court of Appeal in R. v. Simpson (1993), 12 O.R. (3d) 182, albeit in a different context, one in which the officer lacked statutory authority unlike in the present case. In determining whether or not a police officer's detention of a vehicle and its driver and passenger could be authorized by common law in the absence of statutory authority, Doherty J.A. reviewed U.S. jurisprudence on the doctrine of articulable cause and stated (at p. 202): "These cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation." [See Note 7 below]

Note 6: Ibid at para. 23.
Note 7: Ibid at para. 24.

¶ 27 It is apparent from the foregoing that Gonthier J. equated the meaning of s. 99(1)(f) of the Customs Act with articulable cause in Simpson, supra. Although the Court was divided on the interpretation of the facts, Major J. (Sopinka J. concurring) was of the same view. He said:

> In R. v. Simpson (1993), 12 O.R. (3d) 182, the Ontario Court of Appeal held that in the absence of statutory authority to stop a vehicle, stopping a vehicle for the purpose of determining if the occupants were involved in criminal activity can only be justified if the police have some "articulable cause" for the detention. The Court of Appeal held that there must be a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is implicated in the activity under investigation. Of particular importance to this case, the Ontario Court of Appeal stated that a hunch based on intuition gained by experience cannot suffice as articulable cause. " [A]rticulable cause" is a standard equivalent to the requirements of s. 99(1)(f). [See Note 8 below] [emphasis added]

Note 8: Ibid at para. 52.

¶ 28 Gonthier J. said the following approach should be taken to the analysis of the "constellation of objectively discernible facts":

> Viewing the facts and circumstances as a whole, rather than isolating each in turn, is an approach which commends itself beyond the fact situation in Simpson. As Belleghem J. observed in R. v. Marin, [1994] O.J. No. 1280 (Gen. Div.), with respect to the facts (or "indicators") warranting a detention and search for narcotics under the Customs Act (at para. 16):
>
> > The "indicators" are to be seen as a constellation, or cluster, leading or tending to a general conclusion. Looked at individually no single one is likely sufficient to warrant the grounds for the detention and seizure. The whole is greater than the sum of the individual parts viewed individually. [See Note 9 below]

Note 9: Ibid at para. 25.

¶ 29 The inquiry concerning investigative detention does not stop with articulable cause for detention. The extent and nature of the investigation is regulated by the circumstances giving rise to articulable cause. In Simpson, supra, Doherty J.A. said:

> I should not be taken as holding that the presence of an articulable cause renders any detention for investigative purposes a justifiable exercise of a police officer's common law powers. The inquiry into the existence of an articulable cause is only the first step in the determination of whether the detention was justified in the totality of the circumstances and consequently a lawful exercise of the officer's common law powers as described in Waterfield, supra, and approved in Dedman, 32 O.R. (2d) 641, supra. Without articulable cause, no detention to investigate the detainee for possible criminal activity could be viewed as a proper exercise of the common law power. If articulable cause exists, the detention may or may not be justified. For example, a reasonably based suspicion that a person committed some property related offence at a distant point in the past while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute the suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation. [See Note 10 below]

Note 10: Simpson, supra note 1 at pp. 203-4.

¶ 30 In Jacques, supra, Gonthier J. dealt with the second step as follows:

> The circumstances which permitted the stop also permitted the search of the appellants' vehicle. Constable Ward's search met the criteria set out by this Court in R. v. Collins, [1987] 1 S.C.R. 265: it was authorized by law, namely s. 99(1)(f) of the Act; that law is itself reasonable as I have previously elaborated; and the search was carried out in a reasonable manner. On this third point, I can add nothing to the summary in the court below (at p. 207):
>
> > Cst. Ward's actions amounted to a cursory search of the truck and its contents sufficient to confirm his suspicions. The circumstances of the search themselves do not indicate that it was unreasonable. Cst. Ward was not abusive or overbearing. Although Cst. Ward could have searched the truck in any event, he sought and received Mr. Jacques' permission to do so. He disturbed the contents of the truck only slightly and sufficiently to confirm his suspicions that an offence may have occurred. [See Note 11 below]

Note 11: Jacques, supra note 4 at para. 31.

¶ 31 Gonthier J. found that although the appellants were detained, their detention was not arbitrary and although their vehicle was searched, the search was not unreasonable. Accordingly, there was no violation of the appellants' rights under s. 8 or s. 9 of the Charter.

¶ 32 In Simpson, supra, Doherty J.A. indicated that the courts must act as the gatekeeper regulating the police power for investigatory detention so that "street detentions do not end up being non-stationhouse incommunicado arrests. Each case depends on its own facts." [See Note 12 below] Before discussing the evidence of articulable cause in this case it is instructive to review the fact situations in several motor vehicles cases that have considered articulable cause or, as it is often also described, reasonable suspicion.

Note 12: Doherty J.A. quoting Professor Young at p. 199.

Cases dealing with articulable cause and investigative detention fact situations

R. v. Simpson [See Note 13 below] (Ontario Court of Appeal)

Note 13: Supra, note 1.

¶ 33 Acting on information that a particular house was suspected to be a "crack house", a police officer patrolled the area and observed a woman leave a car parked in the driveway of the house and enter the residence. She left a short time later accompanied by the accused and drove away with the accused in the passenger seat. The police officer, who had no information pertaining to either person, followed them and stopped the vehicle.

¶ 34 The police officer admitted that his decision to stop the motor vehicle had nothing to do with the enforcement of laws relating to the operation of motor vehicles. Rather, he was seeking confirmation of the report about the crack house and wanted the opportunity, by questioning the occupants of the vehicle and looking into the vehicle, to develop grounds to arrest either or both of the occupants for drug-related offences.

¶ 35 Doherty J.A. said there was no articulable cause in this case justifying the detention. The police officer had information of unknown age that another police officer had been told that the residence was believed to be a crack house. He did not know the primary source of the information and he had no reason to believe that the

source in general, or this particular piece of information, was reliable. He had no reason to suspect that the accused or the driver of the car was involved in criminal activity. As there was no articulable cause for the detention, the common law police power did not authorize the police officer's conduct. The detention was both unlawful and arbitrary, contrary to s. 9 of the Charter.

R. v. Carson [See Note 14 below] (New Brunswick Court of Appeal)

Note 14: [1998] N.B.J. No. 482.

¶ 36 The accused, appealed a conviction for driving with a blood alcohol level over .08. The accused drank about eight beers at a party and fell asleep at 10 p.m. He was awakened at 1:30 a.m. to move his truck from the driveway. As he was backing his truck out of the driveway, he noticed the lights of a vehicle and drove back into the driveway. The vehicle was a police car. The police officer noticed that the accused was confused and unsure. The accused failed a roadside screening test and gave a breathalyzer sample. He was charged with driving while his blood alcohol was over .08. The trial judge found that the police officer had articulable cause to stop the accused and registered a conviction. The accused argued that he was arbitrarily detained in contravention of his rights under the Charter. The New Brunswick Court of Appeal found that the test of articulable cause had not been met. Thus the detention was arbitrary and violated s. 9 of the Charter. The breathalyzer sample should therefore have been excluded from evidence, pursuant to s. 24(2) of the Charter. In allowing the appeal the Court said:

> [10] Here, the officer had no reason to stop or approach the appellant's vehicle. Her only assertion as to why she decided to approach the appellant's vehicle was that he seemed confused and unsure of himself. This was not articulable cause; it was not based on objective observations of the appellant's behaviour. There are many reasons why the appellant might have been unsure; that he was backing out of a driveway and noticed that a vehicle was coming along the street, necessitating him to stop; the lateness of the hour, and the darkness are all reasons which could account for the Constable's observations. Thus, the officer's observations seem to have amounted to a "mere hunch", which was proven correct in hindsight.
> [11] While it is true that the test is somewhat less than reasonable and probable grounds, on the facts of this case there was not articulable cause, as there was no clearly expressible reason to detain the appellant. The Constable's assertions as to the appellant's uncertainty and what appeared to her to be his confusion are, as noted, not sufficient cause to detain him.

R. v. Cox [See Note 15 below] (New Brunswick Court of Appeal)

Note 15: [1999] N.B.J. No. 86.

¶ 37 The accused was convicted of possession of illegally obtained tobacco. Cox was driving on a highway and an officer came up behind his vehicle. The officer noted that Cox's vehicle fit the profile developed by the police with respect to smugglers of contraband. In this case there was the rigid way the vehicle was being driven, that is, at and within the speed limit, that it was an older model car with a big trunk and the driver had a piece of clothing hanging on the clothes hook in the rear. The officer stopped the car. He tried to get Cox to give him permission to open the trunk of the car, but Cox would not do so. In some disputed manner, the police officer came into possession of the keys to the car, looked in the trunk and found contraband tobacco. He arrested Cox. The trial judge held that the stopping of the vehicle was arbitrary, but that Cox was not under arrest before the search. He further concluded that there were violations of Cox's rights under the Canadian Charter of Rights and Freedoms. However, the trial judge concluded that to exclude the evidence of the tobacco would bring the administration of justice into disrepute. In setting the conviction aside Ryan J.A. said

> [11] Furthermore, the evidence of the smuggler's profile upon which the officer says he relied, does not meet the standard of articulable cause: (1) an older vehicle, a 1987 LTD with a large

trunk area; how unusual is this in the Atlantic Provinces? (2) clothing hanging off the clothes hook in the car; the man was passing through New Brunswick and travelling hundreds of kilometres to his residence in Cape Breton in a car with Nova Scotia licence plates; and (3) he was travelling within the speed limit, a requirement of the law. In R. v. Simpson (1993), 60 O.A.C. 327 at pp. 342-343 Mr. Justice Doherty concluded an extensive discussion of the constituent elements of articulable cause as follows:

> ... objectively discernible facts which give the detaining officer reasonable cause to suspect that the detained is criminally implicated in the activity under investigation.

[12] The elements of the smuggler's profile here are no more than hunches, speculation and guesses that do not qualify as "objectively discernible facts." As such, they do not support a reasonable belief that Mr. Cox was implicated in unlawful activity that justified stopping his motor vehicle.

R. v. Coleman [See Note 16 below] (Ontario Superior Court of Justice)

Note 16: (1999), 43 M.V.R. (3d) 196.

¶ 38 As a result of ongoing complaints and community concerns about persistent drug trafficking and prostitution activity in a small parking lot the police proceeded to that location in a marked cruiser. While parked near the entrance an officer saw a minivan driven by the accused proceeding eastbound. The accused slowed the vehicle as if to turn into the lot. He made direct eye contact with the officer, resumed speed and continued eastbound. The officer formed the opinion the accused was startled by the police presence, and, as a result, continued on his way.

¶ 39 Drambot J. analyzed the evidence as follows. When the officer in a marked vehicle in a parking lot known in the community to be the location for ongoing drug dealing, observed the driver of a vehicle appear to be about to turn into the lot, see the police, and abruptly drive away, he was in possession of information which, objectively viewed, would support a reasonable suspicion that the accused was engaged in unlawful activity: driving under suspension or in possession of a stolen vehicle or in possession of other contraband or, having regard to the location he appeared to be entering, the time of day and his response when he spotted the police, engaged in drug trafficking. The officer had articulable cause to detain the accused briefly for investigative purposes. There was no breach of the Charter.

R. v. Yamanaki [See Note 17 below] (British Columbia Court of Appeal)

Note 17: (1998), 128 C.C.C. (3d) 570.

¶ 40 The two accused were charged with possession of instruments suitable for the purpose of breaking into a coin-operated device. The police had received complaints about what was thought to be gunfire. On arrival in the area the two accused were seen standing by an old model vehicle. They stated they had not heard any gunfire, but said that their vehicle had broken down and back-fired several times. One of the police officers saw equipment for drywalling work inside the vehicle. When the officer asked what was in a bag one of the accused was holding, the response was "electrical tools". The officer said he was suspicious about the explanation of backfire noises and suspected the two accused had been the cause of the gunfire reports. The accused agreed to let the police officer look in the bag. Upon examining the contents the officer found the instruments which were the subject of the charge. The trial court held there was no breach of s. 8 of the Charter and the accused were convicted.

¶ 41 In dismissing the appeal the Court of Appeal said that although the accused had not given a genuine consent to look into the bag this was not essential to the lawfulness of the search of the bag because there was articulable cause to detain the accused temporarily for the purpose of investigating the gunfire complaints. The

Court said the police had been dispatched to the area to investigate several reports of gunfire. The accused seemed to be out of place in the neighborhood at 5:30 a.m. One of the accused said he was an electrician which did not fit with what the constable saw in the car. The accused was holding the bag close to his body. Speaking for the Court, McEachern C.J.B.C. said these facts constituted articulable cause to detain the accused temporarily for the purposes of investigating the gunfire complaints and to search the bag for weapons in the course of that investigation.

R. v. Mulligan [See Note 18 below] (Ontario Court of Appeal)

Note 18: (2000), 142 C.C.C. (3d) 14 (Ont. C.A.)

¶ 42 Late at night in an isolated location, a police officer saw a pick-up truck parked outside a commercial establishment. Suspecting a break-in or theft, he drove onto the property to investigate and found the appellant in an intoxicated condition behind the wheel of the truck. The appellant was arrested and a scuffle ensued. The accused was charged and found guilty of care and control of a motor vehicle while impaired and resisting arrest. He appealed the convictions.

¶ 43 Sharpe J.A. said the officer required a bona fide reasonable suspicion of criminal activity being perpetrated against the owner or occupant or the property. In addition, he must be able to demonstrate an objective factual basis that gave rise to his suspicion. ("... there must be some 'articulable cause' above the level of a mere 'hunch', 'a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.'" [See Note 19 below]). He said that in the present case, the trial judge accepted the bona fides of the officer and specifically found that his purpose was to investigate suspected criminal activity directed against the property. The objectively discernable presence of a pick-up truck with its lights on outside a commercial establishment late at night in a rural area satisfied this requirement. The officer's conduct did not amount to a search within the meaning of s. 8 of the Charter.

Note 19: Ibid at para. 27.

R. v. Jacques [See Note 20 below] (Supreme Court of Canada)

Note 20: Supra, note 4.

¶ 44 An RCMP officer received a radio report from the U.S. border patrol informing him that a single vehicle had crossed the Canada-U.S. border at a nearby uncontrolled point of entry. No description of the vehicle or of its passengers, contents or licence plates was given. The officer proceeded to the intersection of the road from the border and the Trans-Canada highway. He testified that it would take approximately three minutes to drive from the border to the intersection and that it took him three to five minutes to drive from where he received the radio report to the intersection. When he arrived he noticed two vehicles waiting. The first in line was a car with New Brunswick licence plates driven by a woman approximately 60 years old. The second vehicle was a pickup truck with a Quebec licence plate in the rear, a cellular phone antenna, and a cap on the back. The officer stopped this vehicle. At trial he explained that he had a choice between the two vehicles and picked the one he felt was more suspicious. When asked where he had been, the driver replied, "I'm coming from across". He was then asked what he had in the back of the vehicle, and replied that it was whisky. On request, he opened the back of the truck and the officer noted several Wal-Mart bags and some boxes with liquor markings on them. The officer then placed the appellants under arrest and confiscated their truck. The appellants were charged with failing to report to customs and smuggling. The charges were dismissed.

¶ 45 The New Brunswick Court of Appeal found that the stopping of the appellants' vehicle was permitted under s. 99(1)(f) of the Customs Act, concluding that the officer had reasonable grounds to suspect a

contravention of the Act because the truck was on the road leading from the border and did not fit into the surroundings. It set aside the acquittals.

¶ 46 In finding that there was no arbitrary detention of the appellants and the search of the vehicle was not unreasonable Gonthier J. said the following Court of Appeal reasons provided justification for the requisite reasonable suspicion under ss. 99(1)(f) of the Customs Act:

> Three minutes before stopping Mr. Jacques' vehicle, Cst. Ward had received precise and reliable information of a single vehicle entry into Canada at an unmanned border point on a secondary paved road in a rural area. He went to the mouth of the road leading from the border where, calling on his experience of three years of police work in the area, he found a vehicle that, in his opinion, did not fit into the surroundings. He came to that conclusion after observing a covered half-ton truck with a cellular phone antenna and, more significantly, with no front licence plate, a requirement for New Brunswick vehicles, and an out-of-province plate at the rear of the vehicle. In such circumstances, in my opinion, Cst. Ward's actions were not arbitrary and he was acting on reasonable grounds when he stopped and searched Mr. Jacques' vehicle. [See Note 21 below]

Note 21: Ibid at para. 26.

R. v. Wilson [See Note 22 below] (Supreme Court of Canada)

Note 22: [1990] 1 S.C.R. 1291.

¶ 47 At about 12:40 a.m., a police officer stopped the appellant, who was driving his "four-by-four" pick-up truck on a street in the town of Stettler, Alberta. The officer said he stopped the appellant's vehicle for the following reasons: the vehicle was a block away from one of the hotels; the bars at the hotels had just closed; there were three men in the front seat of the vehicle; the vehicle had out-of-province licence plates; and he recognized neither the vehicle nor its occupants. Constable MacFarlane testified that, though he was looking for impaired drivers, he was not doing this in the fashion commonly followed by police officers under Alberta's Checkstop Programme. The officer smelled alcohol on the appellant's breath, and made an A.L.E.R.T. demand that the appellant failed. Based on the subsequent breathalyzer result the appellant was convicted of driving over .08. The appellant based his appeal to the Supreme Court of Canada on two submissions. First, he contended that the office had no statutory or common law authority to stop his vehicle. Second, he argued that even if the officer actions were authorized by statute or common law, they violated s. 9 of the Charter and could not be justified under s. 1.

¶ 48 In the course of rejecting both submissions Cory J. said:

> ... the stopping of the appellant was not random, but was based on the fact that the appellant was driving away from a hotel shortly after the closing time for the bar and that the vehicle and its occupants were unknown to the police officer. While these facts might not form grounds for stopping a vehicle in downtown Edmonton or Toronto, they merit consideration in the setting of a rural community. In a case such as this, where the police offer grounds for stopping a motorist that are reasonable and can be clearly expressed (the articulable cause referred to in the American authorities), the stop should not be regarded as random. As a result, although the appellant was detained, the detention was not arbitrary in this case and the stop did not violate s. 9 of the Charter. [See Note 23 below]

Note 23: Ibid at para. 13.

R. v. Lal [See Note 24 below] (British Columbia Court of Appeal)

Note 24: [1998] B.C.J. No. 2446.

¶ 49 The accused was convicted of possession of a concealed weapon and possession of a restricted weapon. Two brothers had been shot and killed within two months of each other. The police formed the opinion that the killings were part of a feud between rival factions of a gang engaged in drug trafficking. Shortly after the second killing, a civilian unconnected with the gang was shot near the residence of the suspected killer. To protect the other members of the deceased's family, the police deployed emergency response team officers to watch over the family home. One of the officers received information from his superior that occupants of a yellow Acura model NSX licence number EBD 727 were to be considered armed, dangerous, and a threat to the other family members. Several days later, the officer was in the vicinity of the family home of the deceased brothers, when he observed the vehicle described to him by his superior. He stopped the vehicle driven by the accused and waited 15 minutes for the back-up unit to arrive. The accused was asked to step out of the vehicle, and was searched. A loaded weapon was discovered. The accused claimed that the police did not have the requisite grounds to stop and search him, and that his right to be free from unreasonable search under the Canadian Charter of Rights and Freedoms was violated.

¶ 50 The issues in this appeal was whether the officer who made the decision to stop the appellant was justified on the basis of a reasonable suspicion [articulable cause], and if he was entitled to stop the accused, whether the search for weapons was a necessary incident of the stop.

¶ 51 The question arose as to whether the officer was entitled to rely on the largely conclusory information of the superior officer concerning the Acura. Ryan J.A. said:

> I agree that a police officer is entitled to act upon information given to the officer by another member of the police force. To suggest that police officers cannot act on the assumption that a fellow officer's advice is reliable is unrealistic and would unduly hamper law enforcement. But when the Crown is called upon at trial to justify a search based on reasonable grounds or a stop based on articulable cause, there must be some evidence placed before the trial judge that the police officer's information was in fact reliable or worthy of acting upon. [See Note 25 below]

Note 25: Ibid at para. 24.

¶ 52 Ryan J.A. went on to say that "[S]ince the standard for reasonable suspicion is less demanding than that for reasonable belief it can arise from information that is less reliable than that required to show reasonable belief." [See Note 26 below] He concluded that the information on which the officer acted was sufficiently reliable to form the basis of a reasonable suspicion that the driver of the Acura might be engaged in criminal activity and this permitted the officer to make an investigatory stop of the vehicle in question.

Note 26: Ibid at para. 30.

¶ 53 Ryan J.A. further concluded that the scope of the search was justified because the information indicated the occupant of the yellow Acura was armed and dangerous. He was within two blocks of the deceased's family home. Three people had been murdered on the streets of Vancouver, one in broad daylight. Bullets had penetrated shop windows and parked vehicles. The police suspected the accused may have been on his way to do further violence to the deceased's family. In these circumstances the police were thoroughly justified in conducting the personal search of the accused for weapons.

Comments on the case law

¶ 54 Not unlike the television monitoring of disputed decisions by referees in hockey, the "close calls" by gatekeeper trial judges, are subject to "video replay" in the appeal courts. The majority opinion of Gonthier J. and the minority decision of Major J. in the 3:2 split decision of the Supreme Court of Canada in Jacques, supra, is a prime example.

¶ 55 Even with time for judicial reflection (a luxury police officers cannot afford. [See Note 27 below]) some of the decisions appear to be to be inconsistent, if not contradictory. In Simpson Doherty J.A. said the proximity to a suspected "crack house" was not a proper factor for articulable cause. In Wilson the proximity to a hotel shortly after closing time in a small town by occupants not known to the police officer was upheld. In Carson the officer said the accused seemed confused and unsure of himself as he backed his truck out of a driveway late at night and on noticing approaching lights of a vehicle drove back into the driveway. This was not articulable cause. In Coleman the accused slowed his vehicle to turn into a parking lot under observation for drug trafficking, made direct eye contact with the police officer and then resumed speed. This was articulable cause. In Mulligan the police saw a pick-up truck late at night outside a commercial establishment in an isolated area. Sharpe J.A. said this was an objective factual basis for suspicion of possible criminal activity. Additional examples could be cited.

Note 27: R. v. Golub (1997), 117 C.C.C. (3d) 193 per Doherty J.A. at para. 18.

¶ 56 However, notwithstanding the foregoing comments, the thread running through the cases is the prerequisite principle that, viewing the facts and circumstances as a whole rather than isolating each in turn, the court must be satisfied there is a bona fide, clearly expressed and factually objective reason justifying not only the detention of the suspect but also the extent and nature of the investigation. Intuition and hunches confirmed by hindsight are not acceptable.

Section 9: Everyone has the right not to be arbitrarily detained or imprisoned

Submissions of counsel for the defendants re arbitrary detention

¶ 57 Counsel for Stalas says that stopping the Lincoln for speeding was just an excuse to conduct a drug investigation. At the Preliminary Hearing Osborne said that as a safety precaution he always runs a CPIC check before he stops a vehicle to ascertain whether the vehicle is stolen. On cross-examination he said he did not notice the Lincoln was speeding until after he started the CPIC check. He acknowledged that at the time he pulled the Lincoln over it was not just the speeding he had in his mind. He also wanted to investigate whether this was a possible drug courier, a far more serious offence. At best, the legal scope of the detention was limited to issuing a speeding ticket and this was never done.

¶ 58 Counsel further submits that Osborne did not see anything illegal upon which to base articulable cause. The indicators recited by Osborne are not objectively reasonable grounds for suspicion as required by Simpson. What is wrong about fast food wrappers in a car or an open map in a car traveling across Canada or any car for that matter? In this day and age there is nothing unusual about possessing cell phones. Is everyone that drives a large late model rental car under suspicion of transporting drugs?

¶ 59 Osborne could not say how many or what kind of wrappers were in the car. He acknowledged that drug couriers can use any size or age of car. He admitted there could be a practical explanation for having an open road map in the car. During the four years since the drug interdiction course Osborne made between 10 and 20 drug investigation stops without finding any drugs. Rome had a zero score for between 50 and 100 stops. This shows the inaccuracy and unreasonableness of the so-called indicators.

¶ 60 Counsel for the defendants argue that the indicators are clearly consistent with innocent vehicular traffic. There was no objectively based articulable cause for the drug investigation. Recognizing the validity of the indicators would be a recipe for arbitrary detention of any member of the motoring public. The indicators

were and are totally subjective and resulted in arbitrary detention of the defendants in contravention of their Charter rights under section 9.

Analysis re articulable cause

¶ 61 Section 216(1) of the Highway Traffic Act authorizes the stopping of vehicles for what may be broadly described as highway regulation and safety purposes. In Browne v. Durham Regional Police Force [See Note 28 below] Doherty J.A. said "[A]rticulable cause exists under s. 216(1) if the police have a reason for stopping the vehicle which is legitimately connected to highway safety concerns." [See Note 29 below] Where the police have highway traffic concerns and other unrelated concerns, then the limit on their conduct should be imposed by limiting their conduct after the stop so long as the other purposes motivating the stop are not themselves improper. [See Note 30 below]

Note 28: (1998), 131 C.C.C. (3d) 1 (Ont. C.A.).
Note 29: Ibid at para. 53.
Note 30: Ibid at para. 31.

¶ 62 Stopping the Lincoln for speeding was legitimately connected to a highway safety concern. The fact that Osborne suspected there was a possibility of drugs did not taint the lawfulness of the stop. The lawfulness of the subsequent investigative detention for drugs depends on whether there was articulable cause.

¶ 63 Counsel for the defendants have dissected the articulable cause indicators one by one. This sort of "divide and conquer analysis" [See Note 31 below] does not take into account the totality of the circumstances and runs contrary to the approach dictated by Gonthier J. in Jacques, supra, which requires the court to view the facts and circumstances as a whole rather than isolating each indicator in turn.

Note 31: This phrase is borrowed from the reasons for judgment of Chief Justice Rehnquist of the United States Supreme Court in United States v. Arvizu [2002] SCT-QL 15 No. 00-1519 at paragraph 21, decided January 15, 2002, criticizing and overruling the Arizona Court of Appeal which had evaluated and rejected seven listed factors in isolation from each other that a police office said provided him with reasonable suspicion to stop and search a vehicle which turned out to be carrying 100 pounds of marijuana.

¶ 64 When Osborne stopped the Lincoln for speeding the fact that the Lincoln was a large car from British Columbia was certainly in his mind. He was alerted to look for other drug indicators. In the course of obtaining Stalas' driver licence which he was legally entitled to do, Osborne noticed several additional drug courier indicators: cell phones, a pager, an open map and fast food wrappers inside the car. The Budget Rental Agreement revealed the Lincoln was rented, another indicator. To add to his suspicion the terms of the Agreement restricted driving to the province of British Columbia.

¶ 65 The fact that the two duffle bags were on the inside of the car was extremely significant. Osborne could not understand why they were not in the large trunk of this car. This was a factually objective and clearly expressed ground (see Cory J. in Wilson, supra) confirming Osborne's reasonable suspicion there might be drugs taking up the trunk space.

¶ 66 Furthermore, the drug courier indicators were not something Osborne made up. He had been trained to look for them. Rome gave the same evidence as Osborne concerning the Drug Interdiction Course. In Lal, supra, the court said it is unrealistic to suggest police officers cannot act on the assumption that a fellow officer's advice is reliable. This would unduly hamper law enforcement. The same statement applies to the training that Osborne and Rome received on the Drug Interdiction Course. The fact that Osborne and Rome had not previously made a successful drug courier search based on the indicators does not necessarily invalidate the Drug Interdiction Course. Osborne said he observed more indicators in this case than any prior stop.

¶ 67 In examination-in-chief Osborne said he thought the Lincoln was "an expensive vehicle to be renting for what the driver and the passenger looked to me." He made this comment as an additional observation to the

indicia he outlined for suspecting the defendants might be drug couriers.

¶ 68 Details of the meaning of this statement was not explored or explained in cross-examination. I cannot say whether Osborne was referring to the age of the defendants, their dress, grooming or their racial or ethnic origin. (The defendants appear to be in the mid to late twenties age bracket. Both have dark skins. My best guess is they are of East Indian or middle East origin.)

¶ 69 It was suggested in argument, that this remark masked a discriminatory bias based on irrelevant factors of colour and perhaps age. There is nothing in the evidence to indicate the extent to which the observation influenced Osborne in his assessment of the situation other than as one of several drug courier indicators. There was no reflection of bias, discrimination or discourtesy during the investigation or after the arrest. The conduct and politeness of Osborne and the other officers was exemplary and inconsistent with bias or prejudice, I am unable to attach special weight or significance to the comment.

Decision re articulable cause

¶ 70 Viewing the facts and circumstances as a whole, rather than isolating each in turn, and bearing in mind that the standard for reasonable suspicion is less demanding than that for reasonable belief and can arise from information that is less reliable than that required to show reasonable belief, I find that when Osborne decided to investigate he was not acting on a hunch. He had articulable cause (reasonable grounds) for suspecting there might be drugs in the Lincoln. Therefore, when Osborne asked Stalas to step out of the car to question him, the resulting detention for investigative purposes was not arbitrary within the meaning of s. 9 of the Charter.

¶ 71 The second step in the investigative detention relates to the extent and nature of the investigation undertaken by Osborne. This will be considered under s. 8 of the Charter.

Section 8: Everyone has the right to be secure against unreasonable search or seizure

¶ 72 In Jacques, supra, Gonthier J. said that the circumstances which permitted the stop also permitted the search of the appellants' vehicle without permission. He found that the search conducted by the officer met the criteria in R. v. Collins [See Note 32 below]. In Lal, supra, the British Columbia Court of Appeal concluded the scope of the search was justified because the information indicated the occupant of the yellow Acura was armed and dangerous. In short, the articulable cause that justified the stop was logically connected to the search.

Note 32: [1987] 1 S.C.R. 265.

¶ 73 The duffle bags on the back seat instead of the trunk caused Osborne to reasonably suspect there might be drugs in the trunk. Thinking he required more than reasonable suspicion Osborne asked permission to search. However, the fact is that the consent of Stalas or Calderon was not required. The totality of the circumstances that gave rise to the detention logically justified searching the Lincoln for drugs, especially the trunk without a warrant or permission.

¶ 74 The search met the Collins criteria: it was authorized by law (articulable cause/reasonable suspicion), the law itself is reasonable (see the discussion in Simpson, supra) and the search was carried out in a reasonable manner. Osborne was not abusive or overbearing. He politely asked for permission to search. The contents of the interior of the Lincoln were not significantly disturbed. There was no search of the person. Osborne even asked permission to look in the bags in the trunk even though the trunk reeked of marijuana. The search that resulted in the seizure of the marijuana was not unreasonable within the meaning of s. 8 of the Charter.

¶ 75 Although this finding pre-empts the s. 8 submissions of counsel for the defendants, I will nevertheless set out those submissions along with my analysis concerning each submission.

¶ 76 Mr. Cohen advanced three arguments: (i) Smelling marijuana did not justify continuing the search ("plain smell doctrine"). (ii) The search was not incident to arrest. (iii) The consent to search by Calderon was

not an informed consent.

Submissions of counsel for the defendants re the "plain smell doctrine"

¶ 77 R. v. Polashek [See Note 33 below] was an appeal from a conviction for possession of narcotics for the purpose of trafficking and possession of L.S.D. The "plain smell doctrine" developed in the United States, was considered by the Ontario Court of Appeal.

Note 33: (1999), 134 C.C.C. (3d) 187.

¶ 78 At about 1:00 a.m., the accused was lawfully stopped by a police officer for a Highway Traffic Act violation. In the course of a 20- to 30-second conversation with the accused while the accused was in the vehicle. The officer detected a "strong odour" of marijuana emanating from the vehicle. However, he saw no smoke and could not tell whether the odour was of burnt or unburned marijuana. He told the accused that he smelled marijuana. The accused looked to his right and then over both shoulders to the rear of the vehicle and said, "No, you don't." The officer testified that the use of drugs in the area where the stop occurred "is fairly predominant for such a small area". The officer asked the accused to get out of the vehicle. He searched him and found three individually wrapped pieces of what the officer believed to be cannabis resin in the pocket of the accused's shorts. After arresting the accused for possession of marijuana he continued the search and found over $4,000 in cash in the accused's pockets.

¶ 79 The appellant argued that the police officer had no lawful basis for searching his person and his motor vehicle based on the smell of marijuana emanating from the vehicle and accordingly, the appellant was subjected to an unreasonable search and seizure in violation of s. 8 of the Charter. Addressing this submission Rosenberg J.A. said:

> [13] I agree, in part, with the appellant's position. Had Constable Ross based his arrest of the appellant solely on the presence of the odour I would have held that there were not reasonable and probable grounds to make the arrest. Given Constable Ross' admission that he could not from the odour alone determine whether the marijuana had been smoked recently or even if he was detecting the smell of smoked marijuana, the presence of odour alone did not provide reasonable grounds to believe that the occupant was committing an offence. The sense of smell is highly subjective and to authorize an arrest solely on that basis puts an unreviewable discretion in the hands of the officer. By their nature, smells are transitory, and thus largely incapable of objective verification. A smell will often leave no trace. As Doherty J.A. observed in R. v. Simpson, at p. 202: "... subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation."

¶ 80 Counsel for Stalas says the evidence of the police concerning the smell of marijuana is not coherent. Osborne's nose was within inches of the open window when he first spoke to Stalas and later when he spoke to Calderon. Rome was just as close when he was talking to Calderon. Neither noticed marijuana. Osborne did not notice any smell of marijuana when Stalas got out of the car. There was no evidence of marijuana odour on the clothing of the defendants. And yet Osborne says he detected a strong odour when he was standing outside the passenger door as Calderon exited the Lincoln.

¶ 81 In cross-examination Osborne could not say whether the smell he detected inside the Lincoln was lingering from something having been there before or was actually from something still in the car. The defendants argue this is extremely important because the court must be satisfied that the evidence of smell confirms possession of marijuana at the time the officer is detecting the smell. Counsel says that in the absence of evidence of "present possession" Osborne did not have reasonable and probable grounds to search the trunk after Calderon withdrew his consent. Consequently, continuing the search and seizing the marijuana was unreasonable and in breach of s. 8 of the Charter.

Analysis and decision re the smell of marijuana

¶ 82 In the course of submissions counsel for both defendants made the observation that the evidence of the police officers was "was extremely candid and truthful". I concur with this observation. One of many examples of such honesty relates to their testimony about the odour of marijuana. Although both officers spoke to the defendants at close range through the open windows of the Lincoln they were honest enough to say they did not detect any odour of marijuana. Evidence to the opposite effect would have provided a factual basis for the Crown to argue articulable cause to search without consent before Stalas or Calderon got out of the car.

¶ 83 Counsel asks the court to accept that Osborne did not smell marijuana before the passenger door was opened and then doubt his evidence of smelling marijuana after the door was opened. Osborne indicated that his training and experience enabled him to unequivocally conclude there was a strong odour of fresh marijuana (i.e. not burnt marijuana) in the car. I am convinced that Osborne possessed sufficient expertise to recognize the smell of marijuana and I accept his evidence. It is unrealistic to think the smell of marijuana preceded the rental of the Lincoln. The only reasonable conclusion is that the smell came from marijuana placed in the Lincoln after it was rented by the defendants and was therefore in their possession at the time of the search.

¶ 84 In view of my findings, the following statement by Rosenberg J.A. in Polashek, supra, eliminates the plain smell doctrine from consideration in this case:

> [14] On the other hand, I would not go so far as was urged by the appellant that the presence of the smell of marijuana can never provide the requisite reasonable and probable grounds for an arrest. The circumstances under which the olfactory observation was made will determine the matter. It may be that some officers through experience or training can convince the trial judge that they possesses sufficient expertise that their opinion of present possession can be relied upon. Even in this case, the Crown adduced sufficient evidence from which the trial judge could reasonably conclude that Constable Ross accurately detected the odour of marijuana rather than some other substance.

¶ 85 In any event, Osborne did not base his reasonable and probable grounds for continuing the search solely on the smell of marijuana. He was supported in his conclusion by the other drug courier indicators he had previously noted.

Analysis and decision re search incident to arrest

¶ 86 Even though the search of the interior of the Lincoln and the trunk preceded the arrest, that search can be described as a search incident to arrest. In Polashek the officer searched the accused, found three individually wrapped pieces of what the officer believed to be cannabis resin in the pocket of the accused's shorts and then arrested the accused. Rosenberg J.A. dealt with this sequence in his reasons. He said at paragraph 21:

> In R. v. Debot (1986), 30 C.C.C. (3d) 207 (Ont. C.A.) at 223 (affirmed on other grounds, [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193), Martin J.A. held that where an officer has grounds for a lawful arrest, "the fact that the search preceded the arrest does not preclude it from being a search incident to a valid arrest, where the arrest quickly follows on the search."

Rosenberg J.A. held that the initial search of the appellant, which led to the finding of the cannabis resin, was a lawful and reasonable search incident to arrest. The same conclusion applies in this case to the search for the marijuana in trunk of the Lincoln.

Analysis and decision re informed consent

¶ 87 In R. v. Wills [See Note 34 below] Doherty J.A. stated that where it is said that a person has consented to what would otherwise be an unauthorized search or seizure, the Crown is required to establish on the balance of probabilities that:

(i) there was a consent, express or implied;
(ii) the giver of the consent had the authority to give the consent in question;
(iii) the consent was voluntary in the sense the consent was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested, and

(vi) the giver of the consent was aware of the potential consequences of giving the consent. [See Note 35 below]

Note 34: (1992), 70 C.C.C. (3d) 529.
Note 35: Ibid at p. 546.

¶ 88 The facts relating to the consent issue are as follows. Osborne asked if there were any drugs, guns, or tobacco in the vehicle. Osborne then asked Calderon if he would mind if he searched the car. Osborne told Calderon that if he let him look and anything illegal was found Calderon would be charged. He also told Calderon he could withdraw his consent at any time. Calderon said "Sure, go ahead and look". I am satisfied on a balance of probabilities that the foregoing undisputed facts meet all the requirements stated by Doherty J.A. in Wills, supra.

¶ 89 In withdrawing his consent Calderon said "Okay, I don't want you searching now because my buddy knows more about the law." Mr. Neuberger says it can be inferred from this statement that Calderon did not understand he had a right to refuse to permit the police to search when he consented. I do not draw that inference. The words used by Osborne made it clear that Calderon had the right to refuse permission. Osborne asked if Calderon would mind if Osborne searched. He told Calderon that if Calderon let Osborne look and something illegal was found Calderon could be charged. Calderon obviously understood he had the right to withdraw his consent. I see no reason to conclude he did not understand the right to refuse permission to search while apparently understanding the rest of the information provided by Osborne.

PART II

S. 24(2) of the Charter

> Where, ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

¶ 90 Although my findings in PART I pre-empt the need to consider s. 24(2) of the Charter, I have nevertheless concluded that even if the Charter violations specified below occurred, the evidence of the marijuana should be admitted. Following are my reasons.

S. 9 and s. 10(b) violations

¶ 91 In PART I it was my finding that the detention of Stalas and Calderon for speeding changed to a drug investigation when Osborne asked Stalas to step out of the Lincoln in order to question him about drugs. Counsel for the defendants unsuccessfully argued that Osborne did not have articulable cause or reasonable grounds for conducting a drug investigation; thus, the detention was arbitrary contrary to s. 9 of the Charter and the failure to immediately advise the defendants of their right to counsel was a violation of s. 10(b). For the purpose of this PART II discussion I accept these submissions.

S. 8 violation

¶ 92 Mr. Neuberger says that the failure to advise the defendants of their s. 10(b) rights rendered the warrantless search unlawful and as such, unreasonable contrary to s. 8. The Crown says this argument is a red herring because Osborne had reasonable cause to search the interior of the Lincoln as soon as he smelled the marijuana as Calderon was getting out of the Lincoln. I do not accept this submission. The oral consent and the physical act of exiting the car in order to give effect to that consent cannot be severed. Osborne smelled the marijuana as a direct result of the consent to search the car given by Calderon without being advised of s. 10(b).

¶ 93 In support of his submission Mr. Neuberger relies on the following statements of Lamer J. in Debot v. The Queen [See Note 36 below]:

> [3] ... The right to retain and instruct counsel derives from the arrest or detention, not from the fact of being searched. Therefore immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel. There are, in my view, exceptions to this general rule. One is where the lawfulness of the search is dependent on the detainee's consent.
>
> ***
>
> ... It is my view that it will only be in exceptional circumstances that the denial of the right to counsel will trigger a violation of s. 8. Such would be the case when the lawfulness of the search is dependent upon the consent of the person detained. If a detained person's consent to a search of his house, which, under the circumstances of the case and the applicable law, requires a warrant, was given while that person's s. 10(b) rights were being violated (either because he has not been informed of his right to counsel or because the police obtained his consent to search his house before he has been given a reasonable opportunity to exercise his right to counsel) then the search is unlawful and, as such, unreasonable.

Note 36: [1989] 2 S.C.R. 1140.

¶ 94 Mr. Neuberger notes my finding that even though the search of the Lincoln preceded the arrest, the search can be described as a search incident to arrest. He points that although the general rule is that the police are not required to suspend a search incident to arrest, there is an exception if the lawfulness of the search is dependent on the detainee's consent. As Lamer J. stated in Debot, supra, [See Note 37 below] if a detained person's consent to a search of his house was given "while that person's s. 10(b) rights were being violated (... because he has not been informed of his right to counsel ...) then the search is unlawful and as such, unreasonable." [See Note 38 below] The application of this principle to the facts of this case is not abrogated by the reduced expectation of privacy in a motor vehicle [See Note 39 below].

Note 37: See above at para. 93.
Note 38: Ibid.

Note 39: R. v. Belnavis [1997] 3 S.C.R. 341 at para. 38; R. v. Wise [1997] 3 S.C.R. 341 at para. 38.

¶ 95 For the purpose of this PART II discussion I accept this submission in support of the contention there was a violation of s. 8.

¶ 96 Counsel for the defendants submit that on the basis of the violations of s. 8, s. 9 and s. 10(b) of the Charter admission of the evidence of the marijuana in these proceedings would bring the administration of justice into disrepute.

Discussion

R. v. Collins [See Note 40 below] (Supreme Court of Canada)

Note 40: [1987] 1 S.C.R. 265.

¶ 97 This is the starting point for any discussion about exclusion of evidence under s. 24(2). Following is a summary of the reasons of Lamer J.

¶ 98 The focus of s. 24(2) is the effect of the admission of the evidence in the proceedings, the purpose of the subsection being to prevent the administration of justice from being brought into further disrepute by the admission of the evidence. The test to be applied is whether the evidence "could" bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate and fully apprised of the circumstances of the case. Thus if the admission of the evidence in some way affects the fairness of the trial then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to considerations of other factors, the evidence generally should be excluded. On the other hand, real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. Different considerations apply however where after a violation of the Charter the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Another group of factors are those going to the seriousness of the breach such as whether the police acted in good faith and the availability of other investigatory techniques. Finally, the court must consider whether the judicial system's repute will be better served by the admission or the exclusion of the evidence. Thus the administration of justice would be brought into disrepute by the exclusion of evidence essential to substantiate the charge because of a trivial breach of the Charter. The seriousness of the offence is also relevant consideration but its relevancy depends on the nature of the breach. Thus, if the admission of the evidence were to operate unfairly then, the more serious the offence, the more damaging to the system's repute would be an unfair trial.

¶ 99 To summarize: in deciding whether or not to exclude evidence, the court must consider three groups of factors. The first group concerns the effect the admission of evidence would have on the fairness of the trial. The second group of factors relates to the seriousness of the violation and the reasons for it. These are important considerations in assessing the effect admission of evidence would have on the administration of justice. The third group of factors requires the court to balance the effect of excluding evidence against the effect of admitting it.

First group: Fairness of the trial

¶ 100 The first step in the trial fairness analysis requires the classification of the evidence as either non-conscriptive or conscriptive as explained in R. v. Stillman [See Note 41 below]. Non-conscriptive evidence which is evidence that did not result from the participation of the accused in its creation or discovery will rarely operate to render the trial unfair and the court should therefore move on to consider the seriousness of the violation and the effect of the exclusion of the evidence on the repute of the administration of justice. Evidence is conscriptive when the accused is compelled to incriminate himself by means of a statement, the use of the body or the production of bodily samples. The concept of conscriptive evidence also includes derivative evidence which involves a violation whereby the accused is conscripted against himself which results in the discovery of real evidence. The admission of conscriptive evidence will as a general rule tend to render the trial unfair unless the impugned evidence would have been discovered in the absence of the unlawful conscription of the accused. The evidence is discoverable where it is established that either a non-conscriptive means existed through which the evidence would have been discovered or that its discovery was inevitable. The Crown, however, must bear the onus of establishing discoverability on the balance of probabilities. Where the evidence was discoverable, even though it may be conscriptive, its admission will not, as a general rule, render the trial unfair. Where the evidence would not have been discovered in the absence of the conscription of the accused in

violation of the Charter, its admission would generally render the trial unfair and it is not necessary for the court to consider the seriousness of the violation of the repute of the administration of justice:

Note 41: [1997] 1 S.C.R. 607.

¶ 101 Mr. Neuberger says the marijuana was derivative conscripted evidence because it was discovered as a direct result of the consent to search given by Calderon without the benefit of his s. 10(b) right. In R. v. Bartle [See Note 42 below] (a breathalyzer case) the Court said that one of the purposes of s. 10(b) is to provide detainees with an opportunity to make informed choices about their legal rights and obligations [See Note 43 below]. In R. v. LeClair [See Note 44 below] the Supreme Court of Canada held that line-up evidence could not have been obtained but for the participation of the accused in the construction of the evidence for the purpose of the trial, and the use of such evidence goes to the fairness of the trial process. The violation of the right to counsel of the accused prior to the line-up, in the absence of any mitigating factors, renders such evidence inadmissible. Counsel says there is no difference between a consent to a line-up and a consent to search the Lincoln. By giving consent in the face of the breach of s. 10(b) Calderon participated in the construction of the evidence of the marijuana.

Note 42: [1994] 3 S.C.R. 173.
Note 43: Ibid at para. 16.
Note 44: (1989) 46 C.C.C. (3d) 129.

¶ 102 The argument against this submission is that notwithstanding the breach of s. 10(b) the informed consent was not conscriptive because Calderon did not incriminate himself through a statement, the use of his body (as in LeClair) or the production of body samples (as in Bartle).

¶ 103 Even if the argument of Mr. Neuberger is accepted and the court concludes the evidence of the marijuana was conscripted, admission of this real evidence would not render the trial unfair because on a balance of probabilities discovery of the marijuana was inevitable.

¶ 104 After the defendants were arrested and read their right to counsel they were taken to the Detachment Office and they phoned counsel. The Lincoln was driven across the road and parked into the Detachment Office garage by OPP Officer Cooney (Cooney). He arrived on the scene at 3:06 a.m. and observed the events unfold. Cooney has been an OPP Officer since 1994 and had been stationed at Nipigon for five years. Although he did not have any specialized training in narcotics he had been involved in drug investigations. When the trunk was popped open he said he smelled a "very strong odour" of marijuana. If the right to counsel had been given and exercised before the marijuana was found in the trunk (i.e. before the defendants were arrested) there is no reason to think the Lincoln would not have been driven to the Detachment Office by Cooney. The odour of marijuana that Osborne smelled inside the Lincoln would have been apparent to Cooney. Without doubt he would have drawn this to the attention of Osborne. This would have resulted in probable grounds (or at the very least, articulable cause) to search the trunk.

Second Group: Seriousness of the Charter breach

¶ 105 In Collins Lamer J. said the following concerning this subject:

> There are other factors which are relevant to the seriousness of the Charter violation and thus to the disrepute that will result from judicial acceptance of evidence obtained through that violation. As Le Dain J. wrote in Therens, [(1985), 18 C.C.C. (3d) 481 at p. 512]
>
> > The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence.

> I should add, that the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the Charter tend to render the Charter violation more serious. We are considering the actual conduct of the authorities and the evidence must not be admitted on the basis that they could have proceeded otherwise and obtained the evidence properly. In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the Charter, which is a factor supporting the exclusion of the evidence. [See Note 45 below]

Note 45: Collins, supra at p. 20.

¶ 106 There can be no criticism of the manner in which the police conducted themselves in this case. Osborne and Rome were courteous before and after the defendants were arrested. Osborne did not bull ahead with the search (as did the officer in Cox, supra). He asked Stalas for permission to search. If granted the search it would have been brief and not intrusive. When Stalas refused Osborne exercised good police savvy in approaching Calderon who had rented the Lincoln for permission. (Cooney chatted with the defendants about the weather while Osborne was searching the car.) In asking for permission to search Osborne explained the purpose and ramifications of a search to both defendants. Osborne even asked for permission to examine the duffle bags in the trunk.

¶ 107 The conduct of Osborne throughout the investigation bears many similarities to the conduct of the police officer described by Gonthier J. in Jacques, supra [See Note 46 below]. Immediately after arrest the defendants were given their s. 10(b) rights. I have commented on the candour and honesty of Osborne and Rome in testifying [See Note 47 below].

Note 46: See above at para. 30.
Note 47: See above at para. 109.

¶ 108 Osborne acted in good faith with respect to the detention and search. He suspected possible drug couriers when he stopped the Lincoln for speeding. The fact is however, that unlike the officer in Cox, supra, he had valid reason to stop the Lincoln. There is not a scintilla of evidence to suggest Osborne was not acting in good faith in relying on the drug courier indicators he had been trained to look for during the Drug Interdiction Course. Osborne said "events were happening quickly". With very little time for decision he had two choices: pursue his suspicion or issue a speeding ticket and let the defendants drive away with the drugs he suspected might be in the car.

¶ 109 Exclusion of the real evidence of the marijuana is not justified under the second group of Collins factors.

Third set of factors: Balancing exclusion of the evidence against admitting the evidence

¶ 110 Lamer J. said the following concerning these factors in Collins:

> The final relevant group of factors consists of those that relate to the effect of excluding the evidence. The question under s. 24(2) is whether the system's repute will be better served by the admission or the exclusion of the evidence, and it is thus necessary to consider any disrepute that may result from the exclusion of the evidence. In my view, the administration of justice would be brought into disrepute by the exclusion of evidence essential to substantiate the charge, and thus the acquittal of the accused, because of a trivial breach of the Charter. Such disrepute would be greater if the offence was more serious. I would thus agree with Professor Morissette that evidence is more likely to be excluded if the offence is less serious (supra, pp. 529-31). I hasten to add, however, that if the admission of the evidence would result in an unfair trial, the seriousness of the offence could not render that evidence

admissible. If any relevance is to be given to the seriousness of the offence in the context of the fairness of the trial, it operates in the opposite sense: the more serious the offence, the more damaging to the system's repute would be an unfair trial. [See Note 48 below]

Note 48: Ibid at Party and Party. 20-21.

¶ 111 The police had a valid reason to stop the Lincoln. Osborne acted in good faith in deciding to investigate and search for drugs. He sought and obtained permission to search. The police were courteous throughout the investigation. Even if there was a breach of s. 10(b) resulting in conscripted evidence, discovery of the marijuana was inevitable. Admission of this evidence would not result in an unfair trial.

¶ 112 Having regard to the facts and circumstances relating to the Charter breaches the administration of justice would be brought into disrepute by exclusion of the real evidence of marijuana essential to substantiate the extremely serious charge in this case.

KURISKO J.

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