NOVA SCOTIA COURT OF APPEAL
Citation: R. v. MacEachern, 2007 NSCA 69

Date: 20070608
Docket: CAC 273586
Registry: Halifax

Between:

Shawn Bernard MacEachern

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Bateman, Oland & Fichaud, JJ.A.
Appeal Heard:	May 30, 2007, in Halifax, Nova Scotia
Held:	Appeal is dismissed per reasons for judgment of Fichaud, J.A.; Bateman and Oland, JJ.A. concurring.
Counsel:	David J. Mahoney, for the appellant David Schermbrucker, for the respondent

Reasons for judgment:

[1] A police dog sniffed narcotics in Mr. MacEachern's knapsack at a train station. The police detained and questioned Mr. MacEachern before informing him of his right to counsel. The police arrested him, gave him his *Charter* rights, then searched his knapsack, finding the narcotics. He was convicted of possession for the purpose of trafficking. The issue is whether the narcotics evidence should have been excluded under s. 24(2) of the *Charter*.

1. Background

[2] On January 10, 2005 Mr. MacEachern disembarked from the Via Rail train at the Truro station. He had boarded in Montreal. His only luggage was a knapsack. The knapsack contained marijuana and cocaine.

[3] At the station was the RCMP Criminal Interdiction Team, led by Corporal Fraser, along with Constables Daigle and Ruby and Halifax Regional Municipality Police Constable Pattison who was seconded to the team. Constable Daigle, an experienced dog handler, had his dog Boris. Boris is trained to detect narcotics and has a record of accuracy.

[4] Constable Daigle wore a blue jacket with RCMP shoulder flashes. The others wore plain clothes.

[5] Mr. MacEachern stepped off the train and walked toward the terminal entrance. Constable Daigle and Boris approached. When Mr. MacEachern was about 20 feet away, he slowed down and walked in an arc around Constable Daigle and the dog.

[6] Boris showed an interest in Mr. MacEachern, followed him then sat behind Mr. MacEachern at the station entrance. The act of sitting was the dog's trained signal that Mr. MacEachern or his luggage carried the scent of narcotics.

[7] The dog then followed Mr. MacEachern into the terminal and sat behind him a second time.

[8] Constable Daigle notified Constable Pattison of the positive indication. Constable Pattison approached Mr. MacEachern, presented his police badge and identified himself. He touched Mr. MacEachern on the elbow and directed him to the side of the train station to answer some questions. Mr. MacEachern was making travel arrangements with a shuttle bus driver. Constable Pattison told the driver that Mr. MacEachern was "not going anywhere."

[9] Constable Pattison asked Mr. MacEachern for his train ticket, boarding pass and identification. Constable Pattison wanted this information to determine whether Mr. MacEachern was on a one-way trip, had paid cash and had purchased the ticket at the last minute.

[10] After Mr. MacEachern provided the information, Constable Pattison arrested Mr. MacEachern for possession of narcotics and read him his *Charter* right to counsel and the police caution. This – after the arrest – was the first time any officer had informed Mr. MacEachern of his right to counsel.

[11] Mr. MacEachern immediately told Constable Pattison that he wanted to consult a lawyer.

[12] Constable Pattison searched Mr. MacEachern's knapsack and found 676 grams of cannabis marijuana and 282 grams of cocaine. He rearrested Mr. MacEachern for possession for the purpose of trafficking. Mr. MacEachern was formally charged with possession of marijuana for the purpose of trafficking and possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act* S.C. 1996, c. 19.

[13] Mr. MacEachern was tried without a jury before Chief Justice Kennedy in the Nova Scotia Supreme Court. Mr. MacEachern applied for exclusion of the narcotics evidence under s. 24(2) of the *Charter*. On June 1, 2006, after a *voir dire*, the Chief Justice issued his oral decision on the exclusion motion. He found that Mr. MacEachern was detained, and that the officers violated his s. 10(b) right upon detention to be informed of his right to counsel. The Chief Justice ruled that, under s. 24(2), the evidence of Mr. MacEachern's post-detention conversation with Constable Pattison should be excluded, but the narcotics evidence should not be excluded. I will review the Chief Justice's reasons later.

[14] The trial proceeded, and Mr. MacEachern was convicted of both counts. His sentence was two years on each count, to be served concurrently.

[15] Mr. MacEachern appeals his convictions.

2. Issues

[16] Mr. MacEachern says that the trial judge erred by not specifically finding that his arrest was illegal and that the search violated s. 8 of the *Charter*. Mr. MacEachern submits that the trial judge erred by failing to exclude the evidence under s. 24(2).

3. First Issue - The Charter Breaches

[17] The Chief Justice ruled that the officers had breached Mr. MacEachern's right to be informed without delay of his entitlement to counsel under s. 10(b) of the *Charter*. I agree with the ruling.

[18] Constable Pattison told the shuttle bus driver that Mr. MacEachern was "not going anywhere." He touched Mr. MacEachern and directed Mr. MacEachern to the side where he could be questioned. Mr. MacEachern testified that he believed he had to obey. The Chief Justice made no error in his ruling that this was "detention" within the meaning of *R. v. Therens*, [1985] 1 S.C.R. 613, at ¶ 49-53. See also *R. v. Feeney*, [1997] 2 S.C.R. 13 at ¶ 56; R. *v. Lewis*, 2007 NSCA 2, at ¶ 18-27.

[19] Upon detention, Mr. MacEachern was entitled to be informed of his right to counsel without delay. The officer must inform the detainee of his right to counsel before questioning him: *Feeney* at ¶ 56-57; *R. v. Manninen*, [1987] 1 S.C.R. 1233 at pp. 1241-3. Constable Pattison breached Mr. MacEachern's right under s. 10(b).

[20] I will consider the arrest and legality of the search together.

[21] Section 495 of the *Criminal Code* entitled Constable Pattison to arrest Mr. MacEachern without warrant if Constable Pattison, on reasonable grounds, believed that Mr. MacEachern had committed an indictable offence. Both the objective and subjective requirements must exist: *Feeney* at ¶ 24. The police dog,

trained to detect narcotics with proven effectiveness, had twice given a positive indication. Mr. MacEachern had shown evasive action. The Chief Justice determined that this gave reasonable grounds for the arrest of Mr. MacEachern, satisfying the objective test. Constable Pattison nonetheless said that he did not believe that he had grounds until after he had questioned Mr. MacEachern. So the subjective requirement of s. 495 - Constable Pattison's belief that Mr. MacEachern had committed an offence - was assisted by Mr. MacEachern's post-detention answers to the questions. Those questions followed the breach of Mr. MacEachern's right under s. 10(b) to be informed of his entitlement to counsel. The officers obtained the narcotics in a search incidental to the arrest.

[22] The Chief Justice's discussion of whether the narcotics evidence should be excluded under s. 24(2) makes it clear that he treated the seizure as illegal. But the Chief Justice did not expressly analyze whether the arrest was illegal and the incidental search was unreasonable under s. 8 of the *Charter*.

[23] The Crown's appeal factum acknowledges:

> Without the Appellant's responses Cst. Pattison lacked the subjective grounds to arrest the Appellant (i.e. a belief that the Appellant was illegally in possession of drugs). Therefore the arrest was not lawful under s. 495(1)(a) of the *Code*, and the search was not incidental to a lawful arrest*: R. v. Caslake*, [1998] 1 S.C.R. 51. Hence the search was not authorized by law within s. 8 of the *Charter*.

[24] In *Caslake*, Chief Justice Lamer said (¶ 13):

> 13. . . . However, since the legality of the search is derived from the legality of arrest, if the arrest is later found to be invalid, the search will be also.

In *Feeney* at ¶ 59 Justice Sopinka said that information obtained as a result of a *Charter* breach cannot support the issuance of a search warrant. The same principle applies to the grounds for a warrantless search: *R. v. Mellenthin*, [1992] 3 S.C.R. 615 at pp. 623-5. Mr. MacEachern's search was incidental to the arrest. The subjective prerequisite for arrest derived from Mr. MacEachern's answers to questions that should not have been asked before Mr. MacEachern was informed of his right to counsel under s. 10(b). The search of MacEachern's knapsack violated s. 8 of the *Charter*.

4. Second Issue - s. 24(2) of Charter

[25] In *R. v. Buhay*, [2003] 1 S.C.R. 631 the Court explained the standard of review and rationale for deference by a court of appeal to the rulings of a trial judge under s. 24(2):

> 44 In light of the above, a distinction has been drawn between the judicial adjudication of disrepute, which involves an appreciation of evidence in the exercise of discretion, and the judicial decision to exclude, which is a duty flowing from a finding of disrepute (see Sopinka, Lederman and Bryant, *supra*, at p. 423). Deciding whether each of the preconditions to exclusion is met requires an evaluation of the evidence and the exercise of a substantial amount of judgment which mandates deference by appellate courts (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 276; see also *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 733). This Court has emphasized on numerous occasions the importance of deferring to the s. 24(2) *Charter* findings of lower court judges: see, e.g., *R. v. Duguay*, [1989] 1 S.C.R. 93, at p. 98; *Kokesch*, *supra*, at p. 19; *R. v. Greffe*, [1990] 1 S.C.R. 755, at p. 783; *R. v. Mellenthin*, [1992] 3 S.C.R. 615, at p. 625; *R. v. Wise*, [1992] 1 S.C.R. 527, at p. 539; *R. v. Goncalves*, [1993] 2 S.C.R. 3, at p. 3; *Grant*, *supra*, at p. 256; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 35; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68. It was recently recalled by this Court in *Law*, *supra*, at para. 32:
>
> > While the decision to exclude must be a reasonable one, ***a reviewing court will not interfere with a trial judge's conclusions on s. 24(2) absent an "apparent error as to the applicable principles or rules of law" or an "unreasonable finding" ....***
>
> 45 This is also consistent with the recent decision of this Court in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. The appreciation of whether the admission of evidence would bring the administration of justice into disrepute is a question of mixed fact and law as it involves the application of a legal standard to a set of facts. In *Housen*, at para. 37, Iacobucci and Major JJ., for the majority, held that "[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law".
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> 46 On the s. 24(2) issue as on all others, the trial judge hears evidence and is thus better placed to weigh the credibility of witnesses and gauge the effect of their testimony. Iacobucci J., dissenting in part in *Belnavis*, *supra*, at para. 76, explained cogently the rationale for deference to the findings of trial judges:

> The reasons for this principle of deference are apparent and compelling. Trial judges hear witnesses directly. They observe their demeanour on the witness stand and hear the tone of their responses. They therefore acquire a great deal of information which is not necessarily evident from a written transcript, no matter how complete. Even if it were logistically possible for appellate courts to re-hear witnesses on a regular basis in order to get at this information, they would not do so; the sifting and weighing of this kind of evidence is the particular expertise of the trial court. The further up the appellate chain one goes, the more of this institutional expertise is lost and the greater the risk of a decision which does not reflect the realities of the situation.
>
> 47 The findings of the trial judge which are based on an appreciation of the testimony of witnesses will therefore be shown considerable deference. ***In s. 24(2) findings, this will be especially true with respect to the assessment of the seriousness of the breach, which depends on factors generally established through testimony, such as good faith and the existence of a situation of necessity or urgency (Law, supra, at paras. 38-41).*** [Emphasis added]

[26] In short, the Chief Justice's conclusion under s. 24(2) should be upheld unless he made an error in law or an unreasonable finding. To the same effect from this court: *R. v. Delorey*, 2004 NSCA 95, at ¶ 34; *R. v. Skier*, 2005 NSCA 86 at ¶ 9.

[27] In *R. v. Law*, [2002] 1 S.C.R. 227, at ¶ 33, Justice Bastarache for the Court summarized the principles under s. 24(2):

> 33 In *Collins*, *supra*, this Court grouped the circumstances to be considered under s. 24(2) into three categories: (1) the effect of admitting the evidence on the fairness of the subsequent trial, (2) the seriousness of the police's conduct, and (3) the effects of excluding the evidence on the administration of justice. Trial judges are under an obligation to consider these three factors. In general, it will be much easier to exclude evidence if its admission would affect the fairness of the trial as opposed to condoning a serious constitutional violation: *Collins*, *supra*, at p. 284.

To the same effect *Buhay*, at ¶ 41; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at ¶ 35; and *R. v. Stillman*, [1997] 1 S.C.R. 607, at ¶ 69.

(a) Trial Fairness

[28] The rationale of the trial fairness factor is protection of the accused from providing conscriptive self-incriminating evidence: *Stillman*, ¶ 72-74 per Cory, J. Justice Cory described conscriptive evidence:

> 80 Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to counsel as guaranteed by s. 10(b) of the *Charter*. The other example is the compelled taking and use of the body or of bodily substances of the accused, such as blood, which lead to self-incrimination. It is the compelled statements or the conscripted use of bodily substances obtained in violation of *Charter* rights which may render a trial unfair.
>
> . . .
>
> 98 Thus, it can be seen that the admission of evidence, which was obtained following the breach of an accused's *Charter* rights resulting in the accused being compelled or conscripted to incriminate himself ***by a statement or the use as evidence of his body or bodily substances*** will, as a general rule, be found to render the trial unfair. [Emphasis added]

To the same effect *Law* at ¶ 34-35, *Buhay* at ¶ 49, *Belnavis*, at ¶ 36.

[29] Mr. MacEachern acknowledges that the narcotics evidence was not conscriptive. His appeal factum says:

> [85] It is acknowledged that the learned trial judge was correct when he determined that the narcotics were non-conscripted evidence and its admission into evidence would not render the trial unfair. Accordingly, the focus of the appellate review must address the second and third grounds for exclusion, specifically the seriousness of the Charter breach and whether the exclusion of the evidence would bring the administration of justice into disrepute.

At the appeal hearing Mr. MacEachern's counsel made no submission on trial fairness. I will nonetheless discuss the merits of the trial fairness factor in Mr. MacEachern's circumstances.

[30] The narcotics in Mr. MacEachern's knapsack were in none of the categories of conscriptive evidence defined by Justice Cory in *Stillman*. They were not statements and did not involve the use of Mr. MacEachern's body or bodily substances. The narcotics were real evidence, and existed independently of Mr. MacEachern, his statements and his conduct.

[31] If Mr. MacEachern's conscripted statement, conduct or bodily substance was necessary (1) for the discovery of the evidence or (2) to render the evidence in a form usable by the Crown to prosecute Mr. MacEachern, then the real evidence may be derivatively conscriptive. If the Crown establishes on a balance of probabilities that the evidence would have been discovered and obtained in usable form anyway, without Mr. MacEachern's unlawful conscription, then the admission of the evidence would not render the trial unfair. *Stillman* at ¶ 75-79, 99-119; *Feeney* at ¶ 64-72; *Mellenthin*, at pp. 626-29; *R. v. Burlingham*, [1995] 2 S.C.R. 206, at ¶ 31-32, 35.

[32] The police did not discover the existence of the narcotics from Mr. MacEachern's post-detention questioning. The police dog discovered the narcotics and twice, before Mr. MacEachern's detention, indicated their presence with Mr. MacEachern.

[33] Neither was Mr. MacEachern's conscription necessary for the narcotics to be in a form usable by the Crown. The Chief Justice ruled that, notwithstanding Constable Pattison's reticence, the police dog's positive indications and Mr. MacEachern's evasive behaviour gave the officers reasonable grounds to arrest. The Chief Justice said:

> "Would any reasonable person expect you to allow that man to walk away carrying that bag in those circumstances?"

He continued:

> "So I do find that the discovery of those drugs, that [non-conscriptive] real evidence was not facilitated - as an objective observation was not facilitated by the detention and the subsequent breach."

[34] These conclusions are not challenged on appeal, and bear no error of principle or unreasonable finding. Corporal Fraser, the head of the team, did not share Constable Pattison's subjective underestimation of the grounds for arrest. Corporal Fraser testified that, if Mr. MacEachern had tried to leave, he would have been arrested. There were reasonable grounds to arrest. Even without Mr. MacEachern's conscripted statements, at some point the officers would have come to the subjective view that Mr. MacEachern should be arrested for possession of narcotics, followed by an incidental search. At least there would have been grounds for a search warrant of the knapsack under the *Criminal Code* or s. 11 of the *Controlled Drugs and Substances Act*. Mr. MacEachern would not have just strolled away from the sitting drug dog. There was a legal search in his future.

[35] There is no basis to overturn the Chief Justice's ruling that the narcotics evidence was non-conscriptive. The admission of this evidence would not render the trial unfair under the first factor in the s. 24(2) analysis.

(b) Seriousness of Breach

[36] In *Law*, ¶ 37, Justice Bastarache summarized the approach to the second factor, seriousness of the breach:

> 37 At this stage of *Collins*, *supra*, the conduct of Corporal Desroches in conducting an unauthorized search, as opposed to the fairness of the subsequent trial, informs the analysis. The seriousness of this conduct depends, first, on "whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant": *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 652. Also relevant is whether the police officer could have obtained the evidence by other means, thus rendering his disregard for the *Charter* gratuitous and blatant: *Collins*, *supra*, at p. 285.

To the same effect see *Buhay* at ¶ 52, *Stillman* at ¶ 123.

[37] As noted earlier (¶ 25) in *Buhay* (¶ 47), the Court said that the appellate deference due to the trial judge will apply "especially ... with respect to the seriousness of the breach, which depends on factors generally established through testimony, such as good faith and the existence of a situation of necessity or urgency".

[38] The Chief Justice's oral decision said this was a serious breach:

> And I do think that when I considered proper criteria in relation to Section 24(2) exclusion, the nature of the breach, there would be those who would argue that the breach was not a particularly serious one, as it turns out. I think otherwise. I think that as soon as you got a guy in detention and you are about to ask him questions, you're going to get him to possibly say some things that are not in his best interest, [you've got to] get that Section 10 done.

For this reason, the Chief Justice excluded the evidence of Mr. MacEachern's answers to the post detention questioning.

[39] The Chief Justice viewed the narcotics evidence differently. He found that, when Constable Pattison detained Mr. MacEachern, there reasonable grounds to arrest. Constable Pattison applied what Justice Sopinka in *Feeney*, ¶ 34 described as "an unreasonably high standard". This was the determining factor for the narcotics evidence.

[40] The Chief Justice was entitled to consider this factor. In *Buhay*, with respect to the seriousness of the breach, Justice Arbour for the Court said:

> 65 Some other elements must be considered and some militate in favour of admission of the evidence. The search was not especially obtrusive and the appellant had a lesser expectation of privacy than there is in one's body, home or office. As Cory J. stressed in *Belnavis, supra*, at para. 40: "Obviously, the degree of the seriousness of the breach will increase the greater the expectation of privacy. Clearly the converse must also be true." Furthermore, regardless of Constable Riddell's belief that he did not have sufficient grounds to obtain a search warrant, objectively, he probably did. Indeed, the locker was emitting a smell of marijuana and the security guards, who had seen and handled what they identified as marijuana, were credible informants. The information that they conveyed to the police would have likely been sufficient for issuance of a warrant. This Court has repeatedly held that the existence of reasonable and probable grounds lessened the seriousness of the violation (see, e.g., *Caslake,*

> *supra*, at para. 34; *Belnavis, supra*, at para. 42; *R. v. Sieben*, [1987] 1 S.C.R. 295, at p. 299; *R. v. Jacoy*, [1988] 2 S.C.R. 548, at p. 560; and *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 60).

To a similar effect, *R. v. Caslake*, [1998] 1 S.C.R. 51, at ¶ 34 per Lamer, C.J.C.

[41] Constable Pattison testified that he did not believe he had detained Mr. MacEachern. It turns out he was mistaken. Mr. MacEachern's counsel acknowledges that Constable Pattison did not intend the *Charter* breach. But he submits that Constable Pattison reasonably should have known that touching Mr. MacEachern and saying, in Mr. MacEachern's hearing, "He's not going anywhere" was detention. I agree that an officer should know the basics of detention. There may well be circumstances where an officer's unreasonable disingenuity strains credulity and bespeaks bad faith (*Buhay* ¶ 59). Then there would be a stronger case for exclusion of the evidence. But here it is clear that Constable Pattison did not believe he had detained Mr. MacEachern. The *Charter* breaches, premised on that detention, were not "deliberate" or "wilful" within the meaning of the passage from *Law*, cited earlier.

[42] The Chief Justice's failure expressly to analyze whether the search breached s. 8 does not change the result under s. 24(2). The s. 8 breach flowed directly from the breach of s. 10(b). The source of both was Constable Pattison's post-detention questioning before advice of Mr. MacEachern's right to consult counsel. The Chief Justice thoroughly considered that matter. His discussion of the conscription issue shows he was well aware that the illegal seizure of the narcotics evidence was a focal point under s. 24(2).

(c) Effect on Administration of Justice

[43] The third factor, whether an exclusion would adversely affect the administration of justice, is usefully prefaced by the following passage from the judgment of Justice Iacobucci in *R. v. Mann*, [2004] 3 S.C.R. 59:

> 57 The final consideration is whether the exclusion of the evidence would adversely affect the administration of justice. In this case, there is little doubt that the seized marijuana is the crux of the Crown's case against the appellant. Exclusion of the evidence would substantially diminish, if not eliminate altogether, the Crown's case against the appellant. Possession of marijuana for the purpose of trafficking remains a serious offence despite continuing debate about

> the extent of the harm associated with marijuana use: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at paras. 60 and 153. Regardless, evidence which is non-conscriptive and essential to the Crown's case needs not necessarily be admitted: *Buhay, supra*, at para. 71. Just as there is no automatic exclusionary rule, there can be no automatic inclusion of the evidence either. The focus of the inquiry under this head of analysis is to balance the interests of truth with the integrity of the justice system. The nature of the fundamental rights at issue, and the lack of a reasonable foundation for the search suggest that the inclusion of the evidence would adversely affect the administration of justice.

[44] In Mr. MacEachern's case, the Chief Justice concluded that the introduction of the narcotics evidence

> will not bring the reputation of the administration of justice into disrepute. As a matter of fact, I would suggest that the contrary would be true.

[45] As noted in *Mann*, possession of marijuana for the purposes of trafficking is a serious offence. Clearly the same is true for possession of cocaine for the purpose of trafficking: *R. v. Smith*, [1992] N.S.J. No. 365; *R. v. Byers* (1989), 90 N.S.R. (2d) 263 (C.A.), at p. 264; *R. v. Smith* (1990), 95 N.S.R. (2d) 85 at p. 86.

[46] The narcotics evidence was critical to the Crown's case against Mr. MacEachern.

(d) Conclusion - Balancing the Factors

[47] The narcotics evidence was non-conscriptive. The reason Mr. MacEachern was not arrested was police overcaution. The *Charter* breach was not wilful. The evidence was necessary for the prosecution of serious criminal offences. In my view, the Chief Justice made no error of law or unreasonable finding in his analysis or balancing of these factors and conclusion that the narcotics evidence should not be excluded.

[48] I would dismiss the appeal.

Fichaud, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.