NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Timmons***, 2011 NSCA 39

Date: 20110505
Docket: CAC 329645
Registry: Halifax

Between:

Appellant

William Tracy Timmons

v.

Her Majesty the Queen

Respondent

Revised decision:	The text of the original decision has been corrected according to the erratum dated May 18 , 2011. The text of the erratum is appended to this decision.
Judges:	Oland, Fichaud and Farrar, JJ.A.
Appeal Heard:	November 15, 2010, in Halifax, Nova Scotia
Held:	Leave to appeal is granted, the appeal is allowed and the conviction is set aside per reasons for judgment of Oland, J.A.; Fichaud and Farrar, JJ.A. concurring.
Counsel:	Ralph W. Ripley, for the appellant Monica McQueen, for the respondent

Reasons for judgment:

[1] The main issue on this appeal concerns the police entry and search of a home, without a warrant. In the particular facts of the case, did their actions amount to a breach of the *Charter* right to be secure against unreasonable search and seizure? Other issues arising from this appeal concern the validity of the search warrant that issued after that entry and search, and the admissibility at trial of certain certificates of analysis.

[2] For the reasons which follow, I would allow the appeal.

Background

[3] The appellant, William Tracy Timmons, was charged with unlawful possession of cocaine and possession of marijuana for the purpose of trafficking, contrary to ss. 4 and 5 respectively of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. During the course of his trial, Justice Frank Edwards held a *voir dire* to determine the admissibility of certain evidence.

[4] How the police came to arrive and search the home in Gillisdale, Inverness County, Nova Scotia was described by the trial judge in his *voir dire* decision reported as 2009 NSSC 407:

> [3] ***Facts***: On October 10, 2008, at approximately 10:30 p.m., Nadine Shaw (then age 24 years) telephoned her mother Peggy Shaw. Nadine advised her mother that she and the Accused (with whom Nadine was living) were having a fight and "I wanted her to come pick me up."
>
> [4] The family vehicle was not available so Peggy called the RCMP to have them go for her daughter. Ms. Shaw told the dispatcher that her daughter was being abused. She also told him that the Accused "deals in drugs and has a big Rottweiler." Peggy said she did not know whether or not there were weapons in the Accused's house.
>
> [5] The call was relayed by RCMP telecoms Truro to the Inverness Detachment. Constables Roberts and Bojaruniec were on duty in separate vehicles. When they received the call, they teamed up in one vehicle and began to search for the Accused's home. Peggy Shaw did not know exactly where the Accused lived and had provided telecom with a very vague description. It should be kept in mind that geographical area in question is a large sparsely populated

rural area. Constable Roberts using her cell phone called Peggy Shaw back to get more details. During that call, Peggy Shaw confirmed her belief that Nadine was being abused and also provided Constable Roberts with Nadine's cell phone number. Unfortunately, Peggy Shaw could not provide specific directions to the Accused's location.

[6] The RCMP then contacted Nadine who laughed and said "so my mother called." Nadine insisted that she was fine and did not need the police. Nadine stated further that a friend "Jason Timmons" was picking her up. It turns out that there is no such person as Jason Timmons and she mistakenly said Jason Timmons when she meant Jason Phillips. Nadine went on to reiterate to Constable Roberts "I'm just fine and am leaving right now." Nadine refused to tell police where she was located.

[7] Constable Roberts again called Peggy Shaw who advised that the friend is probably Jason Phillips (not Timmons) and provided police with Phillips' phone number. Constable Roberts phoned that number and spoke with Jason's mother, Irene. Irene confirmed that Nadine had called and Jason has just left. Irene provided more details about the location of the Accused's home and gave sufficient details so that police were enabled to successfully find the residence. But it did take them at least two hours to do so. They recorded their time of arrival there at approximately 12:30 a.m. and the initial call, as I have noted, was at 10:30 p.m. By the time police got to the Accused's residence, therefore, the call was 2 hours old.

[8] It should be borne in mind that Constable Roberts was aware that the Accused had outstanding charges for obstructing police and impaired driving. Police also considered Mr. Timmons to be in the violent category (Code 10:36).

[9] Constable Roberts also believed the Accused to be "major CDSA" (***Controlled Drugs and Substances Act***).

[10] Shortly after Constables Roberts and Bojaruniec arrived, they heard a scream coming from inside the residence. Nadine denies there was any such noise but I do not believe her. (Nadine is still Accused's girlfriend doing her best to extricate him from situation she probably feels responsible for). (Nadine's memory vague - e.g. clearly wrong on times. Memory selective. Constable Roberts says the scream increased everyone's threat level.

[11] In fairness to her, there is another possibility which would be consistent with the evidence given by Nadine Shaw. Nadine stated that while police were still outside the residence, the dog, a Rottweiler mix, which was inside the home, was whimpering. (The dog was not barking.) It is possible that Constables

> Roberts and Bojaruniec honestly mistook the whimpering sounds for human sounds. Constable Roberts did described the scream as "... someone trying to scream but not able to actually get a scream out as if in a panic situation. It would be my first thought when I heard it. So it wasn't a loud scream cry for help but it was like a ... a shriek."
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> [12] Constable Septon arrives five minutes later, followed a few minutes after that by Constable Montreuil and Auxiliary Constable Camus.
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> [13] Police also saw a dog dish and chain outside indicating the possible presence of guard dog. This observation made drawing weapons prudent and absolutely justified.

[5] Nadine Shaw responded to the police pounding on the door, demanding that it be opened and the dog secured. When she opened the door, she said that everything was fine. Nadine told the police that no assault had taken place, she and Mr. Timmons had had a verbal argument, she had wanted to leave and he did not want her to take his truck.

[6] From where they had entered, the three officers could see inside a bedroom off that space. There was a person lying on the bed. Cst. Montreuil went straight there. She asked Mr. Timmons to get out of bed and be searched for officer safety reasons. He cooperated. Cst. Septon assisted with the pat down search. Afterwards, Cst. Montreuil took him to the living room.

[7] The other two officers entered the residence after the first three. They assisted in "clearing the house" for security purposes. They entered each room and space that could hold a person to ensure that no one was concealed there and that there were no firearms.

[8] After seeing a number of items about the property, the police decided to obtain a search warrant. Cst. Montreuil relayed information by telephone to Cpl. MacKay. In her Information to Obtain a Search Warrant (the "Information"), Cpl. MacKay wrote that the officers, whom she identified by name in each instance, had observed articles including:

- "a large Ziploc bag containing substances believed to be Marijuana in the bedroom on top of a clothes basket, in plain view",

- "a large black garbage bag containing dried marijuana plants in the kitchen",

- "approximately 170 pre-planted marijuana seed basket" in the basement, and

- "Miracle Grow solution, large buckets and insulation venting. As well as a halogen lamp, timers, a tray with heater, and fans" in the spare room, which had its window covered with dark plastic.

[9] In the Information, Cpl. MacKay stated that she had reasonable grounds to believe and did believe that there were controlled substances or precursors at a dwelling located at 139 Egypt Road, Scottsville, Inverness County. The information included a description of the premises and out buildings.

[10] While the RCMP officers waited at the house, Cpl. MacKay took the Information to a Justice of the Peace. He issued a warrant authorizing the search of the premises described in the Information.

[11] During the *voir dire*, the RCMP officers were not able to substantiate the origin or the description of all the particulars which appeared in the Information. They testified as to some omissions or discrepancies in how the house was described in that document compared with the actual premises.

The *Voir Dire* Decision - Unreasonable Search and Seizure

[12] In his decision on the *voir dire* concerning the alleged breach of s. 8 of the *Charter* by the warrantless entry and search, the judge stated:

> [14] In those circumstances, police had a responsibility to enter the residence – whether invited or not. The perceived scream meant that either Nadine was lying about being okay, or had been subsequently threatened, or that someone else inside was in trouble. Police had to investigate and check the entire house for the presence of other persons. . . .

He stated that there was no qualitative difference between a 911 call as in *R. v. Godoy*, [1999] 1 S.C.R. 311 and here where Peggy Shaw had phoned police out of concern for her daughter's safety.

[13] According to the judge, the entry by the police was not only justified but entirely necessary. He also stated that once inside the residence, the police were justified in checking the house to ensure that there were no other occupants and in searching Mr. Timmons to ensure he had no weapon. The judge held that the Crown had proved that the police acted reasonably and lawfully in searching Mr. Timmons' residence and that there was no breach of s. 8 of the *Charter*.

The Trial Decision

[14] The evidence heard by the trial judge on that *Charter* application was considered in the trial proper along with additional evidence called by the Crown. The judge found Mr. Timmons guilty as charged of possession of cocaine and marijuana, and possession of marijuana for the purposes of trafficking, contrary to ss. 4 and 5 of the *Controlled Drugs and Substances Act*. Mr. Timmons appeals against his conviction.

Issues

[15] Mr. Timmons collapsed the 18 issues in his notice of appeal into four categories. The issues can be restated as follows:

1. Was the initial warrantless entry and search of the home by police a violation of s. 8 of the *Charter?*

2. Was the further search of the premises under the authority of a search warrant a violation of s. 8 of the *Charter*?

3. Should the evidence found as a result of the searches have been excluded pursuant to s. 24(2) of the *Charter*?

4. Should the certificates of analysis tendered at trial have been admitted into evidence?

Standard of Review

[16] The jurisdiction of this court in this appeal against conviction is set out in s. 675 of the *Criminal Code*:

> 675. (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
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> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
>
> (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal ...

[17] For questions of law, the standard of review is correctness. For questions of fact, it is overriding and palpable error. For questions of mixed law and fact, it is also palpable and overriding error, unless a question of law is readily extricable. In that situation, the standard of correctness applies to that question of law. See *Housen v. Nikolaisen*, 2002 SCC 33.

[18] Whether the correct legal standards were identified and applied is a question of law. If no such error was made, an appellate court then considers the evidentiary basis of the decision and the application of the legal principles to the facts of the case which, unless there are extractable legal questions, are questions of mixed fact and law.

Analysis

Warrantless Entry and Search

[19] Mr. Timmons argues that the trial judge erred in law in determining that his rights as guaranteed by s. 8 of the *Charter* to be secure against unreasonable search and seizure were not breached by the police entry and search of his home. He raises several arguments, including:

(a) The call to which the police responded was not a 911 call or distress call made from his home;

(b) The police were not justified in entering when Nadine opened the door and said that she was fine; and

(c) Once the police had entered, their "clearing the house" was not justified.

[20] I begin by setting out the relevant provisions of the *Canadian Charter of Rights and Freedoms*, namely, sections 8 and 24:

> Search or seizure
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> . . .
>
> Enforcement of guaranteed rights and freedoms
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
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> Exclusion of evidence bringing administration of justice into disrepute
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> (2) Where, in proceedings under subsection (1), 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.

[21] An individual is entitled to privacy in his or her own home. The unauthorized presence of state agents such as the police constitutes an invasion of that privacy. As stated by Cory J. at ¶ 141 of *R. v. Silveira*, [1995] 2 S.C.R. 297:

> 141 ...It must be the final refuge and safe haven for all Canadians. It is there that the expectation of privacy is at its highest and where there should be freedom from external forces, particularly the actions of agents of the state, unless those

> actions are duly authorized. This principle is fundamental to a democratic society as Canadians understand that term. ...

[22] However, the principle is not without exceptions. In her decision in *Silveira*, L'Heureux-Dubé J. referred to *R. v. Landry*, [1986] 1 S.C.R. 145 where the majority concluded that a warrantless entry in hot pursuit circumstances was permitted, and stated at p. 744:

> [108] ... In concurring reasons, Estey J. added in *Landry* (Beetz and McIntyre JJ. concurring), at p. 166, that the ancient principle of the inviolability of the home "must yield to the legitimate requirements of law enforcement" and went on to cite the following passage from the case of *Lyons v. The Queen*, [1984] 2 S.C.R. 633, where for the majority he wrote (at p. 657):
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> > The home is not a castle in isolation; it is a castle in a community and draws its support and security of existence from the community. <u>The law has long recognized many compromises and outright intrusions on the literal sense of this concept</u>. . . . (Emphasis in original)

[23] Once it has been demonstrated that a search is a warrantless one, the burden is on the Crown to show, on a balance of probabilities, that the search was a reasonable one. A search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search was conducted is reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265 at ¶ 23.

[24] It is undisputed that here the police activity following entry and before the issuance of the search warrant amounted to a warrantless search and thus was *prima facie* unreasonable. It is not suggested that exceptions to the expectation of privacy in a home, such as hot pursuit, exigent circumstances, or statutory authorization, are applicable. In order to be lawful, the search had to have been conducted pursuant to common law police powers. If it was not lawful, it is then necessary to consider whether the evidence obtained as a result should be excluded under s. 24(2) of the *Charter*.

[25] With this background, I turn to the arguments raised by Mr. Timmons.

(a) **Not a 911 or Distress Call**

[26] Mr. Timmons characterizes the original call by Peggy Shaw to the RCMP as just a call by a mother looking for a drive for her daughter. He argues that it was not a 911 call, nor akin to a 911 call. The call was not made by an alleged victim, or from his home. He emphasizes that before the police arrived at his residence, Nadine had told the police on the telephone that she was "perfectly fine". She had laughed and said that she was in no danger. Nadine had indicated that she did not need help, but a drive home, and she had already arranged a drive.

[27] With respect, I cannot accept this argument. Rather, I agree with the trial judge. In the particular circumstances of this case, the fact that the call which triggered police response was not through 911, by the alleged victim, or from the house is not material.

[28] I begin by considering the jurisprudence regarding 911 emergency response calls. The leading case is *R. v. Godoy*, *supra*. There the police responded to a 911 call which originated from Mr. Godoy's apartment. It was classified as an "unknown trouble" call, one where the line had been disconnected before the caller spoke. When the accused answered the door, he said there was no problem. He tried to shut the door when the police asked to enter to investigate, but an officer prevented him from doing so. After the officers entered, they found the accused's wife sobbing and injured. The accused was eventually charged, among other things, with assaulting a police officer with the intent of resisting arrest.

[29] The trial judge acquitted on the basis that the police entry into the accused's apartment was unauthorized and, therefore, all subsequent police actions, including his arrest, were illegal. That decision was overturned on appeal. The Ontario Court of Appeal held that the police were acting in the execution of their duty to protect life and prevent injury when they forcibly entered the apartment in response to a disconnected 911 call.

[30] On appeal to the Supreme Court of Canada, one of the issues was whether the appellate court had erred in that determination. Chief Justice Lamer, writing for the Court, stated:

> 8 . . . <u>The police were acting in the course of their duty to "protect life" which includes preventing death or serious injury</u>. They entered the apartment

> with the knowledge that a 911 call was made from that residence. Entry was necessary to determine the cause of the distress and to give aid if necessary. Giving aid to persons in distress is the very essence of the police duty to "protect life".
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> . . .
>
> 11 In my view, public policy clearly requires that the police ab initio have the authority to investigate 911 calls, but whether they may enter dwelling houses in the course of such an investigation depends on the circumstances of each case.
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> . . .
>
> 20 . . . I see no other use for an emergency response system if those persons who are dispatched to the scene cannot actually respond to the individual caller. I certainly cannot accept that the police should simply take the word of the person who answers the door that there is "no problem" inside.
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> . . .
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> 22 Thus in my view, the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. The public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's privacy interest. However, I emphasize that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident's privacy or property. In Dedman, supra, at p. 35, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. Each case will be considered in its own context, keeping in mind all of the surrounding circumstances. . . .

[31] Also relevant to this issue is *R. v. Norris*, 2010 ONSC 2430 where, in response to a report of a domestic assault, the police forcibly entered a home by kicking in the door. One of the issues raised was whether a telephone call to the police by a third person respecting alleged criminal activity in another residence

was sufficient to invoke the same or a similar emergency response as a 911 call. Stach, J. stated:

> [15] While it is true that a 9-1-1 call must be treated from the outset as a "distress" call it does not follow from this that all information which finds its way to the police by other means cannot constitute circumstances of distress. In my view it is the substance of the information in the hands of the police and its analysis that needs to be questioned rather than the precise means by which that information comes into the hands of the police. It is a contextual analysis. ...

[32] Twice her mother had told the police that Nadine Shaw had been abused. They had no reason to disbelieve her. The police themselves considered Mr. Timmons to be violent for reasons separate from this incident. While Nadine, the alleged victim, had assured the police on the telephone that she was fine and had arranged for a drive home, other information she gave or did not give, was concerning. She refused to tell the police where she was. She hung up on the police and did not answer when they called back. Nadine could have been threatened to respond in these ways which made it more difficult for the police to find her.

[33] Nadine gave a wrong name for the person she said was to pick her up. The officers could not get confirmation that anyone had picked her up and removed her from the home to safety. In fact, she never was picked up. She was still on the premises when they arrived after midnight, having been trying to locate her for two hours in an isolated countryside.

[34] In the circumstances, it was reasonable for the police to believe that something was or could be wrong, and they should find and see her in case Nadine required protection or rescue. Their proceeding to and attendance at Mr. Timmons' home were actions taken within the course of the police duty to "protect life".

[35] In my view, when this matter is considered in context, keeping in mind all of the surrounding circumstances, it was reasonable for the police to search for the alleged victim and to go to Mr. Timmons' home.

At the Door

[36] Although Nadine Shaw had told the police at the door that she was fine, her statements could have been involuntary and made pursuant to threats of violence. At this point, she was still inside with the person reported to have abused her, and possibly under his control.

[37] At ¶ 20 of *Godoy*, Lamer, C.J. could not accept that the police should simply take the word of the person who answers the door that there is no problem inside. While he was referring to someone other than the alleged victim, the same concerns can arise when that person is the alleged victim. Here it was reasonable for the police to stand their ground. Their alternative was to accept what Nadine said at the door at face value and simply leave. If they had done so, the officers could have been abandoning an alleged victim of abuse in the company of her alleged abuser and in a remote and secluded location, without ever seeing or speaking with her alone.

Police Entry

[38] In his *voir dire* decision, the trial judge stated that in the circumstances, including the perceived scream, the police had a responsibility to enter the residence, whether invited or not, and that their warrantless entry, search of Mr. Timmons' person, and search of his house did not breach his s. 8 *Charter* right against unreasonable search and seizure.

[39] With respect, I disagree with the judge's analysis of the police entry.

[40] Four R.C.M.P. officers, with their firearms or Taser out of their holsters and at the low ready position, were at the scene. So was an unarmed auxiliary constable. They had positioned themselves at two entrances to the house. When the police demanded, Nadine came and opened the door. She was the person who had been reported as having been abused by Mr. Timmons.

[41] If the police were concerned that her assurances that all was well might not be genuine or made of her own free will, they could have asked Nadine to step outside the house. The police could then have questioned her face to face and away from any possible influence by Mr. Timmons.

[42] If she had been in any danger, Nadine then could have simply left with the five officers. She had been located and was safe with them. There would have been no reason or need to enter the residence.

[43] The police had no information that there was anyone in the house other than Mr. Timmons and Nadine Shaw. However if, because of the perceived scream or otherwise, they were concerned that there might be anyone else in the house who was in trouble, they could have obtained that information from Nadine Shaw, outside the house. They could also have asked whether there were any firearms or weapons there. If she said that there was someone who needed assistance, the officers would have reasonable grounds to believe that that person's safety was a risk. They then would have been justified in entering the house to locate and protect him or her.

[44] If Nadine refused to step outside the house when asked, the police might have suspected that Mr. Timmons was threatening her from behind the door or farther away, and that he was armed. In that case, they would have had to decide how next to proceed. Depending on the circumstances, one reasonable option might well be a warrantless entry with the object of protecting Nadine's safety.

[45] But the police did not ask Nadine to step outside the house. Instead three officers entered. Nadine Shaw told them that she was fine. There was no one nearby or who was interfering with their conversation. The only person in view was a man lying on a bed in a bedroom. There was no evidence that he either moved or reached for something suddenly, or indeed at all. Nevertheless the police went straight into the bedroom, had him get up, did a pat-down search to which the man cooperated, and then proceeded to search his house.

[46] In my view, the trial judge erred in principle by failing to consider alternatives to the warrantless entry of Mr. Timmons' home and bedroom, and the search of his home.

[47] In fulfilling their duties to prevent death and serious injury, the police are often required to make rapid assessments and decisions in potentially dangerous situations. However, they must always include in their considerations the rights set out in the *Charter*. Chief Justice Lamer's statements in ¶ 22 of *Godoy*, where he

emphasized that the intrusion into a dwelling to ascertain the safety of a caller was limited to the protection of life and safety, are instructive and clear. I repeat:

> The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident's privacy or property.

[48] In his submissions to the trial judge, counsel for Mr. Timmons emphasized and quoted this passage from *Godoy*. While the judge referred to *Godoy* in his reasons, he made no mention of this principle. It does not appear that he considered it in deciding that the police entry without a warrant was justified.

[49] As to the pat-down search, in *R. v. Mann*, 2004 SCC 52 the Supreme Court of Canada considered searches incidental to the police power of investigative detention. Such searches are warrantless and presumed to be unreasonable unless they can be justified and found reasonable pursuant to the test in *Collins*, described earlier. Iacobucci, J, writing for the majority, noted the importance of maintaining a distinction between search incidental to arrest (such as in *R. v. Golden*, 2001 SCC 83) and search incidental to an investigative detention. He stated:

> 37 . . . The latter does not give license to officers to reap the seeds of a warrantless search without the need to effect a lawful arrest based on reasonable and probable grounds, nor does it erode the obligation to obtain search warrants where possible." ...
>
> 40 The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. . . . The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.

[50] The judge's failure to consider alternatives short of police entry and search of a person and a home without authorization by warrant led to his finding that there had been no violation of the s. 8 *Charter* right to be secure against

unreasonable search and seizure. Having determined that there was no *Charter* breach, he did not consider s. 24(2) of the *Charter*.

[51] In certain circumstances, an appellate court can proceed with a s. 24(2) analysis. In *R. v. Caputo* (1997), 114 C.C.C. (3d) 1, 98 O.A.C. 30 (C.A.), Rosenberg, J.A. commented:

> 36. The trial judge did not consider the application of s. 24(2) of the Charter because, in his view, there was no ongoing violation of the appellant's rights at the time that statements #5 and #6 were made and because he determined that the earlier violations did not taint the subsequent collection of evidence. In my view, the trial judge erred in adopting that approach and, consequently, this court is required to consider the application of s. 24(2). This court is in as good a position as the trial judge to make the necessary determination under s. 24(2). The evidence concerning the appellant's detention and subsequent arrest was undisputed and, as such, it is only necessary that this court draw the appropriate inferences from this evidence and the findings of fact made by the trial judge. [Emphasis added.]

[52] See also *R. v. Squires*, 2005 NLCA 51, 199 C.C.C. (3d) 509, where the Court of Appeal concluded that the trial judge had erred by failing to engage the s. 24(2) analysis. In rejecting Squires' argument for a new trial, Mercer, J.A. writing for the court stated that it had the record of the pre-trial applications and therefore could determine whether a certain item ought to have been admitted in evidence at trial. As authority for appellate courts undertaking the s. 24(2) analysis, he referred to, for example, *R. v. Laurin* (1997), 113 C.C.C. (3d) 519 (Ont. C.A.); *R. v. Smith* (1998), 219 A.R. 109 (Alta. C.A.).

[53] In *R. v. Ngai*, 2010 ABCA 10, 251 C.C.C. (3d) 533, the trial judge determined that there had been no s. 8 breach and therefore did not proceed to a s. 24(2) analysis. In the course of its decision, the Court of Appeal observed:

> 27 . . . while no oral arguments had been made at trial on the section 24(2) analysis, counsel for both the Crown and the appellant had filed written submissions on the point.
>
> ...

> 31 At trial, evidence was adduced during the *voir dire* to deal with both the issue as to whether or not there had been a section 8 breach and also if so, should the evidence be excluded pursuant to section 24(2).

[54] *Caputo*, *Squires* and *Ngai* establish that, where the trial judge has not done so, it is permissible for an appellate court to conduct a s. 24(2) analysis when the record is sufficient. When the record is not complete, an appellate panel may send the matter back for a new trial. See, for example, *R. v. Le*, (1996), 181 A.R. 107 (C.A.) where the record was complicated due to the bifurcation of the s. 8 and s 24(2) arguments, with the latter to proceed only if and after the s. 8 breach was established.

[55] In the case before us, we have a transcript of brief oral defence submissions on s. 24(2), but no Crown submissions, as the trial judge told the Crown they were not necessary. We have no copies of any written submissions on s. 24(2) to the judge. In this court, the Crown made submissions on s. 24(2) but the defence (appellant) said very little on the topic and requested that the matter be remitted for retrial. The *voir dire* decision did not find it necessary to discuss s. 24(2). As a result, we have little guidance from the trial judge on the s. 24(2) analysis. In my view, this is not a case where it is appropriate for the Court of Appeal, at first instance, to engage in the delicate balance of a s. 24(2) analysis.

Disposition

[56] To dispose of the appeal, it is unnecessary to discuss the second and fourth issues mentioned earlier. I would grant leave to appeal, and allow the appeal. I would set aside the conviction. Any retrial shall be at the option of the Crown and, if held, shall be before a different judge.

Oland, J.A.

Concurred in:
Fichaud, J.A.
Farrar, J.A.

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Revised Judgment:	**The text of the original judgment has been corrected according to this erratum dated May 18, 2011.**
Judges:	Oland, Fichaud and Farrar, JJ.A.
Appeal Heard:	November 15, 2010, in Halifax, Nova Scotia
Held:	Leave to appeal is granted, the appeal is allowed and the conviction is set aside per reasons for judgment of Oland, J.A.; Fichaud and Farrar, JJ.A. concurring.
Counsel:	Ralph W. Ripley, for the appellant Monica McQueen, for the respondent

Erratum:

[57] In ¶ 9, line one, replace “Cst.” with “Cpl”.