PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Earle, 2012 NSPC 27

Date: 20120326
Docket: 2336596
Registry: Sydney, N.S.

Between:

Her Majesty the Queen

v.

Tammy Frances Earle

Judge: The Honourable Judge Jean M. Whalen

Heard: January 10, and February 23, 2012, in Sydney, Nova Scotia

Oral decision: March 26, 2012
Written decision: April 5, 2012

Charge: Did on or about the 13th day of July 2011 at or near Highway 105, North Sydney, CBRM, Nova Scotia, did possess a substance included in Schedule II to wit: in excess of three kilograms of Cannabis Marijuana for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*;

And further, did possess a substance included in Schedule II to wit: Cannabis Resin for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*.

Counsel: Theresa O'Leary, for the Crown
William P. Burchell, for the Defence

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By the Court:

[1] INTRODUCTION

[2] Ms. Earle was traveling by taxi cab to the "Newfoundland ferry". The R.C.M.P. were doing a traffic check stop on highway 105, North Sydney. The taxi cab was stopped and then subsequently directed to pull off to the side of the road. As a result of further questioning and actions by the police, including the use of a "sniffer dog", Ms. Earle was arrested for "possession for the purpose of trafficking".

[3] Her suitcase was removed from the taxi and the lock was cut open. Upon inspection, 24 pounds of marijuana and 213 grams of hashish were found. Charges were laid pursuant to s. 5(2) of the *Controlled Drugs and Substances Act*.

[4] Defence counsel argues the initial stop (traffic check) in the middle of highway was lawful under the *Motor Vehicle Act*; however, the direction and further stop at the side of the road for just under one hour was unlawful, it amounts to an arbitrary detention, a breach of the defendant's Charter rights. Subsequently her arrest, the search incident thereto of her suitcase was unlawful and any items found and seized should be excluded pursuant to s. 24(2) of the Charter.

[5] The crown argues, the stop was not arbitrary, it was lawful. Based on a "constellation" of factors the police had reasonable grounds to deploy a "sniffer dog". This provided sufficient grounds to arrest the defendant and the subsequent search incident to arrest was lawful. Even if the court were to find a charter breach the evidence should not be excluded.

[6] ISSUES:

(I) Was the defendant's detention arbitrary, thus a breach of her s. 9 Charter rights?

(II) Was the search of her suitcase a breach of s. 8 of the Charter? If so,

(III) Should the evidence be excluded pursuant to s. 24(2) of the Charter?

[7] REVIEW OF THE EVIDENCE

[8] The Crown called two (2) officers on the *voir dire*.

[9] Constable Bonnell testified he was posted with the Cape Breton Integrated Traffic Services Unit in North Sydney on date in question. His shift began at 1400 hours on July 12, 2011.

[10] He and Constable Skinner were manning a highway check stop on highway 105 approximately 1 to 1.5 km from the entrance to the "Newfoundland ferry". They were in uniform, operating marked police cars with emergency lights activated.

[11] The purpose of the check stop was to look for infractions under the *Motor Vehicle Act* or impaired drivers.

[12] At approximately 1943 hours Constable Bonnell observed a minivan enter the check stop (heading east bound toward the Newfoundland ferry). Constable Bonnell stated, "What struck my attention first, it said Aircab at the top". "...as it approached in Province of New Brunswick by law you have to have a licence plate in front and back..."

[13] Constable Bonnell testified he stopped the driver and learned that he was on his way to the "Newfoundland ferry". There was a single passenger, a female later identified as, Tammy Earle, in the passenger seat (second row).

[14] He spoke with Ms. Earle and learned she was traveling from Ontario, heading home to Newfoundland. She had taken a cab from Salsbury, New Brunswick to Moncton Airport, where she got another cab (due to mechanical difficulties) which was taking her to the ferry.

[15] When asked if he had formed any kind of opinion at that point in time, Constable Bonnell testified (page 11, line 7):

> "Yeah, eh, it was strange, it was from the, eh, from the norm of what we were used to. Transportation that goes to the Newfoundland ferries, just usually your own personal vehicle, major transport trucks. Aside from that it is a walk-on, eh, it is very rare that you ever see a taxi cab out of Province,

> and to be honest, the first time I've ever seen it in my experience going to Newfoundland ferry."

[16] Constable Bonnell also had a discussion with the defendant regarding her possessions. He learned she had a bag and a suitcase in the back of the taxi. At page 12, line 4:

> "Yes Sir, you could see, eh, you could see a bag located with her, like close to her person and there was a black suitcase located in the trunk which was in plain view, there was nothing obstructing it, covering it, you could look in the back window and there it was."

[17] Constable Bonnell found out from the driver the cost of the fare from the Moncton Airport was $600.00. She told the officer she had gotten home this way before, i.e., taxi to the ferry.

[18] When the officer was asked if he made any other inquiries about what she might have in her possession, on her person, or in her luggage, the officer testified at Page 13, line 10:

> "Later on during the course of the investigation, I had asked her what was in the suitcase if there was anything illegal in the sense of drugs or contraband and she said no it was just her clothes that was in the luggage. She actually had that bag, the bag that was close to her, she had opened that, we hadn't searched her, she had opened it and there was nothing like of anything illegal by any means, she just had personal belongings in there."

[19] Constable Bonnell testified Ms. Earle's suitcase was locked, described it as a "small luggage lock". This he stated at Page 14, line 18:

> "...in my experience and well professionally and personally most people don't lock their luggage. I found that very strange. The luggage was actually brand new too."

[20] Later at page 15, line 5:

> "There was nothing...no identifying tags, no name tags, nothing on the suitcase."

[21] Constable Bonnell stated at this time he had "formed the belief that there was something illegal being transported in that suitcase."

[22] When asked what factors lead to that belief, Constable Bonnell testified at Page 16, line 6:

> "Yeah the taxi being out of the norm, the suitcase, not a large number of suitcases, at first she instructed she had been in Ontario for three weeks and was traveling home, even myself that would be a small amount of luggage after (3) weeks of travelling just to come home with one suitcase. She only had enough money to pay for the cab and get across the ferry, which is, to my knowledge and experience, indicative of transporting illegal stuff, you don't want, eh, debit cards, credit cards nothing is going to trace you, just quick cash..."

[23] At line 14:

> "...Speaking with the taxi driver also, no other fares, just her, he never picked up anyone else...there was just the two of them..."

[24] Constable Bonnell testified he told Ms. Earle what his thoughts were. At page 17, line 4:

> "In the course of the investigation I had told her that and she had stated no, there were just her clothes in the suitcase."

[25] Constable Bonnell testified as a result of his belief he made the decision to contact the Canine Unit. Ms. Earle was also "formally" detained for investigation purposes, advised of her charter of rights and police caution...placed in the rear of...police vehicle..." (at 2010 hours)

[26] Constable Bonnell testified the canine unit arrived at 2039 hours. After a discussion with the officer a "perimeter search" of the vehicle was conducted.

[27] At page 25, line 8, Constable Bonnell testified:

> "The dog started on the passenger rear side of the vehicle...the dog went around...started on the rear passenger...went around...got here, sat."

[28] This procedure was done twice, as a result of the outcome, Constable Bonnell believed he had reasonable and probable grounds to place Ms. Earle under arrest. The defendant was arrested at 2043 hours for "possession for the purpose of trafficking.".

[29] ON CROSS EXAMINATION

[30] Constable Bonnell testified he stopped the taxi at the check stop and spoke with the driver. He then "deemed I wanted to speak with him further, I instructed him to pull to the right".

[31] When asked by Mr. Burchell why he wanted to speak to him further, the Constable stated at page 31, line 10:

> "Because stuff when I stopped him was speaking with him, it was not making sense, like it didn't, it was strange from the norm of what I was used to seeing on that highway."

[32] At line 13 – 19:

> Q: So basically because it was a taxi cab from the Moncton Airport?
>
> A: Yes Sir, carrying a single female headed to the Newfoundland ferry.
>
> Q: So you had a hunch something was amiss?
>
> A: To be completely honest, there was a spotty sense if that's the only way I could describe, that something was amiss, yes that's correct.
>
> Q: So you operate on a hunch, you pull him over. You had a hunch something was wrong...?
>
> A: Yeah, I had a gut feeling that something was wrong.

[33] The Constable acknowledged that the defendant was upfront with her answers. She did not appear nervous or upset.

[34] When asked, "What was it from your experience that said that was out of the norm?" The officer stated at page 35, line 5:

> "In my experience in working with the traffic unit, and also working as a patrol officer with the Cape Breton Regional Police Service, and dealing in any traffic enforcement that I had dealt with while on duty, I have never come across a taxi cab from the New Brunswick area heading to the Newfoundland ferry."

[35] The Constable admitted he did not ask the taxi driver if he had ever made the trip to the Nova Scotia terminal before. There was also nothing in his notes about "long travel trips", because he stated it "wasn't pertaining to the ferry".

[36] The Constable asked for photo identification from the driver and the passenger and although he said he would have asked for the vehicle permit and insurance it is not in his "general report".

[37] At page 40, line 3:

> Q: Yeah, and in fact this wasn't a check under the *Motor Vehicle Act* at all was it? It never was.
>
> A: Initially it was when I first stopped them on the highway.
>
> Q: When you stopped them on the highway you saw an Air Cab light, you saw New Brunswick plates, and you never took any of the steps normally taken by a police officer on a vehicle stop under the authority of the *Motor Vehicle Act*, correct?
>
> A: If that's how it is documented on my report then that is correct.

[38] The Constable was questioned about the suitcase and he testified he could see the lock on the suitcase from his view outside of the vehicle, but couldn't see

all of the suitcase. It wasn't until the trunk of the vehicle was opened that he observed there were no name tags or freight tags.

[39] The officer got photo identification from Ms. Earle, he completed a "person's check" for outstanding warrants etc. He found there were none. This was done because he had a "gut feeling". (Page 49, line 12)

[40] Ms. Earle was arrested by Constable Bonnell at 8:43 p.m. for "possession of contraband for the purpose of trafficking". The suitcase was opened, the officer did not have a warrant because based on his training and work as a police officer, he did not believe he needed one. He confirmed there were no exigent circumstances.

[41] Constable Mark Skinner testified he was working with Constable Bonnell conducting a check stop on Highway 105. They stop vehicles "looking for seatbelts, safety infractions, impaired drivers..."

[42] At approximately 7:45 p.m. the officer testified they both noticed a vehicle a "Moncton Airport Taxi". He stated at page 69, line 18:

> "Well I kind of yelled to Constable Bonnell, I said, Brian this looks a little unusual. Why don't you have a talk with these, these individuals?"

[43] Fifteen minutes later Constable Skinner had contact with the defendant. After speaking with Constable Bonnell about "some unusual circumstances" in relation to the vehicle that Ms. Earle was in, he went over to the taxi while Constable Bonnell went back to his vehicle.

[44] He began a conversation with Ms. Earle about where she was going and how she was getting there. She was very cooperative and did not appear upset or nervous. He told her they were concerned she might be "transporting contraband".

[45] He asked for her consent to search her person and property. He explained "the consent to search procedure" and told her that "she could at any time say no don't search, stop searching..." (page 73, Line 11)

[46] It was noticed at this point in time that there was a lock on the suitcase. (page 73, line 14)

[47] At page 74, line 2, Constable Skinner testified:

> "The door was opened in the van, but it had dark tinted windows in it, I was kind of looking back and forth between her and her suitcase."

[48] Later at line 5:

> "I am noticing there is a lock on the suitcase which is another unusual characteristic as far as I am concerned, having a suitcase locked."

[49] It was Constable Skinner who opened the "rear hatch" of the van after Ms. Earle gave her consent to search her suitcase. He obtained no consent from the cab driver to search the vehicle. After the hatch was opened, Constable Skinner had a full view of the suitcase. At page 75, line 2, he stated:

> "...I notice that this is a large suitcase, it is brand new, there are no markings on it, there are no tags on the luggage, nothing to say it belongs to her, ...you would expect a piece of luggage to have a scuff or two on it."

[50] Ms. Earle was unable to find the key to the suitcase after looking for several minutes, Constable Skinner suggested he could cut the lock with bolt cutters, search her suitcase and then "you can be on your way".

[51] He testified Ms. Earle then "effectively" withdrew her consent when she stated:

> "Stay the fuck away from my suitcase, don't go near it, don't cut the lock". (page 76, line 15)

[52] Constable Skinner and Constable Bonnell had a second conversation about what he had observed regarding the suitcase and his conversation with the defendant.

[53] It was then decided (by Constable Bonnell) to detain Ms. Earle and call a dog handler. The defendant was subsequently arrested after Constable Spencer and the dog did their search.

[54] Constable Skinner took photos of the scene, van, and suitcase.

[55] On cross examination Constable Skinner conceded that his report does not contain reference to Ms Earle's attitude change; becoming verbally abusive, he simply noted she withdrew her consent.

[56] THE LAW

(I) The Scope of Search Incident to Arrest or Detention

[57] Scott C. Hutchison writes at N.C.L.P., volume I, Tab D.2, at page 2 to page 4:

> Obviously it is a precondition to the power to search incidental to an arrest or detention that the arrest or detention be lawful. Where the search is challenged the onus is on the Crown to demonstrate both that the arrest (or detention) was lawful and that the search fell within the scope of activity authorized in the circumstances. This includes an onus to justify extraordinary searches (e.g. strip searches) to the standard prescribed. **R. v. Stillman** [1997] 1 S.C.R. 607 at para 27; **R. v. Caslake** [1998] 1 S.C.R. 51; **R. v. Besharah** [2010], SJ. No. 7 (CA).
>
> Different considerations drive the rationale (and hence the scope) for the distinct powers given to the police to search incident to the different legal states of 'arrest' and 'detention'. As Justice Iacobucci said in **R. v. Mann** [2004] S.C.J. No. 49:
>
> > "I note at the outset the importance of maintaining a distinction between search incidental to arrest and search incidental to an investigative detention. **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**." [emphasis added]
>
> Arrest is a legal status arising where an officer formally takes a person into custody with a view to holding him for later interim release or presentment to a court of competent jurisdiction. It requires a reasonably grounded belief that the arrestee has

committed an arrestable offence. It anticipates an extended time in police custody. Given the high stakes of such an encounter it is reasonable for the law to approach the transaction on the assumption that emotions will run high and that there will be a potential for unexpected danger, and that the person being arrested will take steps to destroy or obscure any article of evidence under their control. The scope of the "incidental" intrusion on privacy is appropriately measured against these realities. As the Court said in **Cloutier v. Langlois**, [1990] 1 S.C.R. 158, QL para 54-62; **Cloutier v. Langlois**, at QL para 49:

> the common law as recognized and developed in Canada holds that the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him.

Or in some cases a citizen **R. v. Lerke** (1986), 24 C.C.C. (3d) 129 (Alta. CA.); See also **R. v. Asante-Mensah** [2003] 2 S.C.R. 3.

Detentions are authorized at a significantly lower threshold and represent a less significant state interference with a person's liberty. The modest nature of the interaction (both in terms of the preconditions for a lawful detention and the reduction in any reasonable expectation of privacy) justifies only a much narrower police intrusion on the detainee's reasonable expectation of privacy. The power to search incident to an investigative detention is therefore limited by the nature of the detention. Such detentions are authorized by the need to balance individual liberty with our common interest in having the police be able to conduct reasonable inquiries.

In order to justify searches as an incident to an investigative detention the police must be able to identify *reasonable grounds to believe* that such a search is necessary to protect the officer or public safety. This is in most cases limited to authority for a 'frisk' type search, though in an appropriate case a broader search might be justified. For example, in *White* the Court of Appeal of Ontario approved an officer's actions seizing a mobile phone incident to an investigative detention where there was reason to believe the detainee had, or was about to, call confederates to come and assist him in resisting the police. **R. v. Mann** [2004] SCJ. No. 49; **R. v. White**, [2007] O.J. No. 1605 (C.A.)

(II) Investigative Detention

[58] The concept of an investigative detention has been explained by the Supreme Court of Canada in **R. v. Mann** [2004] 3 S.C.R. 59. Paragraph 45 of this decision summarized the salient points of investigative detention and reads as follows:

> "To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case."

[59] The test for evaluating the validity of an investigative detention is provided at paragraph 34 of the **Mann**, *supra*, decision. Paragraph 34 reads as follows:

> "The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the Waterfield test, along with the Simpson articulable cause requirement, calls for investigative detentions to be premises upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the

> nature and extent of that interference, in order to meet the second prong of the Waterfield test."

[60] Then at paragraph 35 of the **Mann**, *supra,* decision stated:

> "Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have carte blanche to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a de facto arrest."

(III) <u>"Sniffer Dog"</u>

[61] Isabel J. Schurman writes at N.C.L.P., Volume I, TAB B.1 at page 9:

> "Sniffer dogs used by the police to detect evidence of criminal activities constitute investigative tools legitimized at common law, but in the decisions of *A.M.* and *Kang-Brown* the Supreme Court confirmed that the use of such dogs constitutes a search under the *Charter*, as the canines are capable of extracting information clearly intended to be kept private.
>
> The split decision in those cases concluded that even minimally-intrusive investigative tools, such as sniff searches, will attract *Charter* scrutiny. The technique will be permissible where officers reasonably suspect that the targeted individual may be involved in some criminal activity. If there are no grounds for reasonable suspicion, the use of the sniffer dogs will violate the s. 8 reasonableness standards.
>
> In *A.M.* and *Kang-Brown*, the suspects in the search were not detained, but other considerations come into play when the sniffer dog is being used to investigate persons in custody. These were considered by the Saskatchewan Court of Appeal in *Yeh*. The court concluded that:
>
> > ...an investigative detention does not involve any right to search the detainee beyond what is

> reasonably necessary for safety purposes. As a result, the police have no right to conduct a sniff search as an incident of an investigative detention. Any such search needs to be independently justifiable in the sense that, before it is undertaken, the police must have a reasonable suspicion that the person who is the subject of the search is illegally in possession of drugs. [2009] SKCA 112, at paras 48-49.

The court went on to state that circumstances justifying investigative detention will not always justify a sniff search, but that the two may overlap in certain circumstances."

(IV) Kang-Brown

[62] In **R v. Chehil**, 2011 NSCA 82, C.J. MacDonald at para 27 states:

> In **Kang-Brown**, *supra*, a majority of the Supreme Court of Canada confirmed that the police are justified in engaging "trained and well-handled" police dogs to sniff a traveller's luggage provided they act on a "reasonable suspicion" that a crime is being committed. For example, Binnie, J. Explains:
>
> 58 My colleague LeBel J. Writes at para. 1:
>
> > ...I acknowledge that the Charter does not prohibit the use of sniffer dogs or other investigative techniques by police; it does require, however, that they be used in accordance with the standards established by s. 8.
>
> We agree that the use of a sniffer dog amounts to a "search" because of the significance and quality of the information obtained about concealed contents, whether such contents are in a suspect's belongings or carried on his or her person. (in the present case, the positive "sniff" was itself considered sufficient by the RCMP to arrest the appellant before even physically checking his bag to confirm the presence of illegal drugs). However, because of the minimal intrusion, contraband-specific nature and pinpoint accuracy of a sniff executed by a trained and well-handled dog (as in the case of Chevy here), it is my view for reasons set out in

> A.M., released concurrently, that a proper balance between an individual's s. 8 rights and the reasonable demands of law enforcement would be struck by permitting such "sniff" searches on a "reasonable suspicion" standard without requiring prior judicial authorization.

[63] At para 28:

> What then constitutes a "reasonable suspicion"? Binnie, J., goes on to explain:
>
> > 75 The "reasonable suspicion" standard is not a new juridical standard called into existence for the purposes of this case. "Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. As observed by P. Sankoff and S. Perrault, "Suspicious Searches: What's so Reasonable About Them?" (1999), 24 C.R. (5th) 123:
> >
> > > [T]he fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify such a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment.
> >
> > ...
> >
> > What distinguishes "reasonable suspicion" from the higher standard of "reasonable and probable grounds" is merely the degree of probability demonstrating that a person is involved in criminal activity, not the existence of objectively ascertainable facts which,

> in both cases, must exist to support the search. [pp. 125-26]

Writing about "reasonable suspicion" in the context of the entrapment defence, Lamer J. In *R. V. Mack*, [1988] 2 S.C.R. 903, thought it unwise to elaborate "in the abstract" (p. 965). See also *R. V. Cahill* (1992), 13 C.R. (4th) 327 (B.C.C.A.) at p. 339. However, in *Alabama v. White*, 496 U.S. 325 (1990), the U.S. Supreme Court contrasted "reasonable suspicion" with reasonable grounds of belief (or, what the U.S. lawyers call "probable cause"):

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. [p. 330]

[64] Then at para 29:

In elaborating, Binnie, J., adopts the reasoning of the Ontario Court of Appeal in **R. v. Simpson** (1993), 12 O.R. (3d) 182. While requiring less than the reasonable and probable standard, it involves more than a hunch:

> 76 The U.S. Fourth Amendment cases were reviewed by the Ontario Court of Appeal in connection with investigative stops based on reasonable suspicion in *R. v. Simpson* (1993), 12 O.R. (3d) 182, where Doherty J.A. concluded, 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. The requirement that the facts must meet an objectively discernible standard . . . serves to avoid indiscriminate and discriminatory exercises of the police power. [Emphasis added.]

The court of Appeal stated that a hunch based on intuition gained by experience cannot suffice as "articulable cause". The *Simpson* description of "articulable cause" was treated as equivalent to "reasonable suspicion" in the context of s. 99(1)(f) of the *Customs Act* in *R.v. Jacques*, [1996] 3 S.C.R. 312 *per* Gonthier J., at para. 24, and Major J., at para 52, and I conclude that it applied to "reasonable suspicion" in the present context as well. See also *R. v. Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.) at para 27.

[65] Then at para 30:

Furthermore, it requires an element of objectivity:

> 77 It is important to emphasize the requirement for *objective* "articulable" grounds, as did the B.C. Court of Appeal in R. V. Lal (1998), 113 B.C.A.C. 47, at para. 23:
>
> > The fundamental point is that the trial judge must be in a position to make an independent assessment of the facts upon which the suspicion is based.
>
> 78 The importance of objective grounds in the present context, of course, is that where police initiate warrantless "sniff" searches there is no before-the-fact judicial authorization. The after-the-fact review can only truly be an "independent assessment" if there are objective grounds put forward to support the personal opinion of the police officer. As Doherty J.A. commented in *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.):
>
> > The protection against police excess rests not only in the standard itself, but in its retrospective application. [para. 65]

> 79 The objective of the Jetway program and similar police operations in the U.S. is therefore to identify characteristics "generally associated with narcotics traffickers" (W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004), vol. 4, at p. 503) without sweeping up "a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure" (*Reid v. Georgia*, 448 U.S. 438(1980), at p. 441). In these cases, the *Charter* protection is of immediate concern not only to accused drug dealers but to the general travelling public who have every right to go about their law-abiding business without being the subject of random police searches, by dog or otherwise. Abella J. In R. v. Clayton, 2007, S.C.C. 32, stated:
>
> > The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

[66] At para 32:

> Binnie, J. in **A.M.**, *supra*, transposes this same logic to our situation; the sniff search:
>
> > 5 ...
> >
> > Stripped of the relevant context, musing on the differences between a dog's nose and an infrared camera, or generalizing about "emanations", does not greatly advance the resolution of the issues before us. What is required is to strike an appropriate balance between the state's need to search (whether the need be public safety, routine crime investigation or other public interest) against

> the invasion of privacy which the search entails, including the disruption and prejudice that may be caused to law-abiding members of the public, whether travelling (as in *Kang-Brown*) or in the schools (as here) or in the peace and quiet of their own homes.

[67] At para 33:

> Turning then to the decision under appeal, it is clear from his comprehensive and careful reasons that the judge well understood the appropriate test for a reasonable suspicion:
>
> > 150 A review of the separate judgement in **R. v. Kang-Brown** and **R. v. A.M.** indicates that at least five of the Justices favoured a reasonable suspicion standard for dog sniff searches. Shortly after these decisions were released Professor Don Stuart in his article, Revitalizing Section B: Individualized Reasonable Suspicion is a Sound Compromise for Routine Dog Sniff Use (2008), 55 C.R. (6th) 376 referred to the likelihood that "with the retirement of Justice Bastarache, all eight justices currently favour a test of at least individualized reasonable suspicion".
> >
> > 151 What is clear from these separate judgments is that police cannot simply rely on speculation, intuition, hunches or educated guesses. A well educated guess that drugs will be found does not amount to reasonable suspicion.
> >
> > 152 The decisions in **Kang-Brown** and **A.M.** make it clear that reasonable suspicion is a lower standard than that of reasonable and probable grounds. It is not the standard of absolute certainty or even reasonable probability. Reasonable suspicion means "something more than a mere suspicion and less than a belief based upon reasonable and probable grounds". It requires "objectively discernable" facts, capable of articulation, which allow the Court to make an independent assessment of the basis for the suspicion. It must be supported by factual elements

> that can be identified and presented in evidence. The person claiming to have reasonable suspicion must be able to identify and articulate the factors justifying the reasonable suspicion allegedly held.
>
> 153 There must be a constellation of objectively discernable facts which give the officer reasonable cause to suspect illegal activity. In **R. v. Simpson** (1993), 12 O.R. (3d) 182 Doherty J.A. stated at p. 202:
>
> > ... The requirement that the facts must meet an objectively discernable standard...serves to avoid indiscriminate and discriminatory exercises of the police power.
>
> 154 The reduction of the standard from reasonable and probable grounds to a reasonable suspicion requires, according to Binnie J. In **Kang-Brown** that courts engage in rigorous after the fact judicial scrutiny of the grounds alleged to constitute reasonable suspicion: **R.v. Kang-Brown** (supra at para. 26).

[68] At para. 36 C.J. MacDonald lists factors ... based on police intelligence and then goes on to state at para. 37:

> 37 These factors, in my respectful view, converge to establish the requisite reasonable grounds to suspect. In reaching this conclusion, I am not overlooking the fact that each of these factors considered in isolation offers an innocent explanation. For example, many innocent people travel alone. Many may use overnight flights to save money. A certain percentage may walk up without a reservation. No doubt some still pay cash. Not everyone has an old suitcase.
>
> 38 However, we must step back and look at the "constellation" of factors. In other words, our task is not to consider each factor in isolation to determine if there may be innocent explanations.

[69] Then at para 40:

> 40 ..., we must ask whether these factors coalesced into reasonable suspicion, despite a potential innocent explanation for each.

[70] Later at para 41 and 42:

> 41 Furthermore, as is evident from the above passages, the judge felt that the police could have taken additional steps to buttress their grounds for suspicion. For example, he noted:
>
> - "No attempt was made to determine the reason for this cash purchase."
>
> - "The police did not speak to the applicant."
>
> - "...no attempt was made to determine the reason for one-way travel..."
>
> - "No attempt was made to determine why the applicant was travelling alone."
>
> 42 Could the police have done more? By all means. However, again, that is not the question. Instead, the question is whether in this case the police did enough to establish a reasonable suspicion.

(V) Consent (to Search)

[71] Michal Fairburn writes at NCLP Volume I, TAB D.3 at page 2:

> **B. Consent**
>
> i. *Where there Exits Lawful Consent, There Is No Search or Seizure*
>
> Where an individual provides a lawful consent to the state to take something over which he or she enjoys a reasonable expectation of privacy, the state is not searching or seizing within the meaning of s. 8 of the *Charter*. (**R. v. D'Armour**, [2002] O.J. No. 3103 (C.A.) at paras. 64-65.) As Justice Doherty noted in *Simon*, one of the values animating s.8 of the *Charter* is personal autonomy.

That autonomy demands that a person be permitted to choose whether to waive the right to be left alone by the state. Where that choice is made, s.8 of the *Charter* loses all application because the person has "consented to the state intrusion upon his or her privacy". (**R. v. Simon**, 2008 ONCA 578 at para. 48.) She has waived her *Charter* protection and there is no search or seizure; there is a mere taking or receipt of the thing given. As Justice Doherty put it in *Wills*, the quintessential case setting out the doctrinal limits of the doctrine of consent:

> "If an individual chooses to give something to a police officer, it is a misuse of language to say that the police officer seized the thing given. Rather, the officer simply received it. As there is no seizure, the reasonableness of the police conduct need not be addressed...."

R. v. Wills (1992), 70 C.C.C. (3d) 529 (Ont. C.A.).

The first expression of this principle was in *Dyment* where LaForest J. Held that: "the essence of a seizure under s.8 is the taking of a thing from a person by a public authority *without the person's consent* [emphasis added]". **R. v. Dyment** (1988), 45 C.C.C. (3d) 244 (S.C.C.) at p. 257.

ii. *The Criteria For a Lawful Consent*

- *Overview*

A person's consent can justify what would otherwise be considered an unreasonable search and seizure where the Crown establishes on a balance of probabilities the following criteria set out in *Wills*:

(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 that the word is used in *Goldman, supra,* and 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. **R. v. Wills**, *supra*, at p. 546.

These criteria have been repeatedly applied by courts throughout the country as the correct analytical approach to consent. **R. v. Perello** (2005), 193 C.C.C. (3d) 151 (Sask. C.A.) at para. 16.

- *The Crown's Burden of Proof*

The Crown must establish on a balance of probabilities that a voluntary and informed consent was given. The use of the word voluntariness in this context, the third factor from *Wills*, can sometimes be confusing when it comes to deciding upon the Crown's burden of proof. We tend to think of voluntariness in the statement against interest context and, as such, attach to it the Crown's corresponding responsibility of proof beyond and reasonable doubt. While the doctrine of consent latches onto the voluntariness jurisprudence, to the extent that it draws on the same considerations in determining whether a consent was provided voluntarily (without coercion or oppression or like state misconduct), the Crown is not held to the same standard of proof when establishing voluntariness in the consent search context.

Rather, the Crown need only establish on a balance of probabilities that consent to take was provided voluntarily. This is true even when it comes to consent to provide bodily samples. This aligns the burden of proof for the Crown in the consent to search context with the long established standard of proof on a balance of probabilities for the waiver of other *Charter* rights.

- *Informed Consent*

> When an individual consents to the state taking something that they would not otherwise be permitted to take without a search warrant, that person "relinquishes" their "right to be left alone by the state and removes the reasonableness barrier imposed by s.8 of the *Charter*". Mere acquiescence in what a person perceives as the inevitable will not constitute a valid consent. Rather, consent must be a conscious decision on the part of the person holding the privacy interest to allow the police to do something they would otherwise require an authorization to do. **R. v. O'Connor** (2002), 170 C.C.C. (3d) 365 (Ont. C.A.); **R. v. Oickle** (2000), 147 C.C.C. (3d) 321 (S.C.C.); **R. v. Colson** (2008), 230 C.C.C. (3d) 250 (Ont. C.A.) at para. 42; **R. v. Colson**, *supra*, at para. 23; **R. v. Wills**, supra, at p. 541; **R. v. Couturier** (2004), 190 C.C.C. (3d) 429 (NBCA) at paras 30-31.

(IV) **Analysis**

[72] Based on the evidence before me, I find that the initial check stop pursuant to the *Motor Vehicle Act* was lawful. But, because of three factors:

(1) Out of Province cab (from Moncton Airport); (2) Vehicle was going to the Newfoundland Ferry; (3) Female passenger travelling from Ontario going to Newfoundland Ferry;

Constable Bonnell directed the vehicle to the side of the road.

[73] At page 40, line 3 of the transcript:

Q: Yeah, and in fact this wasn't a check under the Motor Vehicle Act at all was it? It never was.

A: Initially it was when I first stopped them on the highway.

[74] Then at page 41, line 3:

Q: So you were conducting an investigation based on your hunch that something was amiss, correct?

A: On my gut feeling that something was amiss, that's correct, Sir.

[75] So by the police officer's own admission, the driver and particularly the passenger are involved in an "investigative detention". The accused was not detained merely by reason of being a passenger of a vehicle that was the subject of a lawful traffic stop.

[76] I find Ms. Earle was the focus of the police officers immediately and the direction to pull off the highway to the side of the road was made with an alternate purpose of investigating some other form of criminal activity.

[77] At para 29, **R. v. Chehil**, *supra,*:

> "The court of Appeal stated that a hunch based on intuition gained by experience cannot suffice as 'articulable case'".

[78] Constable Bonnell asked for not only the driver's identification but the passenger's, as well.

[79] At page 39, line 1 of the transcript:

> "I wanted to see who she was and if she actually was heading to Newfoundland."

[80] The officer did not ask the taxi driver for insurance, licence, permit, etc. There is no evidence that a visual inspection was done of the vehicle to determine if there were any mechanical issues, or for the protection of the officers conducting the stop.

[81] There is absolutely no evidence of any motor vehicle infractions. Constable Bonnell got information from the defendant about coming from Ontario, visiting family, taking a cab from Salisbury to the Airport, then to the ferry. This information was corroborated by the taxi driver.

[82] Constable Bonnell ran Ms. Earle's name for outstanding warrants etc., (which came back negative) while Constable Skinner spoke to the defendant, getting information about her luggage and her consent to search, which was subsequently withdrawn, and which she had every right to do.

[83] At para 28, **R. v. Chehil**, *supra*, our Court of Appeal quotes J. Binnie, who cites an article at (1999), 24 C.R. (5th) 123:

> "The fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify such a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment."

[84] There is no evidence here as in other cases of:

(1) Police surveillance or source information.

(2) No discernable smell of marijuana or tobacco.

(3) No special RCMP investigation tasked to detect the flow of illegal drugs to Newfoundland.

(4) There were no characteristics "generally associated with narcotic traffickers" testified to by either police officer.

(5) No information received that either the driver or passenger were known to police.

(6) There were no motor vehicle infractions, for example, stolen licence plate on the car which can suggest to police that such a vehicle is used in crimes.

[85] Simply a lone female travelling by taxi cab from the Moncton Airport to the Newfoundland ferry which Constable Bonnell felt was very rare and he had never seen before.

[86] The cases are clear "police cannot simply rely on speculation, intuition, hunches, or educated guesses. A well educated guess that drugs will be found does not amount to reasonable suspicion".

[87] I find that Constable Bonnell did not have articulable cause to direct the taxi cab to pull over to the side of the road so that Constable Bonnell could follow his "gut feeling".

[88] There are no "objectively discernable" facts, capable of articulation, which allow the court to make an independent assessment of the basis for suspicion.

[89] The subsequent information gathering by Constable Bonnell and Constable Skinner was a "fishing expedition". It became evident to the court that Ms. Earle was not going to be leaving the side of that highway until the officers searched her suitcase. "We can cut the lock, look, and you can be on your way." Much was made about the suitcase and its appearance. I find a material inconsistency regarding Constable Bonnell's testimony and that of Constable Skinner . Constable Bonnell testified, "...you could look in the back window and there it was." While Constable Skinner testified the windows were dark and you couldn't see it. He saw it while talking to the defendant at the passenger door.

[90] This suitcase was used by Constable Bonnell to form his suspicion, but much of the suitcases description came after the defendant gave her consent to search, and the van door was open, and the officers got a closer look.

[91] As a result of factors set out (page 16, line 6 of the transcript) Constable Bonnell formed a belief and he used this to formally detain Ms. Earle, and call the canine unit.

[92] In my respectful opinion, this unlawful detention at the side of the highway used to gather more information did not produce factors that would establish the requisite reasonable grounds to suspect.

[93] Each may have an innocent explanation, however, the court is not considering each factor in isolation; the court is examining the "constellation" of factors.

[94] As a result I find the police had no right to conduct a sniff search as an incident of an unlawful investigative detention... <u>Once again it must be emphasized</u> before [a sniff search] is undertaken, the police must have a reasonable suspicion that the person, who is the subject of the search, is illegally in possession of drugs.

[95] And even if I did find the "sniff search" to be based on reasonable suspicion I am mindful of J. Binnie's comments in **Kang-Brown**, *supra*, at page 9:

> "...the potential use of this search technique [requires] that the dog must be capable of being proven to have an accurate track record before it can be used to carry out a sniff search. The search will also be subject to careful after-the-fact judicial review to ensure:
>
> (a) That the police had objective grounds upon which to base reasonable suspicion
>
> (b) That the police dog had a track record demonstrating a high rate of accuracy and a low rate of false positives, and
>
> (c) That the search was otherwise not unreasonably taken."

[96] The court heard no evidence from the "dog handler".

[97] Therefore based on the evidence and my findings, I conclude:

1) The original check stop was lawful.

2) The subsequent direction to the side of the highway by Constable Bonnell resulted in an "unlawful detention" (breaching s.9).

3) The "dog sniff" was not based on factors sufficient to meet the test of reasonable suspicion.

4) Therefore, the defendant's arrest, and the subsequent search was unlawful breaching s 8.

[98] The last issue to be decided by the court is whether the evidence seized by police should be excluded pursuant to s.24(2).

[99] **S. 24(2) Analysis**:

[100] In a paper written by D. Mahoney, dated November 21, 2008, at page 9, he states:

> Justice Binnie (*Kang-Brown*) and majority rejected the notion that individuals have no reasonable expectation to privacy when they are in possession of illegal contraband on their person, in their luggage, in their motor vehicles, or in their homes. The court confirmed that the focus is not on the legal status of the concealed item, but on where the search takes place, the purpose of the search and the impact on the person who is subject to the search...
>
> The Supreme Court has reaffirmed the legal principle that privacy is an interest that belongs to everyone, and the focus is on the right of an individual to be free from unreasonable search and seizure in schools, and public transport facilities not on the right of drug smugglers to be free of interference.

[101] With respect to Section 9 of the *Charter*, Mr. J. Iacobucci in *Waterfield* stated:

> "Individual liberty interests are fundamental to the Canadian Constitutional Order...police do not have carte blanche to detain."

[102] The court must balance the seriousness of the risk to the public or individual safety with the liberty interests of members of the public, [in order to protect the majority of innocent travelers from random and groundless searches]...the general travelling public have every right to go about their law-abiding business without being the subject of random police searches...

[103] **R. v. Grant**, a 2009 S.C.J. 32, at para. 59:

> When must evidence obtained in violation of a person's *Charter* rights be excluded? Section 24(2) of the *Charter* provides the following answer:
>
> > 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 of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[104] At para. 68 in that same case, Justice MacLauchlin states:

> "The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute."

[105] And further at para. 70 the court goes on to state:

> "...s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system."

[106] And further at para. 71:

> "...a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct... (2) the impact of the breach on the *Charter*-protected interests of the accused,... and (3) society's interest in the adjudication of the case on its merits."

[107] When evaluating the first line of inquiry, the court must consider the seriousness of the state conduct. Was this a minor violation or something much more egregious? Did the police act in good faith, or were they negligent or wilfully blind?

[108] With respect to the second line of inquiry, the court must consider the extent to which the breach actually undermined the interests protected by the right infringed. What are those interests? Here it is one of privacy.

[109] And lastly the third line of inquiry requires the court to consider not only the negative impact of the admission, but also the impact of failing to admit the evidence. At para. 82 of **Grant** *(supra)* states:

> "The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": *Mann*, at para. 57, *per* Iacobucci J. The court must ask "whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, *per* Doherty J.A.

[110] The first line of inquiry: the seriousness of the *Charter* infringing state conduct.

[111] Regarding the case before me, I find that there was:

1) No reliance on confidential human sources.
2) No record or reports of previous drug involvement .
3) No outstanding warrants or charges.
4) No information that the defendant was associated to the vehicle or cab driver such as "known to police".
5) It was not defendant's vehicle (although there is a lesser expectation of privacy in a car).
6) And that: the defendant was asked much more than to identify herself during a "traffic stop".
7) The police officers' actions were speculative based on a "gut feeling".

[112] The second line of inquiry: Impact on the Charter protected interests of the accused. What interests are we concerned with? Section 9 which required the state to justify any interference with a person's liberty and a section 8 violation which protects a person's reasonable expectation of privacy. It does not protect property. Justice MacLauchlin at para. 78, in **Grant**, (*supra*) states:

> "...an unreasonable search contrary to s.8 of the Charter may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of

> privacy, or that demeans his or her dignity, is more serious than one that does not."

[113] I find that:

1) It was a warrantless search, resulting in the defendant's arrest.

2) The police say they had reasonable and probable grounds to suspect. Yet, the police officers did not know specifically what they were looking for – "illegal substance / contraband."

3) The defendant was in a taxi cab – what is her expectation of privacy? Less than your home, but there is some "expectation of privacy".

4) There were no exigent circumstances.

5) The search of the defendant's "purse", turning out of pockets, and later her suitcase, was not for officer safety.

6) And lastly, the search was not to prevent destruction of evidence.

[114] The third line of inquiry: Society's adjudication on the merits. The question to be asked is:

> "...whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's 'collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law': *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20." **Grant**, *supra* at para. 79

[115] The evidence seized was real evidence. Unreliable evidence would go to the defendant's interest in a fair trial and public interest in uncovering the truth. The evidence already existed. Ms. Earle was asked a series of questions which the police officers used to form a "reasonable suspicion" leading to a "sniff" search of her suitcase. Ms. Earle was cooperative until they wanted to cut the lock of her suitcase and she withdrew her consent, which she had every right to do.

[116] The offence is trafficking in [marijuana] and:

> "...while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) 'operate independently of the type of crime for which the individual stands accused' (para. 51). And as Lamer J. observed in *Collins*, '[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority' (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high." **Grant** *(supra)* para. 84

[117] The long term safety and concern for our children and the community regarding exposure to dealers and drugs cannot be achieved by police officers violating a citizen's right at every turn.

[118] The sole purpose of the police is to investigate crime. This investigation was not knowledge based. The court has evidence of the police officer's "gut feeling". It was a fishing expedition and arbitrary detention, a surreptitious search and seizure. The evidence seized is very important, without it the Crown cannot prove its case.

[119] Having considered all three lines of inquiry which cause the court to consider all of the circumstances, I must now determine whether on balance, admission of the evidence obtained by the *Charter* breach would bring the administration of justice into disrepute.

[120] Section 24(2) does not confer discretion on the judge, but a duty to admit or exclude evidence as a result of his or her finding.

[121] **R. v. Harrison, 2009 S.C.J. No. 34**, para. 36 states:

> "The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed."

[122] With respect, I find on a balance of probabilities that the Crown has not proven that the exclusion of this evidence in all of the circumstances would bring the administration of justice into disrepute and therefore I am not prepared to admit the evidence on the trial proper.

The Honourable Judge Jean Whalen