

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Alharoun*, 2020 NSPC 23

**Date:** 2020-05-27

**Docket:** 8302579-80, 8305023-24  
8302591, 8302594, 8305013-15

**Registry:** Amherst, NS

**Between:**

Her Majesty the Queen

v.

Mohammad Alharoun  
and  
Bashar Mohammad Adwan

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**DECISION ON *VOIR DIRE***

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**Judge:** The Honourable Judge Rosalind Michie

**Decision:** May 27, 2020

**Charges:** *Excise Act* 32(1) x 2, *Criminal Code* 121.1(1) x 2,  
*Revenue Act* 39(1)(a) x 2, *Revenue Act* 39(1)(b) x 2,  
*Revenue Act* 40

**Counsel:** Mr. Paul Drysdale, for the Provincial Crown  
Mr. Terry Farrell, for the Federal Crown  
Mr. Godfred Chongatera, for the Defence

**By the Court:**

[1] Bashar Mohammad Adwan and Mohammad Alharoun were charged on separate informations for offences that allegedly occurred on November 19, 2018 at Saltsprings, Nova Scotia. They are each charged with:

*On or about the 19<sup>th</sup> day of November A.D. 2018 at, or near Saltsprings, Nova Scotia, did unlawfully have in his possession unstamped tobacco product contrary to section 32(1) of the Excise Act 2001, S.C. 2002, c 22, and thereby commit an offence contrary to section 216(1) of the said Act;*

*on or about the 19<sup>th</sup> day of November A.D. 2018 at, or near Saltsprings, Nova Scotia, did transport and have in his possession for the purpose of sale a tobacco product that is not packaged, unless it is stamped and thereby committing an offence, contrary to Section 121.1(1) of the Criminal Code;*

*on or about the November 19<sup>th</sup> A.D., 2018 at, or near Saltsprings, Cumberland County, Province of Nova Scotia, did have in his/her possession tobacco on which tax had not been paid, contrary to Section 39(1)(a) of the Revenue Act, thereby committing an offence contrary to section 85 of the Revenue Act S.N.S 1995-96, c. 17, as amended,*

*And furthermore at the aforesaid time and place did have in his/her possession tobacco not bearing the prescribed markings, contrary to section 39 (1)(b) of the Revenue Act, thereby committing an offence contrary to section 85 of the Revenue Act S.N.S. 1995-96, c.17, as amended.*

Mr. Mohammad Alharoun is additionally charged with:

*And furthermore at the aforesaid time and place, did transport tobacco without being in possession of a bill of lading, waybill or document showing the origin and destination of the tobacco, in contravention of section 40 of the Revenue Act S.N.S. 1995-96, c. 17, as amended and thereby committed an offence contrary to section 85 of the Act.*

[2] Mr. Chongatera acts as counsel for both accused persons and he filed a notice of *Charter* application alleging an infringement of the applicants' section 8, 9 and 10 *Charter* rights.

[3] Pursuant to section 24 (2) of the *Charter*, the applicants seek exclusion of the evidence.

[4] All evidence and submissions were translated into Arabic, the first language of the applicants, through a translator.

[5] A joint *voir dire* was held on January 14 and 15 with the agreement by counsel that the evidence would apply to both applicants. It was agreed by counsel that the evidence taken at the *voir dire* will also form part of the evidence to be considered in the trial.

[6] The Crown called two witnesses, Constables Bryce Haight and Jamie Fisher. Neither applicant presented evidence at the *voir dire*.

## **ISSUES**

ISSUE 1: SECTIONS 8 AND 9 OF THE *CHARTER*:

- a) Did the police have reasonable grounds to arrest the two accused persons?
- b) Were Messrs. Adwan and Alharoun arbitrarily detained?
- c) Was the search of the rental vehicle reasonable?

ISSUE 2: SECTION 10(A) AND (B) OF THE *CHARTER*

Were the applicants advised promptly of the reason for their arrest and their right to retain and instruct counsel without delay?

ISSUE 3: SECTION 24(2) OF THE *CHARTER*

If a breach is found, should the evidence be excluded?

[7] On November 19, 2018 RCMP Constable Bryce Haight, a member of the Northwest traffic unit, was stationary in a marked police vehicle on Highway 104 at exit 5, in Saltsprings, Cumberland County. He was monitoring eastbound traffic, or traffic heading from the direction of New Brunswick heading toward Truro, Nova Scotia.

[8] Constable Haight's primary focus was looking for *Motor Vehicle Act* infractions. Constable Haight testified that he works on a roving traffic unit, and in addition to enforcing the *Motor Vehicle Act* and *Criminal Code*, the roving units also specifically target contraband enforcement.

[9] Constable Haight testified that he is a 12 year veteran of the RCMP. He received RCMP interdiction training called the “Pipeline” course, which provides tools to assist police officers in identifying indicators of contraband items being transported on the highways, which can include drugs, illegal tobacco, large sums of currency and human trafficking.

[10] On November 19, 2018 Constable Haight was using a handheld LIDAR radar unit to detect speeding infractions. Constable Haight was both trained and certified in the use of the Pro Laser for LIDAR radar unit, and he is also qualified as an instructor in the operation of the LIDAR unit. Constable Haight was situated on the ramp which leads to the 104 Highway facing eastbound on a curve where he could easily observe eastbound vehicles and his police car was partially obscured to traffic passing by on the highway.

[11] Constable Haight observed a white Hyundai Santa Fe travelling eastbound at a high rate of speed as it passed by the location of the police car travelling in the left lane, overtaking another vehicle. Constable Haight pointed the LIDAR device at the vehicle and obtained a speed reading of 137 kilometres per hour. The posted speed limit on that portion of the highway is 110 kilometres per hour.

[12] Constable Haight pursued the Santa Fe with the stated intention of executing a traffic stop because the vehicle was speeding. It took him between one and one and a half minutes to catch up with the vehicle. He activated his emergency lights, and the vehicle reduced speed and pulled over to the shoulder of the road. Constable Haight testified that at this point it was simply a routine traffic stop. He updated RCMP dispatch as to his location and queried the vehicle license plate using his in-car computer. The vehicle information was returned as being a rental vehicle.

[13] Constable Haight testified that it was not unusual to encounter rented vehicles on the highway, but that it was significant to him because if the vehicle was a rental, as a police officer he has no way of knowing who he might be dealing with inside the vehicle. If the vehicle had come back registered to an individual, he might have a police record or further information at his disposal such as information regarding outstanding warrants which would assist him in identifying who he was dealing with.

[14] Constable Haight also noticed that the tint in the rear windows was darker than most vehicles that he encountered, and he based this on his experience of

stopping vehicles every day in the course of his duties as a traffic enforcement officer.

[15] Constable Haight found the extra dark window tint to be unusual, and to him it appeared to be an attempt at concealment of the view into the back of the SUV. He testified that this made him uncomfortable because he had no way of knowing what or who he would encounter in the back of the vehicle. Constable Haight testified that at the time, he believed that this could be a sign of contraband being transported on the highway, given the fact that it was an overcast day. Constable Haight later discovered that the vehicle had manual sun shades that could be pulled from the bottom to the top of the rear windows and secured by a hook at the top to add extra shade to the rear of the vehicle in addition to the tinted windows themselves. He noted both blinds were drawn up, covering both rear windows.

[16] The traffic stop was conducted at 2:00p.m. When Constable Haight approached the vehicle and observed the tinting and the blinds, he approached more cautiously because he could not see inside the back of the vehicle. Constable Haight noted that it was a very cloudy day and snow flurries were falling which made him question why the blinds were in use on that particular day. As a result of his heightened caution, the constable remained behind the B pillar between the

front and rear doors on the driver's side for a longer duration than he normally would before he engaged with the driver.

[17] Constable Haight noted two occupants in the vehicle, both of whom he identified in court.

[18] Mr. Adwan was identified as the driver of the vehicle. He was addressed both in French and English, he was informed immediately of the reasons for the stop and that the conversation was being audio and video recorded. The officer requested the driver's license, proof of insurance and vehicle registration.

[19] Constable Haight testified that the driver responded that he understood why he was being stopped and he complied with Constable Haight's request by providing his Nova Scotia identification card and the rental agreement for the vehicle.

[20] Constable Haight described his interaction with Mr. Adwan as good. He testified that he asked the driver, Mr. Adwan about his journey, and specifically where he was coming from. At this point Constable Haight changed his location from behind the B pillar, taking a step or two forward toward the driver of the vehicle when he felt that there was no threat to his safety. As Constable Haight was



speaking with the driver, he noted that the passenger was interacting with him and engaging with him more than the driver.

[21] Constable Haight noted that the passenger was speaking in a very low tone of voice, and he had difficulty hearing him because the highway surface was wet on that day, and passing traffic was causing a lot of background noise. As a result, Constable Haight leaned into the vehicle so that he could hear the occupants more clearly. Eventually, Constable Haight left the driver's side window and moved to the passenger side to speak with the passenger, identified as Mr. Alharoun.

[22] A video recording of the interaction between Constable Haight and the two accused was exhibited as VD4 and played in court, while Constable Haight provided a narration of events as they unfolded on the video.

[23] While Constable Haight was addressing the driver of the vehicle, he could be seen looking inside the vehicle and doing a "double take". At this point Constable Haight testified that he was processing the information and putting the indicators together. He believed that he was looking at a shipment of contraband tobacco. He testified that he saw visible cardboard boxes within the vehicle as depicted in photo three of exhibit VD1.

[24] Constable Haight observed three cardboard cases in the back of the vehicle, and he testified that he believed that the boxes contained tobacco for several reasons. He testified that based on his experience and training the boxes that he saw were consistent with contraband tobacco, and specifically the exterior packaging by the case.

[25] Constable Haight testified that he had come into contact with contraband tobacco by the case on approximately six prior occasions. He noted the size, and the markings on the outside of the case which bore the letters “B” and “L” in black marker, handwritten in the same areas on both visible cases on the top right corner of the boxes. He testified that he had seen these markings before, and it indicated to him that the boxes contained contraband or illegal tobacco. His training and prior experience led him to believe that the “B” signified the brand, and the “L” signified light cigarettes.

[26] Constable Haight also noted that there was a winter jacket covering the other boxes, partially concealing them from view.

[27] Constable Haight testified that there were other things which aroused his suspicion at that point in time. First was the direction of travel of the vehicle from the direction of New Brunswick travelling east on Highway 104. Cumberland

County borders New Brunswick, and Constable Haight testified that all of his previous contraband tobacco investigations involved importation of illegal tobacco from New Brunswick into the province of Nova Scotia on Highway 104. Constable Haight testified that he was aware that the contraband tobacco is manufactured on First Nations reserves in Ontario or Quebec.

[28] Another indicator was fact that the vehicle was a rental vehicle. This was significant to Constable Haight because rental vehicles are often used to transport illegal tobacco because if the importers are caught, their vehicle is seized, which is why a rental vehicle is often used.

[29] A further indicator noted by Constable Haight which led him to believe that the SUV was transporting contraband was the extra tint on the windows, and the fact that the rear blinds were engaged on an overcast snowy day. This made Constable Haight question why the blinds were engaged if there were no children or rear passengers.

[30] Constable Haight also testified that the timing of the traffic stop was another possible indicator of the trafficking of contraband tobacco. He testified that in his experience in interdiction work with the provincial alcohol, fuel and tobacco enforcement team, the time of day of stops and arrests for contraband tobacco

generally take place from early morning to mid-afternoon. Constable Haight testified that individuals transporting contraband tobacco will often travel to Ontario or Quebec in the afternoon or evening, arrive at night at which point the vehicle is loaded with the tobacco at a First Nations reserve, and then the vehicles immediately return to Nova Scotia, generally arriving between 8:00 a.m. and mid-afternoon the following day. He acknowledged that not all traffic stops searching for illegal tobacco were successful.

[31] Constable Haight had also reviewed the dates contained in the rental contract that the driver provided to him, which was exhibited as VD5. He noted the rental date was two days prior to the date of the stop, which in Constable Haight's mind was consistent with the vehicle leaving Nova Scotia and travelling directly to Ontario or Quebec to pick up contraband tobacco and immediately returning to Nova Scotia.

[32] When Constable Haight saw the cardboard cases, he testified that it crystallized all of the various grounds in his mind. Constable Haight testified that at this point he was still back slightly behind the driver, and he wanted a view from the passenger side. The passenger was doing the majority of the talking, which was hard for him to hear, so he moved to the passenger side to hear him better and

obtain a second view of the back seat of the vehicle. He was conversing with the passenger in English, which he said the passenger was able to understand.

[33] Constable Haight testified that at this point after looking in the back seat he formulated his grounds that the two accused were in possession of illegal contraband tobacco.

[34] After speaking with the passenger, Constable Haight returned to the driver's side door of the Santa Fe and then placed both gentlemen under arrest verbally. Constable Haight testified that he went to the driver's side to conduct the arrest because the driver was in control of the vehicle, and he did not want to risk the driver pulling away while he was attempting to effect the arrest.

[35] When Constable Haight placed the driver, Mr. Adwan, under arrest he testified that the driver had no difficulty following instructions. After the driver was arrested, Mr. Adwan exited the vehicle and stood next to the officer and unlocked the back door of the vehicle for the officer. At that point Constable Haight testified he opened one of the cases and confirmed that it contained illegal tobacco.

[36] Constable Haight placed handcuffs on the driver who had previously been placed under arrest. He repeated to the driver that he was under arrest for

possession of illegal tobacco, and then he conducted a quick safety search. He noted that the driver was not wearing shoes, so he allowed him to return to the driver's seat to retrieve them. Constable Haight notified dispatch that he had two individuals in custody and requested assistance. Constable Jamie Fisher was the closest officer in the area, and he attended the location of the stop.

[37] Constable Haight placed Mr. Adwan in the rear of the police vehicle and closed the door. Constable Haight then went to the passenger side of the SUV to deal with Mr. Alharoun. He advised him that he was under arrest for possession of illegal tobacco.

[38] Constable Haight testified that Mr. Alharoun understood what he was saying, and that he communicated in broken English. In Constable Haight's opinion, he believed that both accused understood that they been arrested and placed in custody and that he was in a position of authority. Constable Haight was interrupted repeatedly by Mr. Alharoun as he attempted to read him his *Charter* rights and police caution.

[39] Constable Haight testified that when he first advised the driver, Mr. Adwan that he was under arrest, he indicated continuously that the boxes contained fabric, and that his career was like a seamstress, or some words along those lines. The

driver adamantly denied that the cases contained tobacco. These comments were made by Mr. Adwan after he was placed under arrest, but before Constable Haight opened the case in the back of the SUV.

[40] With respect to the driver, Mr. Adwan, Constable Haight read him his *Charter* rights and police caution from a pre-formatted police card along with his right to counsel. Constable Haight testified that Mr. Adwan responded that he understood his reasons for arrest and further that he understood his *Charter* rights, and that he wished to call a lawyer.

[41] After Constable Haight was finished dealing with Mr. Adwan, he testified that he was satisfied Mr. Adwan understood that he was in custody, and why he was in custody, but Constable Haight was not confident that he fully understood his *Charter* rights and police caution. Mr. Adwan had answered yes to other questions but continued to ask Constable Haight “if he was going to be in big trouble”.

[42] With respect to the *Charter of Rights* and police caution read to Mr. Adwan, Constable Haight believed that he did not understand because he continued to make utterances that may not have been in his best interest without speaking to a

lawyer, and he kept on talking to the officer about what was in the rear of the vehicle.

[43] When Constable Haight realized that the accused may not have fully understood his *Charter* rights, he testified that he politely and continually told him to stop talking. At that point Constable Haight determined that he needed to employ the services of a translator to ensure that Mr. Adwan fully understood him. He contacted a translator through RCMP dispatch on his radio. He left his telephone number and waited for a call back, which took 13 minutes. The translator indicated that she could assist in translating English to Arabic. Constable Haight knew that Mr. Adwan spoke Arabic because he asked him what his first language was.

[44] At that point in time, Constable Haight testified that he had arrested the passenger, Mr. Alharoun, twice but at that point had not provided him with his *Charter* rights, police caution or right to counsel because he was dealing with the driver, Mr. Adwan, in his police car. Mr. Alharoun was not placed in handcuffs. According to Constable Haight, his officer safety training dictated that he deal with one person at a time, with the person in handcuffs to be dealt with first. Constable



Haight knew that Constable Fisher was coming soon and would be able to complete the arrest process for Mr. Alharoun upon his arrival.

[45] When asked why he did not *Charter* and caution both accused at the same time, Constable Haight testified that he did not want the two accused to have communication with each other while in custody, especially with the language barrier, therefore he did not want to place both accused in the police car together. This informed his decision to deal with one accused in the police vehicle, while leaving the other in the rental vehicle.

[46] Once Constable Haight made contact with the translator, Ms. Hassan, on the telephone, he apprised her of the situation including the reasons why the two accused had been taken into custody, where the accused were located and he shared with her the potential release plan on a promise to appear. When speaking to the translator, he testified that he used formal words from the card, he read from the same card to her, and she translated them to Mr. Adwan in Arabic. The conversation lasted 12 minutes. At that time arrangements were also made for Constable Fisher to engage the services of the translator for Mr. Alharoun. It was suggested that Constable Fisher begin the transport of Mr. Alharoun to the Amherst detachment because Constable Haight would be on the phone with Ms.

Hassan and she would be unable to have two conversations at once with each accused. Constable Fisher agreed and it was Constable Haight's understanding that Constable Fisher would engage Ms. Hassan's translation services when he arrived at the detachment.

[47] Mr. Adwan indicated that he wished to speak with a lawyer, and Constable Haight secured the services of Ms. Hassan to do the translation between the accused and the lawyer as well upon arrival at the RCMP detachment.

[48] After Constable Haight spoke with the translator, he contacted Constable Cedric Landry by police radio and asked him to secure the rental vehicle and exhibits and arrange for a tow vehicle. As Constable Haight was waiting for Constable Landry, he took the photos which were tendered as Exhibit VD1.

[49] Constable Haight waited for Constable Landry to arrive and secure the rental vehicle before transporting Mr. Adwan to the RCMP detachment. He departed for the Amherst detachment at 3:30 p.m., arriving at 3:47 p.m. When he arrived at the detachment, Constable Haight noted that Constable Fisher was already at the detachment, and that Mr. Alharoun was in the interview room and Constable Fisher was sitting outside the room.

[50] When he arrived at the detachment, Constable Haight contacted Ms. Hassan, the translator, a second time to confirm that she was available to translate the conversation between Mr. Adwan and his lawyer, which she was.

[51] Constable Haight contacted duty counsel and spoke with Brian Stevens, advising who he had in custody and the reasons for the detention and the police plan to release Mr. Adwan. The applicant had not requested a specific lawyer and agreed with Constable Haight's suggestion that he could obtain legal advice through Nova Scotia Legal Aid. Mr. Adwan was in the interview room, and Mr. Haight arranged to put the lawyer, Mr. Stevens, on speakerphone at the same time the translator, Ms. Hassan, was on Constable Haight's personal cell phone, on speakerphone. The conversation did not begin until Constable Haight exited the room to ensure that the call was made in private.

[52] Mr. Adwan spoke to Mr. Stevens for 13 minutes, between 4:12 and 4:25 p.m. Constable Haight knew the conversation ended because Mr. Adwan tapped on the door; Constable Haight entered; the translator was still on Constable Haight's work cell phone. Constable Haight confirmed through the translator that the services of duty counsel were satisfactory to Mr. Adwan, which he confirmed, and the call was ended.

[53] Mr. Adwan did not provide a statement to police. Constable Haight did not request a statement from the accused because he did not believe that it was necessary, and that it would not be an easily facilitated conversation with the translator to try and obtain a statement from the accused.

[54] Both accused were released on a promise to appear at a future date.

[55] On cross examination Constable Haight confirmed the first thing that drew his attention to the accused was the fact that the Santa Fe was speeding, and the second thing that caught his attention was that the vehicle was a rental; then he noticed the unusually dark rear windows.

[56] Constable Haight also confirmed that he leaned into the driver's side of the vehicle and was speaking to the driver and passenger, but he was struggling to hear what was being said. Constable Haight clarified that he struggled to hear both accused when they spoke to him, but that it would not be difficult for them to hear him, because he was talking from inside the vehicle essentially inside a box with no outside road noise. He also indicated that he was wearing an earpiece which also interfered with his ability to hear what was being said by the two occupants of the SUV.

[57] Constable Haight agreed that there was clearly a language barrier, which is why he retained a translator.

[58] The rental vehicle was taken to the Amherst RCMP detachment and secured in the vehicle bay until it could be searched the next day, in the presence of the Nova Scotia Fuel and Tobacco Officer Matthew Brewer. It was determined that the cases contained cartons of contraband tobacco, with 200 cigarettes per carton. The Santa Fe contained 16 cases of tobacco. I heard no evidence of how many cartons of tobacco were contained in each case. A portion of these cartons were randomly removed and sent to the lab in Ottawa for analysis. In addition to the cases of tobacco, a jacket which was covering some of the cases was seized and searched by Constable Haight and found to contain 26 – \$100 Canadian bills in an envelope.

[59] Constable Jamie Fisher was the second Crown witness to testify at the *voir dire*. He is a 13 year member of the RCMP, who was on duty November 19, 2018. He responded to the request for assistance by Constable Haight. When Constable Fisher arrived at the scene, Constable Haight filled him in on the details, advising him that he had conducted a traffic stop for a speeding driver and then determined that the occupants were transporting illegal tobacco. Constable Haight

identified the illegal tobacco in the SUV, and Constable Fisher was able to see from where they were standing the boxes that Constable Haight was speaking of that he believed contained illegal tobacco.

[60] Constable Fisher testified that Constable Haight advised him that he had placed the driver, Mr. Adwan under arrest, but that he had not gone through the complete process of providing him with his full *Charter* rights and caution because he was dealing with the second accused on the scene (the passenger, Mr. Alharoun). Constable Fisher was advised that Mr. Alharoun had been arrested by Constable Haight, but had not been provided with his rights and caution. Constable Haight also advised Constable Fisher that there may be a language barrier.

[61] Constable Fisher confirmed the identity of the person in the SUV and then provided reasons for his arrest from the preformatted *Charter* card, which he read into the record at the *voir dire*. When Constable Fisher read Mr. Alharoun his right to counsel, he indicated that he did not understand. When Constable Fisher asked him directly what he did not understand, Mr. Alharoun simply repeated that he just did not understand. Constable Fisher felt that in fact there was a language barrier and that Mr. Alharoun's comprehension of his rights and what was read to him was limited.

[62] Constable Fisher also based his opinion on the fact that Mr. Alharoun was unable to repeat the words, that he had used, back to him upon his request.

[63] When Constable Fisher read Mr. Alharoun his *Charter* rights, he also replied that he did not understand. Mr. Alharoun had mentioned that he had only been in Canada for two years, and Constable Fisher determined that the services of a translator would be required for Mr. Alharoun so that he could fully understand his rights.

[64] Constable Fisher testified that given the circumstances, specifically the fact that they were located on the side of the highway, and that Constable Haight was currently dealing with the translator for Mr. Adwan, Constable Fisher elected to leave Constable Haight with Mr. Adwan and the SUV, and return to the detachment with Mr. Alharoun to complete the arrest process at the detachment. In his opinion, he testified that the roadside environment is not safe, and given that choice, he elected to take Mr. Alharoun back to the detachment.

[65] Constable Fisher testified that he was aware that Constable Haight was in the middle of using the services of the translator, and that it was going to take him some time to finish this process, so Mr. Alharoun would have been better served

in the safe, quiet environment at the detachment where he could speak to the translator in private.

[66] Constable Fisher testified that he first made contact with Mr. Alharoun at 2:58 p.m. and made his first effort to give him reasons for his arrest at 3:01 p.m. He began reading the police caution to him at 3:06 p.m. and made the decision to transport Mr. Alharoun to the detachment immediately after attempting to relay the police caution to the accused.

[67] Constable Fisher could not recall the exact time of arrival at the Amherst RCMP detachment, but he testified that he initiated translation services for the accused in the detachment at 3:46 p.m. Constable Fisher noted that he did not have to call the 1-800 number to obtain a translator, as Constable Haight had already retained the services of the translator for both Mr. Adwan and Mr. Alharoun, which shortened the time that the request would have taken for a translator to be made.

[68] At that point Constable Fisher testified that successful translation services were provided to Mr. Alharoun, who was read his *Charter* rights and explained to him with the assistance of the translator. With the assistance of the translator Mr. Alharoun indicated that he understood his right to counsel and his *Charter* caution.



[69] Specifically, Constable Fisher read Mr. Alharoun the *Charter* card that he had previously read him, with the assistance of the translator.

[70] He advised the accused that he was arrested for possession of illegal tobacco. He advised him that he had the right to retain and instruct counsel without delay, and that he had the right to free and immediate legal advice from duty counsel. He asked the accused if he understood, to which he replied “yep” through the translator.

[71] Next, Constable Fisher testified that he asked Mr. Alharoun if he wished to call a lawyer. His response, through the translator, was that he wanted to contact the consulate for funds for a lawyer and a translator.

[72] Constable Fisher testified that he advised the accused that he had no access to a consulate.

[73] Constable Fisher testified that he next advised the accused that he had the right to apply to legal aid without cost, through the provincial legal aid program, and then he asked the accused whether he understood. His response, given via the translator was “Yep”.

[74] Constable Fisher then informed the accused that he need not say anything, and that he had nothing to hope from any promise or favor and nothing to fear from any threat whether or not he said anything, and that anything he said may be used as evidence. The accused indicated through the translator that he understood at 15:49 by saying “Yep”.

[75] Constable Fisher testified that he reviewed the phone numbers to access legal advice and the after hours number with the accused through the translator.

[76] Constable Fisher reviewed the phone numbers for duty counsel and legal aid, with the expectation that Mr. Alharoun would not remember those numbers, and he would provide them to him again if he wished to call legal aid. Constable Fisher also utilized translation services to ensure that Mr. Alharoun understood the release process, and that he would have to return to court.

[77] At that point, Constable Fisher was satisfied that the accused could be released from custody, and he ended his call with the translator at 4:07 p.m. Constable Fisher testified that Mr. Alharoun was not questioned or interviewed after speaking with the translator, or at any other time. Constable Fisher kept watch over Mr. Alharoun until the release documents were prepared.

[78] On cross examination Constable Fisher confirmed that Mr. Alharoun requested that he be able to contact the consulate to obtain funds to retain a lawyer. Constable Fisher testified that he told him that he had a right to legal aid to which he replied, “Yep”. Constable Fisher testified that there was no other conversation or communication with respect to contacting the consulate, and that no lawyer was ever contacted for Mr. Alharoun at that time. Constable Fisher was not able to confirm that there was any point when Mr. Alharoun said he was not going to speak with a lawyer, since he was speaking through a translator, and Constable Fisher did not know what was said between them.

[79] On redirect, Constable Fisher confirmed that Mr. Alharoun was already in custody when he first attended the scene of the arrest roadside. Constable Fisher confirmed he did not take Mr. Alharoun into custody, he was already in custody, and that Mr. Alharoun was not provided with any of his *Charter* rights when he was arrested, so Constable Fisher was required to go through that entire process from the beginning. If Constable Fisher had believed that Mr. Alharoun’s rights has been read to him up to that point, he testified that he would have provided him with a secondary caution for a person who has already been *Chartered* and cautioned. That did not happen in this case, and Constable Fisher testified that he started from step one.

[80] Constable Fisher confirmed that Mr. Alharoun did not say which consulate he wished to contact to obtain funds, Constable Fisher did not know which consulate to contact, and he testified that he received no communication from Mr. Alharoun asking him to contact the consulate on his behalf.

#### THE ONUS AND STANDARD OF PROOF

[81] With respect to preliminary issues, standing and the burden, the Crown conceded in their written submissions that the applicants have standing to bring this section 8, 9 and 10 *Charter* application.

[82] The onus to prove that a violation of the *Charter* occurred rests with the person asserting that the *Charter* has been breached. The applicable standard of proof is on a balance of probabilities that there has been a *Charter* infringement such that a remedy under section 24(2) of the *Charter* may be granted, (per *R. v. Collins*, [1987] 1 S.C.R. 265 (at para 21-22)).

[83] When challenged, the Crown must establish a lawful arrest on both subjective and objective grounds. Once established, the onus then shifts back to the applicants to establish, on a balance of probabilities, a section 9 *Charter* breach or

section 8 *Charter* breach regarding the search incident to arrest, per *R. v. Besharah*, 2010, SKCA 2 (CanLii).

[84] If a person is lawfully arrested, there is no section 9 breach. (*R. v. Storrey*, [1990] 1 S.C.R. 241).

[85] Under section 24(2) the applicant must satisfy the court on a balance of probabilities “having regard to all the circumstances” that the admission of the evidence “would bring the administration of justice into disrepute”, see *R. v. Cole*, [2012] 3 S.C.R. 34.

### **ISSUE 1 – SECTION 8 OF THE CHARTER**

[86] The Crown submits that Constable Haight performed a lawful search of the vehicle incidental to the lawful arrest of the accused, and that all contraband seized from the accuseds’ vehicle is admissible evidence against them.

[87] Mr. Chongatera submits that the tobacco seized from the vehicle should be excluded at trial. I received thorough briefs from counsel and thank them for their assistance.

[88] Searches conducted pursuant to a search warrant are presumptively reasonable, all warrantless searches are presumptively or prima facie unreasonable,

per *Southam v. Hunter*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145. The crown has the burden to rebut this presumption of unreasonableness.

[89] To rebut the presumption of unreasonableness the Crown must establish that the search is:

- 1) authorized by law;
- 2) the law itself is reasonable; and
- 3) the manner in which the search is carried out is reasonable: *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 SCR 265.

[90] It is point number one in this three-part test set out in *Collins*, supra, that is at issue in the case at bar – specifically was this a lawful arrest?

[91] The second issue is that if the arrest was lawful, was the search of the rental vehicle conducted incident to arrest?

[92] Was the Arrest Lawful?

Section 495 of the Criminal Code sets out the police powers to arrest without warrant in certain circumstances:

S. 495.

*(1) A peace officer may arrest without warrant*

*(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;*

*(b) a person whom he finds committing a criminal offence; or*

*(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.*

[93] In any case where

*(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to*

*(i) establish the identity of the person,*

*(ii) secure or preserve evidence of or relating to the offence, or*

*(iii) prevent the continuation or repetition of the offence or the commission of another offence.*

[94] The power of the police to lawfully arrest a person pursuant to this provision contains both a subjective and an objective component. The officer must have an honest belief that the requisite grounds exist, and the grounds must be reasonable. (see *R. v. Feeney*, [1997] 2 S.C.R. 13).

[95] Section 9 of the *Charter* requires the existence of reasonable and probable grounds for an arrest: “Everyone has the right not to be arbitrarily detained or imprisoned”.

[96] The Supreme Court of Canada in *R. v. Storrey*, supra, explains the rationale for the requirement for reasonable grounds for arrest at paragraph 14:

*14. Section 450(1) makes it clear that the police were required to have reasonable and probable grounds to believe that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the Criminal code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.*

[97] At paragraph 17 of *Storrey*, supra, the court set out the test for a warrantless arrest:

*17. In summary, then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.*



[98] The Supreme Court of Canada in *R. v Chehil*, 2013 SCC 49 discussed the nature of scrutiny involved in an assessment of objective grounds for arrest:

*An officer's training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, this is not to say that hunches or intuition grounded in an officer's experience will suffice, or that deference is owed to a police officer's view of the circumstances based on her training or experience in the field... A police officer's educated guess must not supplant the rigorous and independent scrutiny demanded by the reasonable suspicion standard. Evidence as to the specific nature and extent of such experience and training is required so that the court may make an objective assessment of the probative link between the constellation of factors relied on by the police and criminality. The more general the constellation relied on by the police, the more they will be a need for specific evidence regarding police experience and training. To the extent that specific evidence of the investigating officers experience and training supports the link the crown asks the court to draw, the more compelling that link will be.*

[99] In discussing the meaning of the phrase “the constellation” in *Chehil*, supra, the Supreme Court of Canada states at paragraph 61 and 62:

*The trial judge considered potential innocent explanations for individual factors that could have been dealt with through further investigation, and found that absent such investigation, there could be no reasonable suspicion of involvement in drug crimes.*

*The Court of Appeal found that the trial judge erred by looking at each factor individually. In their view, it was not determinative that each factor, viewed in isolation, was capable of innocent explanation. They found that the circumstances, must be looked at in their totality, which precludes a divide and conquer approach that finds each factor individually equivocal.*

**Subjective Grounds:**

[100] Section 495(1) of the *Code* requires that the arresting officer must honestly believe that there are reasonable grounds for the arrest. Constable Haight testified that after considering all of the circumstances, the grounds crystalized in his mind and he determined that he had sufficient reasonable and probable grounds to arrest the two accused for possession of illegal tobacco.

[101] In this case, the officer described in detail the observations that he made and the information that was at his disposal at the time, and when I consider the evidence in its totality, including his specific training and experience, I am satisfied that Constable Haight's subjective belief that he had grounds to make the arrests was reasonably held.

**Objective Grounds:**

[102] In order to make a determination as to whether or not there were reasonable grounds on the objective basis, the totality of the circumstances must be considered.

[103] Constable Haight is an experienced, 12 year veteran of the RCMP. He is a member of the roving highway unit tasked with investigating interdiction cases

including the possession and importation of illegal tobacco. He received interdiction training, the “Pipeline Course”, which specifically provides training to assist police officers in identifying indicators of contraband items being transported on the highways, which included the trafficking of illegal tobacco.

[104] Constable Haight participated in previous arrests for contraband tobacco on six to seven prior occasions in operations conducted in conjunction with Nova Scotia Fuel and Tobacco officers.

[105] Constable Haight, in the process of executing a traffic stop for speeding, made a number of observations, including the following:

- He determined that vehicle was a rental, and further inspection of the rental contract indicated that it was rented two days prior to the date of the traffic stop, in his experience consistent with the time frame it would have taken to purchase illegal cigarettes in Ontario or Quebec and then return to Nova Scotia;
- He took note of the time of the stop, early afternoon, which was of significance to him because it is consistent with his knowledge and

experience about the timing of when traffickers often return from a trip to obtain illegal tobacco out of province;

- He noted the direction of travel, from the direction of New Brunswick on highway 104 heading in the direction of Truro, the major route linking New Brunswick to Nova Scotia, and the route which Constable Haight knew from prior arrests is used to transport contraband between New Brunswick and Nova Scotia.
- Constable Haight, upon attending the SUV, immediately saw brown cardboard boxes in the rear of the vehicle, and further, he took notice of the shape and size of the boxes and their exterior appearance, which was consistent in his training and experience with the packaging used to package illegal tobacco by the case. In addition, he saw the markings on the outside, top right corner of the boxes – hand-lettering made in black marker with B and L on the top right of the boxes, which in his training and experience indicated the “B” signified the brand and the letter “L” indicated that the boxes contained light cigarettes.
- Constable Haight also noted what looked to him to be an attempt at concealing the boxes by the unnecessary drawing of the privacy blinds over

the rear tinted windows on an overcast day with snow flurries and by the winter jacket partially concealing some of the boxes in the back of the SUV.

## PLAIN VIEW DOCTRINE

[106] A warrantless search may also be lawful in limited circumstances at common law. The search may be lawful on the basis of the “plain view doctrine”, but this rule has a limited application.

[107] It was held in *R. v. Sanchez-Ruiz*, 121 N.B.R. (2D) 106; 304 A.P.R. 106; 68 C.C.C. (3d) 500 (C.A.) at para. 509:

*“The plain view doctrine permits, within strict limits, the introduction into evidence of items obtained without a search warrant. In a sense, it is an exception to the rule requiring a search warrant. This court in R. v. Belliveau (1986), 30 C.C.C. (3d) 163, 54 C.R. (3d) 144; 75 N.B.R. (2d) 18, had occasion to consider the application of the doctrine. At p. 174, Stratton, C.J. outlined three requirements that must be satisfied before the doctrine may be invoked:*

*‘First, the police officer must lawfully make an “initial intrusion” or otherwise properly be in a position from which he can view a particular area. Secondly, the officer must discover incriminating evidence “inadvertently”, which is to say, he may not “know in advance the location of [certain] evidence and intent to seize it”, relying on the plain view doctrine as a pretext. Finally, it must be “immediately apparent” to the police that the items they observed may be evidence of a crime, contraband, or otherwise subject to seizure. These requirements having been met, when police officers*

*lawfully engage in an activity in a particular area perceive a suspicious object, them may seize it immediately.”*

[108] To summarize the principles set out in *Ruiz*, supra, the plain view doctrine contains three requirements:

- (1) The police officer must be “lawfully positioned”;
- (2) The discovery of evidence must be inadvertent; and
- (3) It must be “immediately apparent” to the police that the items may be evidence of a crime.

[109] Constable Haight satisfied the first of the three requirements which sets out that the police officer must be justified in his initial intrusion. He was on regular patrol when he encountered a speeding vehicle and initiated a traffic stop as a result. It was pure coincidence that he was patrolling the area at that time. He was not searching the highway and the vehicles travelling upon it looking for the accused.

[110] Secondly, the officer must discover the incriminating evidence inadvertently, meaning he did not know of its location in advance. Constable Haight was investigating the speeding infraction when he became suspicious about the tinted, shaded windows and he looked into the rear of the SUV and saw the

cardboard cases. These cases were found inadvertently, and the officer was not looking for anything in particular. I find that the second condition has been satisfied in this case.

[111] Finally, the third condition sets out that it must be “immediately apparent” to the police that the items that they observed may be evidence of a crime, contraband, or otherwise subject to seizure.

[112] Constable Haight testified that when he looked in the back seat, he immediately saw the cardboard cases. The tobacco itself was not immediately apparent or in plain view; but what was in the plain view of the officer were the cardboard cases or boxes of a particular shape and size, which contained identifying features, specifically the “B” and “L”, which he knew from his training and experience denoted the maker and the type of cigarette (B for the brand and L for light) hand lettered on the top-right corner. Constable Haight testified that he had seen these markings before on several occasions and based on his training and experience it was immediately apparent to him that the cardboard cases contained illegal cigarettes.

[113] I find that the Crown has met its burden to establish that this warrantless search was otherwise justified in law, as the boxes of illegal tobacco, which were

immediately recognized as such by the officer, were in plain view in the back seat of the rental SUV.

[114] When I consider the totality of the factors or the constellation of the circumstances observed and considered by Constable Haight, I find that his belief that the boxes contained contraband tobacco was objectively reliable and supported by the evidence. His evidence was given in a very detailed and straightforward manner, it was not impeached on cross examination and overall I found his evidence to be very credible and given in an extremely detailed and reliable manner, and I did not note either any internal or external inconsistencies in his evidence. In short, I accept the evidence of Constable Haight.

[115] Although no one circumstance observed by Constable Haight is sufficient to establish objectively reliable grounds, neither should each piece of evidence be subjected to “piecemeal analysis”. It is not proper to segregate the officer’s criteria for piecemeal analysis, then banish each factor that might have a standalone or innocent explanation, see *R. v. Liberatore*, 2014 NSCA 109 (CanLII), para27. From the point of view of Constable Haight, these factors may have had corroborative weights that together form a sounder platform for an objectively reliable belief that the boxes contained illegal tobacco.



[116] I am satisfied that the grounds to arrest in this case were objectively reasonable and the arrest was, therefore, lawful. As per *R. v. Loewen*, [2011] SCC 21, where an arrest has been determined to be lawful, the attendant detention is not arbitrary, and the applicant's section 9 *Charter* application is therefore dismissed.

#### SEARCH INCIDENT TO ARREST

[117] The common law creates an exception to the rule that a warrantless search is *prima facie* unreasonable when the search is incidental to arrest (see *Cloutier v. Langlois*, [1990] 1 SCR 158; *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 SCR 607. This exception is limited by the courts to protect the individual's privacy rights. (per *R. v. Hiscoe*, 2013 NSCA 48 (CanLII), per Oland, JA at para 33.

[118] The seminal case dealing with searches incidental to arrest is *R. v. Caslake*, [1998] 1 SCR 51, which set out the common-law power to search incidental to arrest. It set out that the three main purposes of search incidental to arrest are to:

- 1) ensure the safety of the police and the public;*
- 2) to prevent the destruction of evidence; and*
- 3) for the collection of evidence. The search must be "truly incidental" to arrest, and this is to be determined on both a subjective and objective standard.*

[119] In the case at bar, I have found that Constable Haight had sufficient grounds to arrest the applicants without a warrant. Moving on to the search of the SUV, I find that the search was truly incidental to arrest, and not a fishing expedition or an attempt to gather further additional evidence to bolster the officer's grounds to arrest.

[120] Constable Haight testified that prior to having the driver, Mr. Adwan, exit the vehicle and open the rear door of the SUV, he had switched position from the passenger side to the driver's side of the SUV and placed both men under arrest. It was at that point, after arresting the two applicants, that Constable Haight opened one of the cases and confirmed that it contained illegal tobacco.

[121] I find that the purpose was to collect evidence of the offence for which the accused had already been arrested. The officer was already satisfied that he had sufficient reasonable and probable grounds to believe that the boxes contained contraband tobacco at that point, and therefore the act of opening the box was a lawful search undertaken incident to a lawful arrest.

**Issue 2: Section 10(a) and (b) of the *Charter*.**

[122] 10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;*
- (b) to retain and instruct counsel without delay and to be informed of that right.*

[123] Per *R. v. Bartle*, 1994 CanLII 64 (SCC), [1990] 1 SCR 190 and *R. v. Brydges*, 1990 CanLII 123 (SCC), [1994] 3 SCR 173, in addition to the rights set out in sections 10(a) and (b) of the *Charter*, upon arrest everyone also has the right to be advised of the existence and availability of Legal Aid and duty counsel.

[124] The first duty is informational in nature. The second and third duties are implementational and are only triggered when the detainee indicates a desire to exercise his or her right to counsel.

[125] In the present case, dealing with the driver, Mr. Adwan, first, it is clear from the evidence of Constable Haight that immediately upon Mr. Adwan's arrest, he was provided with the complete informational component of his section 10(b) *Charter* rights. In the course of Constable Haight attempting to explain to Mr. Adwan the reasons for arrest, and his *Charter* rights, it became very clear to the officer that there was a language/comprehension barrier which Constable Haight believed was preventing Mr. Adwan from truly understanding the nature of his rights.

[126] It was Constable Haight's opinion that Mr. Adwan understood that he was a police officer, and that he had been placed under arrest, and why he had been placed under arrest, given Mr. Adwan's assertions that the boxes contained sewing materials, and his ability to communicate in English in simple terms. Constable Haight was clearly concerned that Mr. Adwan did not truly and fully understand his rights, or the nature of his jeopardy, which is why he immediately engaged the services of a translator, so that the same information could be provided to him in his first language, Arabic. This was arranged and completed within one hour. Once at the detachment, Mr. Adwan was able to speak to Legal Aid duty counsel with the assistance of an Arabic translator.

[127] I find that Constable Haight did all that he could to ensure that Mr. Adwan understood the reasons for his arrest and his *Charter* rights. Constable Haight informed Mr. Adwan promptly of the reasons for his arrest and his rights. When it was clear that the accused did not understand, the translator was contacted and arranged without delay. What amounts to being promptly informed turns on the specifics of the case, see *R. v. Eatman* (1982) 45 NBR (2d) 163 (NBQB) at 165, and in this case, the officer acted immediately when he realized that Mr. Adwan was not understanding him. I find that there has been no infringement of Mr. Adwan's section 10(a) or (b) *Charter* rights, and therefore dismiss the application.

[128] Turning now to the passenger, Mr. Alharoun, there was a significant delay between his arrest and him being informed of the reasons for his arrest, and his *Charter* rights, police caution and right to counsel. I find that the applicant's right to be properly informed of the reasons for his arrest have been breached.

[129] Both applicants were arrested at 1440 hours. Mr. Alharoun was given the reasons for his arrest and rights at 1501, 21 minutes after his arrest by Constable Fisher. I find that this period of delay is reasonable, for the reasons given by Constable Haight, specifically that he was unable to deal with both accused at the same time, and did not wish to give them both their reasons for arrest and rights in the police car at the same time, given the language issue. He radioed for assistance as soon as possible, and upon Constable Fisher's arrival at 1501 Mr. Alharoun was given his reasons for arrest and rights.

[130] Constable Fisher at that point made the decision to return to the Amherst RCMP detachment and utilize the services of the same translator that had been engaged by Constable Haight. Mr. Alharoun was not put in touch with the translator so that his reasons for arrest and rights could be explained to him until 1612, one hour and 28 minutes after his arrest. It is hard to imagine that the translator, Ms. Hassan, could be the only Arabic translator that the RCMP could

obtain by telephone using the 1-800 number that they referenced. There was no evidence that either officer called that number or made any further inquiries to determine if another Arabic interpreter could be made available to ensure that Mr. Alharoun's rights were read to him without delay. I find that Mr. Alharoun's right upon his arrest and detention to be informed promptly of the reasons for his arrest were breached contrary to section 10(a) of the *Charter*.

[131] Once Mr. Alharoun was put in touch with the translator, Constable Fisher ensured that he understood the reason for his arrest. The officer then proceeded to reread Mr. Alharoun the rights that he read him in English roadside. Specifically, he advised Mr. Alharoun he was arrested for possession of illegal tobacco, which the applicant indicated through the translator that he understood. Next Constable Fisher advised the applicant that he had the right to free and immediate legal advice from duty counsel. The applicant responded, "Yep".

[132] Next, Constable Fisher asked the applicant if he wished to call a lawyer, to which Mr. Alharoun responded that he wished to contact the consulate for funds for a lawyer and a translator.

[133] The next thing that Constable Fisher advised the applicant of was that he had the right to apply for legal assistance without cost through the legal aid program, and the applicant responded “Yep”.

[134] Mr. Alharoun was then read his rights from the police *Charter* card at 1549, and Mr. Alharoun again indicated “Yep” signifying that he understood.

[135] Constable Fisher then reviewed the phone numbers for legal aid and duty counsel. There is no evidence before this court that Constable Fisher asked the applicant if he wanted to call legal aid. There is no evidence that Constable Fisher ever offered the applicant a telephone to contact legal aid, or to contact the consulate to arrange funds to retain private counsel. Constable Fisher confirmed that a lawyer was never called for Mr. Alharoun.

[136] I find that Constable Fisher satisfied the informational component of the obligations articulated in section 10(b) of the *Charter*, but he failed to comply with the implementational component contained therein. Constable Fisher was well aware of the language barrier and the difficulty in communicating with an accused through a translator. I find that the applicant wanted to make contact with the consulate for the purpose of obtaining a lawyer. Those were not his exact words,

but his words were filtered through the translator, and I find that the spirit and intent of his response was to contact the consulate so that he could hire a lawyer.

[137] Constable Fisher confirmed that he did not know which consulate the applicant wished to contact, nor did he ask.

[138] The right to counsel requires that the police take reasonable steps to contact counsel, see *R. v. Taylor*, 2014 SCC 50. The 10(b) *Charter* right to speak with legal counsel also includes the right to contact third parties for the purpose of obtaining counsel. Thus, where the detainee expresses a desire to speak with a third party for purposes of obtaining the name of legal counsel, and there are no investigative concerns arising from that request, denial of the right to access the third party may constitute a section 10 breach, see *R. v. Tremblay*, [1987] 2 SCR 435; *R. v. LaPlante* (1987), 1987 CanLII 209 (SK CA), 40 CCC (3d) 63 (Sask CA). The right to speak with a third party to obtain the name of counsel is not absolute, and is fact dependent. As I previously mentioned, the additional layer of complexity in this case is the fact that all of the applicant's responses were filtered through a translator.

[139] In short, the officer did not offer a telephone to the applicant so that he could make contact with either legal aid or private counsel. Further, the officer did not



provide a phone book, nor did he make any efforts to determine which consulate the applicant was referring to. Also, the officer did not undertake the least inquiry to determine the availability of consular services for Mr. Alharoun so that he could retain counsel. In short, I find that the implementational requirements of s.10(b) of the *Charter* had not been met with respect to Mr. Alharoun, and as a result, his *Charter* protected rights contrary to section 10(b) were breached.

### **ISSUE 3: APPLICATION OF SECTION 24(2) OF THE CHARTER**

[140] The remaining issue is whether the evidence, in this case the contraband tobacco, should be excluded from evidence under section 24(2) of the *Charter* with respect to Mr. Alharoun.

s. 24(2) of the *Charter* states:

*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.*

[141] This analysis was further developed by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32.

[142] To determine whether the evidence should be excluded, I will refer to the analysis in *R. v. Grant*, supra, at para 71;

*...Under s. 24(2), 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 (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s.24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.*

[143] The task for the court is to find a balance between individual and societal interests, and to determine whether the administration of justice would be brought into disrepute by the admission of the evidence. Given the infinite number of variables that can present during a criminal trial, the 24 (2) analysis must retain some measure of flexibility and be contextual. (*R v. Grant*, supra, at para.85).

**Step One – the seriousness of the *Charter* infringing state conduct:**

[144] The first part of the *Grant* analysis requires an evaluation of the seriousness of the state conduct that led to the *Charter* breach.

[145] The gravity of the breach is low. The officers were acting in good faith in attempting to exercise their duties, and the *Charter* infringement did not have a significant impact on the *Charter* protected interests of Mr. Alharoun. He did not provide a statement and no derivative evidence was obtained. I find that the conduct of the officers in all the circumstances by infringing Mr. Alharoun's right to counsel was not so serious as to have a negative impact on the rule of law and risk bringing the administration of justice into disrepute. This first factor favours inclusion of the evidence.

**Step Two – The Impact of the Breach on the *Charter* protected Interests of Mr. Alharoun.**

[146] In this case, Mr. Alharoun did not give a statement and no derivative evidence was obtained as a result of the 10(b) *Charter* breach. I find that there was no temporal or causal connection between the breach of the applicant's right to counsel and the earlier discovery and seizure of the illegal tobacco. This factor favours inclusion of the evidence.

**Step Three – Society's Interest in adjudication of the case on its merits**

[147] The tobacco seized constitutes highly reliable non-conscriptive evidence in relation to the charge. A significant amount of tobacco was seized in this case, it is a serious charge and society has an interest in seeing this matter adjudicated on its merits. This is a serious offence; the evidence was that the police seized 16 cases of illegal tobacco. This real evidence is highly reliable and essential to the Crown's case. Society has a strong interest in adjudication of this case on its merits and I find that the truth-seeking process of the criminal trial would be better served by the admission of the evidence, and accordingly, the evidence is admissible in the trial.

R. Michie, JPC.