IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Henderson, 2008 NSSC 386

Date: 20081027
Docket: CRH 291307
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

CHRISTOPHER EDWARD JAMES HENDERSON

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	August 11 & 12; September 24 & 25, 2008 in Halifax, Nova Scotia
Written Decision:	December 17, 2008 *(Oral decision rendered Oct. 27, 2008)*
Counsel:	Susan Bour for the Crown Josh Arnold for the Defendant

By the Court:

INTRODUCTION

[1] This is the reserved decision in the matter of *R. v. Christopher Edward James Henderson*. Because I am giving this decision orally, I reserve the right, if it is required to be reduced to writing to, edit, but of course not change the substance.

[2] I am going to begin with the end.

[3] I have concluded that the search breached Christopher Henderson's *Charter* rights to be free from unreasonable search and seizure pursuant to s. 8 of the *Charter*, and I have also concluded that the evidence should be excluded pursuant to s. 24(2) of the *Charter*.

[4] The accused, Christopher Henderson, was in a minor car accident. The other driver called the police. When the accused opened the trunk of his car, the police officers said they smelled marijuana and Christopher Henderson was arrested. Drugs and packaging were found, and subsequently a loaded handgun. That is

simply an introduction to the facts of the case. Some facts are in dispute, and in this summary of the facts, I will deal mostly with those that are not in dispute.

FACTS

[5] On a hot summer day, July 16th, 2007, Christopher Henderson was in a minor motor vehicle accident on Victoria Road near Cherry Drive in a residential area of Dartmouth. He and the female driver of the other car pulled their cars onto Cherry Drive and the female driver called the police. Christopher Henderson said that he put his sweatshirt and a bag containing marijuana in the trunk of his car before the police arrived.

[6] Constables Muir and Parent arrived on scene. At that time Constable Muir had been 10 months on the police force. As is the usual practice in investigating a motor vehicle accident, the two officers split up to interview the two drivers separately, Constable Muir with the female driver and Constable Parent with Christopher Henderson.

[7] A passerby said something in Constable Muir's hearing about looking in Christopher Henderson's trunk. Constable Parent said he had only got as far with Christopher Henderson as Mr. Henderson getting out his driver's license and that they had done nothing more when suddenly Constable Muir came over. Normally, Constable Parent said, it would have been his job to examine the damage to the vehicle of the person he was interviewing.

[8] Constable Muir came over to Mr. Henderson's vehicle, bent over by the gas filler cap on the side where the damage was, as shown in the exhibit, photo number 2 from Exhibit VD-19. He testified he smelled gas and asked Christopher Henderson to open the trunk. He said Christopher Henderson asked him if he was inspecting for damage to the gas intake. He did not mention the passerby's comment to Mr. Henderson. As a result, Mr. Henderson popped the trunk release lever inside the passenger compartment of the car.

[9] Constable Parent testified that he did not smell gas, nor did he consider there was any safety hazard with respect to Mr. Henderson's vehicle. Constable Muir went to the open trunk, and he testified he smelled fresh marijuana. He asked

Constable Parent to come over, and they testified that they then arrested Mr. Henderson for possession of marijuana.

[10] Constable Muir made reference to calling a canine unit. Subsequently, Mr. Henderson reached in the trunk and pulled out his sweatshirt, in which were wrapped baggies of marijuana. The officers then testified he was rearrested for possession for the purpose of trafficking. Mr. Henderson was handcuffed and placed in the police van, which was parked very close by. He was read his *Charter* rights and given the police caution.

[11] Constable Muir asked Mr. Henderson if he consented to a search of his vehicle. Mr. Henderson said no. Constable Muir then again referred to the canine unit coming. Mr. Henderson subsequently told Constable Muir to look in the backpack in the trunk of the car, and a bulk package of marijuana was found wrapped in a large plastic bag and inside a grocery store plastic bag.

[12] Constables Muir and Parent called their sergeant to the scene. When Sergeant Morris arrived, he testified he looked in the trunk and saw the butt of a gun. He said he removed it and then replaced it. That weapon is shown in

photographs 3 and 4. Two other officers were on scene at that time, Constable Smith and Cadet Brooks, now Constable. The former saw Sergeant Morris remove the handgun and replace it, the latter only saw him replace it.

[13] All officers on scene made notes to which they referred at trial. Constable Muir made his notes later that day, whereas Sergeant Morris made his while he was on scene. The notes of Constables Muir and Parent do not refer to two arrests but only the arrest for trafficking. The notes of Constable Muir do not refer to the passerby who made the comment about looking in Mr. Henderson's trunk. Sergeant Morris' notes do not refer to Constable Parent telling him about a smell of gasoline but they do refer to Constable Muir telling him about the passerby in his comments.

[14] Mr. Henderson was taken to police headquarters for booking, and Constable Muir attended at the Integrated Drug Section to give Detective Constable Langille the information he would need to prepare an Information to Obtain the two search warrants, one for the drugs pursuant to the *CDSA* and the other for the gun pursuant to the *Criminal Code*. Detective Constable Langille was told nothing about the passerby's comments.

[15] Mr. Henderson's vehicle was towed to and searched in the police garage pursuant to the two search warrants. The search was done by Detective Constable Beach with Detective Constable Langille present. They found a loaded .38 calibre handgun, a quantity of hash under the driver's seat, 5.35 grams, a cell phone in the front seat, and in the passenger compartment they found packaging, one of which was a Smelly Proof package. They found Orange Chronic spray and Axe body spray in the front seat of the car. Various exhibits were turned over to Detective Constable Beach, and they were Smelly Proof Ziploc bags containing other Ziploc bags containing a total of 67.97 grams of marijuana in various quantities, a block of marijuana, 246.06 grams from the backpack, another cell phone and a Palm Pilot. Detective Constable Beach said he saw no damage to the gas filler area of the vehicle.

[16] Samples of the drugs were taken and analyzed, and the larger quantities were found to be cannabis marijuana and there was a small quantity of hashish. Detective Constable Langille subsequently arrested Mr. Henderson again at the police station for the weapons charges after the handgun was seized.

[17] Certain critical facts are in dispute with respect to the opening of Mr. Henderson's trunk. First of all, whether Constable Muir paid no attention to the passerby's comments and why he went to Mr. Henderson's vehicle and leaned near the gas filler cap. Also, whether, when he did so, he said he smelled gas or whether Mr. Henderson said to him, "Was there damage to the gas line?" and arising from that, the reason why Mr. Henderson popped the trunk. I will deal with these issues when dealing with the issues of when the investigation began, when the search began, the validity of and/or consent for the search of the trunk of Mr. Henderson's car.

ANALYSIS

1. <u>Reasonable Expectation of Privacy</u>

[18] The first step in the analysis is with respect to the search, whether Mr. Henderson had a reasonable expectation of privacy with respect to the trunk, and that is a threshold issue. The vehicle was his and the trunk was locked, able to be opened by a trunk release located inside the passenger compartment by the driver's seat. In *R. v. Edwards* [1996] S.C.J. No. 11, the Supreme Court of Canada

considered the factors in assessing whether a person had a reasonable expectation of privacy. Each case must be determined on the circumstances of that case and the factors are, but not limited to, the following, quoting from *Edwards*:

> (I) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access including the right to admit or exclude others from the place; ...(vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation.

[19] In *R. v. Belnavis,* [1997] S.C.J. No. 81, the issue was canvassed with respect to motor vehicles. In that case the parties agreed that there was an expectation of privacy in relation to a car. Justice Cory agreed that a warrantless search of the car was a breach of s. 8 of the *Charter* in that case.

[20] Subsequently, in *R. v. Caslake,* [1998] S.C.J. No. 3, Chief Justice Lamer was of the opinion that the privacy interest in a motor vehicle is somewhat less in degree than the expectation of privacy in a home or office or the person. He said in para. 34:

> There is a lesser expectation of privacy in a car than there is in one's home or office, or with respect to their physical person.

[21] The most recent Supreme Court of Canada decision on the issue of reasonable expectation of privacy is *R. v. A.M.*, [2008] S.C.J. No. 19 where the subject was drugs discovered in a student's backpack lying next to a wall in the school gym. A drug sniffer dog reacted to the backpack and the police searched it and found illicit drugs. The Supreme Court of Canada ruled the search was unconstitutional and agreed that the evidence should be excluded. Justice Binnie said in para. 73 of that decision:

> I therefore do not agree with the Crown's argument that A.M.'s reasonable privacy interest in the content of his backpack extended only to what was lawful and excluded what was unlawful. On the contrary, I expect A.M. would not have cared if the police had found a polished apple for the teacher in his backpack. He would very much care about discovery of illicit drugs.

[22] In this case Mr. Henderson was present, the car belonged to him and the trunk was locked. He had the ability to control the means to access the trunk and to exclude others from it. The items in the trunk were not, of course, visible and there is no evidence there was any smell of marijuana emanating from the closed trunk. Christopher Henderson had a reasonable expectation of privacy with respect to the illicit drugs he placed in his trunk when he knew the police had been called. The sweatshirt and backpack were not in the passenger compartment of the car but

locked by him in his trunk. He testified he put them there because he thought it was a private place and the police would not go there.

[23] In my view, his expectation of privacy for items in his trunk was a reasonable one. Although one does not have the same privacy expectation with respect to a vehicle as one's home or office, the privacy expectation with respect to a locked trunk is, in my view, greater than that in the passenger compartment of a vehicle where the items are more easily open to both access and to view.

[24] In *R. v. A.M.*, Justice Binnie was dealing with the accused's privacy interest in his unattended gym bag on the gym floor. He said in para. 48:

> I do not agree with the importance attached to the circumstance that the backpack was unattended. If an accused has a privacy interest in the contents of a letter, it is not lost when she takes it out of her purse and posts it. If an accused has documents concealed in the locked trunk of his car, the privacy interest in the contents of the trunk of the car does not depend on whether he is in the car or has left it parked somewhere, including a public parking lot. My home is no less private when I am out than when I am there. When students left their backpacks in the gymnasium, they did not thereby lose their privacy interest in the concealed contents, in my view.

He continued in para. 49 to say:

The privacy issue relates to the concealed contents.

[25] I, therefore, conclude that the threshold test has been passed.

2. The Search

[26] The next issues, in my view, are bound together: when did the investigation start, when did the search begin, and whether Mr. Henderson consented to the search of his trunk. A warrantless search is *prima facie* unconstitutional, according to *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145. The Crown must, therefore, rebut that presumption on the balance of probabilities in a case like this where there was no search warrant at the time of Constable Muir's search, nor was Christopher Henderson under arrest at that time.

[27] Accordingly, the authorities provided by the Crown with respect to searches incident to arrest are, in my view, not applicable. And I mention as examples the cases of *R. v. Monroe*, 2005 BCCA 610 and *R. v. Alkins*, 2007 ONCA 264.

[28] The opening of the trunk and Constable Muir looking into it constitutes a search. The question then becomes, what grounds did he have for it and did Mr.

Henderson consent? Constable Muir would have the Court believe that (a) he paid no attention to the passerby's comments; (b) he did a routine visual inspection of Mr. Henderson's vehicle; (c) he smelled gas; and (d) when he asked Christopher Henderson to open his trunk, Mr. Henderson asked him if he was looking for damage to the gas line.

[29] I do not accept this evidence. It is inconsistent, not only with the evidence of Mr. Henderson but with that of Constable Parent, Sergeant Morris and Detective Constable Beach and the photos of the damaged area of Mr. Henderson's car. Constable Parent said the usual practice in interviewing motor vehicle accident drivers is to split them up with one officer interviewing each. He had not got very far with obtaining Mr. Henderson's information when, in his words, "all of a sudden" Constable Muir came over suggesting they deal with Mr. Henderson's vehicle, which would normally have been his job as the officer interviewing Mr. Henderson.

[30] Constable Muir then said he leaned over toward the gas filler cap and smelled gasoline. He said it was because of that he asked Mr. Henderson to open

the trunk. However, the notes taken by Sergeant Morris, based on Constable Muir's report to him about the incident, mention nothing about smelling gas.

[31] Constable Muir said he paid no attention to the passerby, the "Looky-Lou" as he called him. He said the passerby said, over his shoulder as he was walking by, "Look in the trunk." Constable Muir said he made no effort to talk to him. He made no notes of the passerby, although he made his notes later on that evening. However, Sergeant Morris' notes of what Constable Muir told him include a reference to the passerby saying, "Look in the trunk."

[32] Constable Muir testified that the fender was hanging in the area by the gas filler cap, whereas, the photos of Mr. Henderson's vehicle, for example, photograph number 2, shows only scrapes on the fender beside the wheel well, well below the gas filler cap, and show no dislodging of the fender.

[33] Constable Parent said he smelled no gas and that he had no concern with respect to any hazard concerning the vehicle. Also, Detective Constable Beach, who searched the vehicle later at the police garage, said he could see no damage to the gas filler area and did not look inside the trunk for damage to the gas line.

[34] Constable Muir testified he bent over near the gas filler cap and it was then he smelled gas. No one else smelled gas. He denied saying anything to Christopher Henderson about the possibility of an explosion but said it was Mr. Henderson who asked him was he looking for damage to the gas line. Constable Parent did not recall either conversation. Constable Muir did not look under the car where the gas tank is.

[35] The evidence does not rebut the presumption that the warrantless search was unconstitutional. I conclude that Constable Muir did pay attention to the words of the passerby to the extent that he "all of a sudden" came over to Mr. Henderson's vehicle where Constable Parent was in the preliminary stages of obtaining information from Mr. Henderson and when Constable Muir could only have had time to do the same with the other driver. I conclude that he was following up on the vague words of the passerby and wanted very much to look in the trunk. He may have smelled gas when he bent over very close to the gas filler cap but no one else did. The damage to Mr. Henderson's vehicle was minor, superficial scrapes, which caused no concern to anyone except, allegedly, Constable Muir. He then asked Mr. Henderson to open the trunk, and I conclude he did refer to a smell of

gas. Otherwise, Mr. Henderson, knowing what was in the trunk, would not have opened the trunk except because of a request from a uniformed armed police officer.

[36] Constable Muir had a vague suspicion that Christopher Henderson may have hidden something of interest to the police in his trunk. He did not have grounds to believe that there were illegal drugs or a prohibited weapon in the trunk. He did not make inquiries of the passerby, nor did he give Mr. Henderson any indication that he wanted to look in the trunk for any reason other than vehicle safety or the safety of people and property. Mr. Henderson had no reason to believe he had changed from being a motorist involved in a motor vehicle accident to a criminal suspect. He was not advised of his option not to open the trunk, nor of the words of the passerby.

[37] In *R. v. Mellenthin*, [1992] S.C.J. No. 100, the accused was stopped at a roadside check. The constable looking in the vehicle saw an open gym bag. The accused what was in the bag and the accused pulled out a baggie in which there were empty glass vials of a type commonly used to store cannabis resin. After a

search of the vehicle, cannabis resin was, in fact, found. Justice Cory, writing for the Supreme Court of Canada, said in para. 11:

> It is true that a person who is detained can still consent to answer police questions. However, that consent must be one that is informed and given at a time when the individual is fully aware of his or her rights.

[38] In para. 17 he said:

> It has been seen that as a result of the check stop the appellant was detained. The arbitrary detention was imposed as soon as he was pulled over. As a result of that detention, it can reasonably be inferred the appellant felt compelled to respond to questions put to him by the police officer. In those circumstances it is incumbent upon the Crown to adduce evidence that the person detained had indeed made an informed consent to the search based upon an awareness of his rights to refuse to respond to the questions or to consent to the search. There is no such evidence in this case. In my view the trial judge was correct in her conclusion that the appellant felt compelled to respond to the police questions. In the circumstances it cannot be said that the search was consensual.

[39] In coming to that conclusion, Justice Cory had said in para. 15:

> However, the subsequent questions pertaining to the gym bag were improper. At the moment the questions were asked, the officer had not even the slightest suspicion that drugs or alcohol were in the vehicle or in the possession of the appellant.

[40] Similarly, Constable Muir did not have the "slightest suspicion" that drugs or a weapon would be found in the trunk of Mr. Henderson's vehicle. He had heard vague comments from a passerby with no detail about what might be found in the

trunk. He did not interview the passerby to get more information from him. He guessed there was something of interest to the police in the trunk of the car. His guess turned out to be correct but that is not grounds for a search.

[41] Constable Muir did not advise Mr. Henderson that he was conducting an investigation and wanted to search his vehicle. He did not advise Mr. Henderson that he had the option to refuse to open the trunk. Mr. Henderson opening the trunk was not based upon an informed consent but was based upon being misled about the real reason Constable Muir wanted him to open the trunk. In my view, under the circumstances, Mr. Henderson felt compelled to open the trunk.

[42] I conclude the Crown has not satisfied me on the balance of probabilities that the search was reasonable. The Crown has not rebutted the presumption about a warrantless search.

[43] In conclusion, the search of the trunk, which began when Mr. Henderson was compelled to open it, was an unconstitutional search. I, therefore, do not need to consider anything that occurred after that except as it may affect the overall context of whether the evidence obtained as a result of the unlawful search should be excluded.

3. Charter s. 24(2)

[44] Section 24(2) of the *Charter* provides:

> 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.

[45] The onus is on Mr. Henderson to establish on the balance of probabilities that the evidence should be excluded. In *R. v. Collins,* [1987] S.C.J. No. 15, Justice Lamer, as he then was, set out in para. 35 factors that must be considered in determining if the evidence should be excluded. He said:

> The factors that the courts have most frequently considered include:
>
> - what kind of evidence was obtained?
>
> - what Charter right was infringed?
>
> - was the Charter violation serious or was it of a merely technical nature?
>
> - was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith?
>
> - did it occur in circumstances of urgency or necessity?
>
> - were there other investigatory techniques available?

- would the evidence have been obtained in any event?

- is the offence serious?

- is the evidence essential to substantiate the charge?

- are other remedies available?

[46] He then grouped these factors into three categories. In para. 36 he said:

> Certain of the factors listed are relevant in determining the effect of the admission of the evidence on the fairness of the trial.

[47] In para. 38, he said:

> There are other factors which are relevant to the seriousness of the *Charter* violation and thus to the disrepute that will result from judicial acceptance of evidence obtained through that violation.

[48] And he said in para. 39:

> The final relevant group of factors consists of those that relate to the effect of excluding the evidence.

a) Trial Fairness

[49] On the issue of trial fairness, in *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.), Justice Cory said that the first step in determining admissibility of the evidence in the context of trial fairness is to decide whether the evidence is conscriptive or non-conscriptive. He described non-conscriptive evidence as follows in para. 75:

> If the accused was not compelled to participate in the creation or discovery of the evidence (i.e. the evidence existed independently of the *Charter* breach in a form useable by the state), the evidence will be classified as non-conscriptive.

[50] He said at para. 80, conscriptive evidence was obtained when:

> ...an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.

[51] The first issue then for me is to determine if the evidence was conscriptive or non-conscriptive using these definitions. The Crown says the evidence was non-conscriptive because it was real evidence, which would inevitably have been discovered. Mr. Henderson says there is no evidence it would inevitably have been

discovered. In *R. v. Collins*, Justice Lamer said the evidence was real evidence if it, "existed irrespective of the *Charter* violation." That, however, does not answer the question in this case because, without the unlawful search, there is no evidence that the contents of the trunk would have been found. It was only found once the trunk was opened. No one testified there was any smell of marijuana or any other indicia of drugs or a weapon before the trunk was opened. The police were investigating a motor vehicle accident and, had there been no comment from a passerby, that is the only investigation the police would have done or would have had any reason to do. No one testified about any drugs or drug paraphernalia being in plain view. The evidence was found only after Mr. Henderson was conscripted by the police to aid in its discovery.

[52] According to *Stillman*, if the accused is conscripted into providing the evidence against him, its admissibility would render the trial unfair unless the Crown can demonstrate that it would have been found by alternate non-conscriptive means. As Justice Cory said in *Stillman* at pp. 364-65:

> If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternate non-conscriptive means, then its admission will render the trial unfair.

[53] In most cases, conscriptive evidence has been considered to be such things as blood samples or confessions which did not exist without the violation. In my view, forcing Mr. Henderson to open his trunk where the drugs and weapon were found is a form of forcing Mr. Henderson to incriminate himself. Once the officers smelled marijuana, they would have had grounds to conduct a search, but only had the opportunity to smell marijuana once the trunk was opened in an unlawful search.

[54] In *R. v. Grant*, 2006 CanLII 18347 (Ont. C.A.) which is on appeal at the Supreme Court of Canada, Justice Laskin of the Ontario Court of Appeal said in paragraphs 45 and 46:

> ... an accused should not be 'conscripted' to participate in creating or producing incriminating evidence. The focus of the trial fairness inquiry, therefore, has been on whether the evidence in question is conscriptive.
>
> In my view, contrary to the ruling of the trial judge, the revolver in this case is 'conscriptive real evidence,' whose admission affected the fairness of the appellant's trial. Conscriptive evidence will ordinarily affect the fairness of an accused's trial, unless it is independently discoverable by non-conscriptive means. 'Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples,' see *Stillman* at paragraph 80. The word 'compelled' has been interpreted broadly to include the participation of an accused in the obtaining or creating of the evidence: see, for example, *R. v. Dolynchuk (2004),* 184 C.C.C. (3d) 214 (Man. C.A.). As Cory, J. explained in *Stillman* at para. 99, conscriptive real evidence or, as he termed it, derivative evidence, is a subset of conscriptive evidence.

> A subset of conscriptive evidence is 'derivative evidence'. This is a term frequently used to describe what is essentially conscriptive 'real' evidence. It involves a *Charter* violation where the accused is conscripted against himself (usually in the form of an inculpatory statement) which then leads to the discovery of an item of real evidence. In other words, the unlawfully conscripted statement of the accused is the necessary cause of the discovery of the real evidence.

[55] In *Mellenthin*, Justice Cory, at para. 24, said the trial judge had concluded that:

> ... the evidence, although real, could never have been discovered but for the illegal search.

[56] Justice Cory said in that para.:

> ... it cannot be denied that the conclusion of the trial judge was a reasonable one. Had it not been for the illegal search, the drugs would not have been found.

[57] Justice Cory then said in para. 29:

> It is clear that the admission of the evidence would render the trial unfair and there is no need to consider the other factors referred to in *Collins*. ...

[58] However, he did go on to deal with the other two factors, as I will do as well.

b) Seriousness of the Breach

[59] In *Collins* at para. 38, Justice Lamer quoted from Justice LeDain in *R. v. Therens,* [1985] 1 S.C.R. 613 as follows:

> The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motived by urgency or necessity to prevent the loss or destruction of the evidence.

[60] The Crown says the actions of police were not heavy handed. She says that they treated Mr. Henderson with respect and that in his testimony Mr. Henderson did not say that they intimidated him. She says there is no evidence of bad faith and the events occurred in a short time frame. On the other hand, Mr. Henderson says the police were not respectful because they lied to him with respect to the smell of gas to get him to open his trunk and threatened to call in a canine unit to search the trunk. He says they did not act in good faith and were not truthful

[61] In my view, the actions of Constable Muir were not inadvertent but a deliberate attempt to circumvent the necessity of having grounds to search the trunk of the car. The breach was, therefore, not a technical one, nor was it done in good faith. Constable Muir wanted to see what the passerby said Mr. Henderson had put in the trunk without having any reliable or detailed information about it.

He acted on a suspicion that there was something illegal. There was no urgency or necessity which caused the breach in order to prevent the destruction or loss of the evidence. These factors, in my view, make the breach more serious.

[62] Justice Sopinka said in para. 46 of *R. v. Kokesch*, [1990] S.C.J. No. 117:

> Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the *Charter* violation is plainly more serious than it would be otherwise, not less. Any other conclusion leads to an indirect but substantial erosion of the *Hunter* standards: the Crown would happily concede s. 8 violations if they could routinely achieve admission under s. 24(2) with the claim that the police did not obtain a warrant because they did not have reasonable and probable grounds. The irony of this result is self-evident. It should not be forgotten that *ex post facto* justification of searches by their results is precisely what the *Hunter* standards were designed to prevent ...

[63] In *R. v. Klimchuk*, [1991] B.C.J. No. 2872, 67 C.C.C. (3d) 385 (B.C.C.A.), Justice Wood of the British Columbia Court of Appeal said at page 419 of the *C.C.C.* report:

> Suspicion, even reasonably based suspicion as existed in this case, cannot be a justification for unconstitutional searches.

[64] He then quoted the above passage from Justice Sopinka's decision in *Kokesch.*

c) The Effects of Excluding the Evidence

[65] As Justice Lamer said in *Collins* at para. 39:

> The question under s. 24(2) is whether the system's repute will be better served by the admission or the exclusion of the evidence, and it is thus necessary to consider any disrepute that may a result from the exclusion of the evidence.

[66] The Crown says excluding the evidence would offend the community and bring the administration of justice into disrepute because a considerable quantity of drugs and a loaded gun were found in the car.

[67] I must consider the effects of excluding the evidence. Without this evidence the Crown will have no evidence to offer on the drug or weapons charges. It is essential to substantiate the charges. There would be no grounds for arrest, no grounds for a search incidental to arrest and no grounds to obtain a search warrant. All that would be left of the incident is a motor vehicle accident report.

[68] The charges are serious ones, but so is the effect on trial fairness. Furthermore, the breach was a serious one. In my view, admitting evidence based upon a deliberate attempt by the police to mislead a person involved in a motor vehicle accident to incriminate himself by forcing him to open the trunk of his car,

in which he had illegal drugs and an illegal weapon, would bring the administration of justice into greater disrepute than excluding the evidence. As Justice Lamar said in *Collins*, again in para. 39:

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

[69] In the *Grant* decision from the Ontario Court of Appeal, Justice Laskin said in para. 65:

> However, important and reliable evidence necessary to sustain a serious charge may nonetheless be excluded if its admission would exact too heavy a toll on the long-term integrity of the justice system.

[70] In that case he concluded that those considerations were absent on the basis that the violation was not wilful or flagrant, unlike what I found in this case.

[71] In *R. v. Buhay*, [2003] S.C.J. No. 30, Justice Arbour, at para. 68, quoted from the trial judge's decision at para. 40 where he expressed concern about:

> ... the casual approach the police took in infringing the accused's rights in these circumstances. It is this court's view and concern that if the evidence was to be admitted in this trial that it may encourage similar conduct by police in the future.

[72] She then went on in para. 70 to refer to Justice Lamer's decision in *Collins* where he emphasized that s. 24(2) is not a remedy for police misconduct. She said in para. 70:

> However, he also stressed that the purpose of s. 24(2) 'is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.'(emphasis in original)

[73] Justice Arbour then commented on the trial judge's concern about encouraging similar police conduct. She said in para. 70 that that concern:

> ... is in line with the purpose of the *Collins* test.

[74] Justice Tidman in *R. v. Skinner*, 2005 NSSC 246 said in para. 71 that, in his experience with police testimony, with few exceptions, he found that they made "a sincere effort to recall events accurately." He found in that case they did not and he said in paras. 72 and 73:

> 72 The police force is the front line and an integral part of the whole of the administration of justice. The Court's part of the administration of justice, ought to be able to rely on the police to make a sincere effort to do justice in criminal cases.

> 73 As Hallett, J.A., said at p. 6 of 6 in *R. v. Innocente*, *supra*, 'the integrity of the police in the judicial process is fundamental.' I find the integrity of the police in this case to be wanting. The accused's *Charter* rights were violated when there was no legitimate reason for the violation.

[75] Justice Tidman had concluded in paras. 62 and 63 of his decision:

> 62 What makes the violation more serious in the Court's view is that the police knew they had no grounds to legally search the accused's premises but proceeded regardless and then obtained entry only after a veiled threat to the accused that it would be 'easier' if he consented to their entry.
>
> 63 Immediately upon the status of the accused changing from a mere homeowner to an arrestee, he was entitled to be told so and treated accordingly. That is to be informed of his rights before any further police action against him. The police did not do so. This improperly deprived the accused of his *Charter* protected opportunity to make a decision as to what he would do when informed of those rights. It was after that point that the bulk of the evidence against him was found.

[76] The young officers in this case, in my view, tried, after the fact, to justify their actions only when it became apparent from Sergeant Morris' notes that there was a reference to the passerby which did not appear in their own notes. If Sergeant Morris' notes had not contained that reference, there would have been no mention of the passerby and the ostensible reason for the opening of Christopher Henderson's trunk would have been the risk of damage to the gas line with the attendant possibly serious consequences. The young constable, 10 months on the force at that time, in my view, knew he did not have grounds to look in Mr. Henderson's trunk and concocted the gas smell story to gain access. This was an

unfortunate lapse of judgement which caused a breach of Mr. Henderson's *Charter* rights. As Justice Tidman said, the courts, as part of the administration of justice, should be able to rely on the police to do what is right.

[77] The recent Supreme Court of Canada decision in *R. v. Kang-Brown*, [2008] S.C.J. No. 18, involved a sniffer dog search in a bus depot. The Supreme Court of Canada allowed the appeal and set aside the conviction on the basis that the evidence should be excluded. Justice Binnie said in para. 104:

> Drug trafficking is a serious matter, but so are the constitutional rights of the travelling public.

[78] Although *Kang-Brown* involved a traveller in a bus depot, in my view, these words are no less applicable to someone driving his own vehicle on a public street who happens to be involved in a minor motor vehicle accident.

[79] The consideration of s. 24(2) is the effect of admitting the evidence and the disrepute it would cause to the administration of justice. As Justice Lamer said in *Collins* in para. 32:

> The concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large.

[80] He continued in para. 32:

> Members of the public generally become conscious of the importance of protecting the rights and freedoms of accuseds only when they are in some way brought closer to the system either personally or through the experience of friends or family. Professor Gibson recognized the danger of leaving the exclusion of evidence to uninformed members of the public when he stated at page 246:
>
> > The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion.
>
> The *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority.

He then continued in para 33:

> The approach I adopt may be put figuratively in terms of the reasonable person test proposed by Professor Yves-Marie Morissette in his article 'The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to do and What Not to Do' (1984), 20 McGill L.J. 521 at p. 538. In applying s. 24 (2), he suggested that the relevant question is: 'Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?' The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable.

It was in this context that he set out the factors to which I have referred.

[81] Society's interest in prosecuting such serious crimes as this must, in this case, give way in the balancing to the seriousness of the breach and the effects of the admission of the evidence on the disrepute it would cause to the administration of justice. The reasonable person, dispassionate and fully apprised of the circumstances of this case would, in my view, consider it unacceptable to admit this evidence because it would cause that reasonable person to have less confidence in the administration of justice. That reasonable person would believe that admitting such evidence would bring the administration of justice into disrepute.

[82] Because of my conclusion with respect to the search, I find it unnecessary to deal with the other issues raised by Mr. Henderson, such as the grounds for arrest, the timing of the giving of *Charter* rights and police caution. If there were no grounds for the search, then there could be no grounds for obtaining the search warrants, so I do not need to deal with their validity or whether they could validate the prior finding of drugs and the gun.

Hood, J.