SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. LeBlanc*, 2009 NSSC 99

Date: 20090327
Docket: CRH 298345
Registry: Halifax

Between:

Her Majesty the Queen

and

Jeremy Alvin LeBlanc

Judge:	The Honourable Justice Duncan R. Beveridge
Heard:	February 16 and 23, 2009, in Halifax, Nova Scotia
Counsel:	Ronald A. Lacey, for the Crown Roger A. Burrill and Nasha Nijhawan, articled clerk, for the Accused

By the Court:

INTRODUCTION:

[1] Shortly after 11:00 p.m. on January 27, 2007 the accused was stopped for speeding. The officer who stopped him observed what he considered to be an unusual degree of nervousness by the accused for what appeared to be a routine traffic stop. The officer then noticed that the driver was Jeremy LeBlanc, who had a reputation for drug trafficking and violence associated with that activity. The officer radioed for back-up. Two police units arrived. In one of those units was Cst. Fish. Based on a number of factors, Fish believed he had sufficient grounds to arrest the accused. After removing the accused from his vehicle, Cst. Fish located and seized a loaded .22 semi-automatic handgun.

[2] The accused is charged with seven weapons related offences arising out of the seizure of the handgun. The accused seeks an order excluding the handgun from evidence on the basis that the police violated his rights under ss. 8, 9 and 10(b) of the *Charter*. There are two broad issues raised by this request. They are:

- did the police have the authority to search and then seize the handgun
- if the police did not, is the handgun nonetheless admissible

FACTUAL BACKGROUND

[3] The Defence acknowledges that the facts are really not disputed. It is the application of the law to the facts that causes them to contend that the police did not have the lawful authority to arrest or detain the accused, search his vehicle and seize the handgun.

[4] Cst. M. Reeves had been a police officer with the Halifax Regional Police Service (HRPS) for nine years when he was on general patrol on January 27, 2007. He was assigned to the Spryfield area. While driving northbound on Northwest Arm Drive he saw a vehicle travelling in the opposite direction at what appeared to him to be a high rate of speed. His mobile radar was engaged. The vehicle was clocked at 110 kph. The speed limit was 80 kph. He locked in the reading, crossed the median and pursued the vehicle.

[5] Cst. Reeves turned on his emergency lights. Within a short distance, the vehicle stopped. The vehicle was a red, two door Honda Civic. The driver was the accused. He was the only occupant. Cst. Reeves stopped his police vehicle two car lengths behind the Honda and slightly to its left, in order to give him a safe lane to walk on his anticipated approach to the Honda.

[6] Cst. Reeves turned on what he described as his take down lights. They shone into the interior of the Honda. While Cst. Reeves was typing into his computer the fact of the traffic stop, he noticed the driver moving within the Honda. He acknowledged that movement by the driver would not be unusual. Nonetheless he felt that the degree or amount of movement was more than normal. Reeves described his experience in doing traffic stops as extensive. He could not estimate the number of such stops he had carried out. In his opinion the movement he saw was highly irregular.

[7] Cst. Reeves stayed in the driver's blind spot as he approached the Honda. The accused was still moving around the vehicle as if looking for something. The movements were sped up, anxious ones. Cst. Reeves knocked on the window. The driver rolled it down. Cst. Reeves told the accused he was being stopped for travelling 110 kph in an 80 zone. The accused replied he did not think that was his speed. Cst. Reeves offered to show the accused the radar reading. The accused replied, no that was fine, but he did not think he was going that fast.

[8] Cst. Reeves requested the usual documents, licence, insurance and registration. The accused informed Cst. Reeves that he had an expired insurance card. He explained that the vehicle belonged to a friend and that there is a current insurance card as the owner had been ticketed for no insurance and had them cancelled by proving existence of valid insurance. During this conversation the accused handed to Cst. Reeves a bundle of documents through the open window. The bundle consisted of the accused's licence, an expired insurance card and the registration. The registration document is 4 x 8 inches. The accused was so nervous that the registration was flopping up and down. There was no wind. Cst. Reeves testified he had stopped 16 year old drivers on the day they got their licence and he had not seen nervousness to this degree.

[9] As the accused was handing the bundle to Cst. Reeves he dropped it between the door and the driver's seat. The accused asked Cst. Reeves if he could open the door to retrieve the documents. Cst. Reeves agreed. During the retrieval process

the accused's cell phone rang. The accused identified the caller to Cst. Reeves as the owner and handed him the phone. There is no evidence this person identified herself as the registered owner to Cst. Reeves, or that she knew the identity of the accused and he had the vehicle with her permission.

[10] Cst. Reeves testified that this person told him that she had received two tickets for no insurance, and the current insurance card was either in the centre console or in the glove box. Cst. Reeves told the accused what the owner had said. The accused then looked in the console, pulled out documents and searched for the insurance card.

[11] He then closed the console, reached over and opened the glove box part way, but did not look into the box and immediately closed it. Cst. Reeves decided to return to his car. Before leaving, the accused asked permission to continue looking for the insurance card. Cst. Reeves agreed.

[12] While returning to the police car, Cst. Reeves kept on eye on the accused. He saw him still moving to the passenger side, and to the front of the car's compartment. Despite having given to the accused permission to continue to look for the missing document, the activity heightened Cst. Reeve's nervousness. He reasoned that the driver had already been through the vehicle as he had the documents, including the expired insurance card. The driver knew where they were, but when the registered owner had given the two possible locations of the console or the glove box, he had not really looked in the glove box.

[13] Despite these observations Cst. Reeves testified he had no fear for his safety. When he started to fill out the first of two intended Summary Offence Tickets he says he had a gut feeling. He got out of his vehicle, then got back in and then out again. He went to the front of his vehicle and at this time he looked at the licence for the very first time and saw that the driver was the accused, Jeremy LeBlanc.

[14] Cst. Reeves testified that did not know Mr. LeBlanc personally, but may have seen him outside a court house some time ago. However, he offered that he was very familiar with the accused's name due to police intelligence.

[15] His sense of concern increased on learning that the driver was Jeremy LeBlanc, as LeBlanc had a reputation as a drug trafficker, enforcer and known to

be in possession of firearms. Cst. Reeves testified he had learned this through HRPS intelligence.

[16] Cst. Reeves immediately returned to his car and called for assistance, advising dispatch that he had Jeremy LeBlanc stopped. During this time Cst. Reeves says the accused was still looking around the inside of the Honda, going over to the passenger side and back.

[17] Cst. Reeves then approached the Honda again in order to interrupt the actions of the accused. He saw the accused in the driver's seat, but with the whole of his upper torso over on the passenger's seat as far as one could go. He found this very unusual. He knocked on the window, causing the accused to scream in surprise and sit back up. Reeves asked the accused if he had found the insurance papers yet and he said he had not. Cst. Reeves did not see what the accused had been doing. The accused had nothing in his hands and there was nothing on the floor. Cst. Reeves said okay, keep looking and returned to his vehicle.

[18] Within a few minutes Cst. Swallow arrived and parked behind Cst. Reeves. Cst. Reeves testified that he told Swallow what movements he had seen, particularly the last movement. Cst. Swallow told Reeves that Cst. Fish has information that the accused may be in possession of a handgun or a firearm.

[19] Cst. Reeves then approached the Honda a third time and told the accused that he was getting a ticket for speeding and for no insurance. Cst. Reeves then got back into his patrol car and started writing a ticket while Cst. Swallow watched the accused. Reeves then got out and then back into his car. Shortly thereafter a paddy wagon arrived, occupied by Csts. Fish and Conrad.

[20] Since it was Cst. Fish that decided the accused was " arrestable" his evidence is crucial to a determination of many, but not all of the *Charter* issues raised by the Defence.

[21] Cst. Fish is also an experienced police officer. He was a constable in Toronto for two years and as of January 27, 2007, seven years with HRPS. He was assigned to general patrol in West Division. Cst. Conrad was his partner.

[22] Fish testified that it was at 2316 that Cst. Reeves called in a traffic stop. A short time later he heard Cst. Reeves call in that Jeremy LeBlanc was the driver and was acting very nervously, reaching around the vehicle.

[23] In Cst. Fish's view, if a person is a member of HRPS and does not know who Jeremy LeBlanc is, that person is simply not doing their job. Cst. Fish testified that Jeremy LeBlanc was well known to him, both through personal contact and from police intelligence. He elaborated that he had stopped Mr. LeBlanc before on a traffic stop and had a number of conversations with him on other occasions. Cst. Fish said he had the benefit of several debriefings on LeBlanc and his associates.

[24] Mr. LeBlanc was not only at the scene of the murder of Wayne ("Chop") Marriott but also had been shot. Cst. Fish was of the view that Mr. LeBlanc was "involved" in what he described as a war in the Spryfield area and would have good reason to have to defend himself.

[25] In my opinion what was crucial to the decision by Cst. Fish to arrest the accused was a conversation he described as having with his close personal friend and fellow officer, Cst. Perry Astephan on January 26, 2007. Apparently Cst. Astephan had been away on course for at least a few days. After completing his shift on January 26, Cst. Fish spoke with Cst. Astephan on the phone. Fish does not recall the time of the call or who initiated it. He agreed it was an informal talk to catch up.

[26] At one point in the conversation Cst. Fish mentioned Jeremy LeBlanc's name as he had recently seen him in a red Honda Civic, a different vehicle than normal. Cst. Astephan then said to Cst. Fish that he should be careful around LeBlanc as Astephan had source information that LeBlanc has a firearm on him all the time, whether he is walking around or in a vehicle, due to what was going on in Spryfield.

[27] As noted earlier, when Cst. Fish heard that Cst. Reeves had Jeremy LeBlanc stopped, he had Cst. Conrad call dispatch to put their unit on the back up call. Cst. Fish testified that he then called Cst . Swallow directly on his cell phone and told him about the source information he had received from Cst. Astephan that LeBlanc had a firearm on him at all times. He cautioned Cst. Swallow to keep his head up and be careful.

[28] Csts. Fish and Conrad arrived at the traffic stop within one minute of hearing that it was Jeremy LeBlanc that had been stopped by Cst. Reeves. It is obvious that Cst. Fish only had a limited conversation with Reeves before proceeding to the red Honda to arrest the accused. At one point he described having talked with Cst. Reeves for a second. Later he described the conversation with Reeves to be no longer than 20 to 30 seconds. As Cst. Fish put it, "his main concern was to get to the car".

[29] I accept Cst. Fish's evidence that on arrival Cst. Reeves told him about Jeremy LeBlanc reaching around being fidgety. Cst. Fish noticed that Reeves also appeared to be nervous. Cst. Fish added that Reeves told him that he had never seen someone acting so nervous on a traffic stop. At that point, Cst. Fish told Reeves about the source information he had from Cst. Astephan.

[30] Cst. Fish walked to the driver's side of the Honda with his firearm drawn, but down at his side. Once he could see LeBlanc's hands he re-holstered his firearm and identified himself. The accused knew who he was and asked, "what's up Fish ?" The window was down approximately four inches with the door locked. He ordered LeBlanc to exit the vehicle. When LeBlanc asked why Fish told him because he had information that he had a firearm, "I am going to take you out of the vehicle and you are going to be arrested for possession of a firearm and searched." LeBlanc protested that Cst. Fish could not do this and announced he was going to call Warren. Cst. Fish said, "Warren who?"; even though he knew who he meant. LeBlanc began to use his cell phone.

[31] Cst. Fish directed Cst. Reeves to move his patrol car to block the Honda as there was nothing at that point to prevent LeBlanc from trying to drive away. In the meantime, Cst. Swallow was directly behind Cst. Fish with his taser drawn, charged and aimed through the open window, targeting LeBlanc's leg. Cst. Conrad was on the other side of the Honda with his firearm drawn and at the ready.

[32] Cst. Fish told LeBlanc that he was not leaving until he came out of the car and cautioned him "don't make me have to break the window". LeBlanc reached over and unlocked the door. He was then pulled out of the car and taken to the rear of the Honda where Csts. Reeves and Swallow began to handcuff him. Cst. Fish ducked his head into the Honda and checked under the passenger's seat as this is both a common area for guns to be hidden and was the area that Cst. Reeves had

told him LeBlanc had been reaching to. His knuckles came into contact with a hard object. He retrieved the object. It was a loaded .22 Browning semi-automatic handgun.

[33] Csts. Reeves and Swallow confirmed in almost all respects the details and sequence of events testified to by Cst. Fish. Cst. Reeves testified that when Cst. Fish arrived and came to the front of his car, he told Fish of the movements he had seen in or around the floor area and the fidgety movements. He confirmed for Fish that it was Jeremy LeBlanc he had stopped and he had been "digging around" the vehicle. He estimated the conversation to be 20 seconds. As Cst. Fish was walking away he mentioned to Reeves his information that LeBlanc is in possession of a firearm.

[34] Cst. Reeves overheard Cst. Fish tell LeBlanc to roll down his window, and that he had information to believe that he was in possession of a firearm. Immediately afterwards Fish directed Cst. Reeves to move his vehicle to block the Honda. Cst. Reeves ran to do so. It took 45 seconds to a minute to complete the re-positioning of the police vehicle.

[35] As Cst. Reeves walked back to the Honda, the accused is already out of the Honda and being walked back to its rear. When Cst. Reeves arrived at the rear of the Honda he immediately advised the accused that he was going to handcuff him for his and Reeves' safety. He did so, and then searched Mr. LeBlanc. Cst. Reeves found a cell phone and a puffer.

LAWFUL AUTHORITY TO SEARCH AND SEIZE THE HANDGUN

[36] Since the search and seizure of the accused and his vehicle was without warrant, the Crown acknowledges that it bears the burden in establishing, on a balance of probabilities, that the search and seizure was not unreasonable. The Crown contends that the search was reasonable as being incidental to a lawful arrest by Cst. Fish.

Search Incident to Arrest

[37] The law has long recognized the power of the police to search for evidence and weapons incidental to a lawful arrest. (See *R. v. Rao* (1984), 12 C.C.C. (3d) 97 (Ont.C.A.); *R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.)

[38] As noted by Smith J.A. in *R. v. Parchment*, [2007] B.C.J. No. 1281 (C.A.):

> [19] For an arrest to be found lawful, it must be demonstrated that the arresting officer subjectively had reasonable and probable grounds on which to base the arrest and that the grounds were objectively justifiable, that is, that a reasonable person placed in the position of the arresting officer must be able to conclude that there were reasonable and probable grounds for the arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-51, 53 C.C.C. (3d) 316.

[39] I have no doubt that Cst. Fish had an honestly held subjective belief that he had reasonable and probable grounds to arrest the accused. I make this finding of an honest subjective belief despite the lack of any specific evidence from Cst. Fish that he believed he had " reasonable and probable grounds" to arrest the accused. As Cst. Fish put it, he believed that the accused was " arrestable". Cst. Fish was not questioned in direct or in cross examination what he meant by that term.

[40] In the circumstances it is a reasonable inference that Cst. Fish was referring to the power bestowed on him as a peace officer under s. 495 of the *Criminal Code* to arrest without warrant a person that he believes on reasonable grounds has committed an indictable offence. This was the general thrust of his testimony. The defence did not suggest otherwise. The real question is whether those grounds were objectively justifiable.

[41] The power of the police to arrest without warrant was discussed by Cory J. in *R. v. Storrey*, [1990] 1 S.C.R. 241, as follows:

> [14] Section 450(1) makes it clear that the police were required to have reasonable and probable grounds 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**.

> [15] The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need [page250] for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:
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> > The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a prima facie case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.
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> [16] There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. **Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.** See *R. v. Brown* (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.
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> [emphasis added]

[42] The Crown argues that Cst. Fish had the necessary objective grounds for arresting the accused based on the following four factors:

1. He had received the tip from his trusted friend and fellow police officer that the accused was in possession of a firearm at all times.

2. Cst. Fish's observations on the scene.
3. The observations of Cst. Reeves that were communicated to Cst Fish, both over the air and when Cst. Fish spoke to Cst. Reeves on the scene of the traffic stop.
4. Cst. Fish's personal knowledge of the accused and general information concerning the accused gleaned from his occupation as a member of HRPS.

[43] Although the Crown has set out four factors that it says amount collectively to the necessary objective criteria, there are really only three and some of these overlap. First of all, Cst. Fish did not testify to relying on any observations of the accused he made when he arrived at the scene. Furthermore, he did not testify to having made any observations of the accused. In direct examination he was asked what was in his mind and purpose as he approached Mr. LeBlanc's car. His reply was that it was pretty cut and dry because of the source information that the accused had a firearm, coupled with the information from Cst. Reeves about the accused's erratic behaviour he had obtained en route, that he was going to arrest him for possession of a weapon for a purpose dangerous.

[44] The determination of Cst. Fish to arrest the accused was reinforced by his evidence in cross examination. He testified that from the moment of his arrival at the scene he viewed Mr. LeBlanc as detained and it was his goal to arrest him. I therefore find that there was nothing added to his determination to arrest the accused based on what he may or may not have observed on the scene. The only evidence of any observations he made of the accused was during his verbal exchange with the accused, and his reluctance to get out of the vehicle, insisting that the police had no lawful authority to arrest or search him. This exchange can hardly be viewed as in any way relevant to the subjective or objective criteria to arrest.

[45] I am mindful that in assessing the objective criteria available to Cst. Fish they must not be assessed in isolation, but considered together, including what reasonable inferences were open to be drawn by a reasonable person standing in the shoes of Cst. Fish, factoring in his experience. It is an error to consider each fact or observation in isolation (see *R. v. Lawes*, 2007 ONCA 10 at para 4). The standard to be met is that of a reasonable probability. There is no need to establish a *prima facie* case with respect to the elements of the suspected offence. The

requisite standard was summarized by Smith J.A. in *A.G. Canada v. Mouland* 2007 SKCA 105 as follows:

> [22] The standard of reasonable and probable grounds is not, of course, one of certainty. It is only necessary that the circumstances known to the officer making the arrest objectively indicate the **reasonable probability** that the arrestee has committed the crime for which he is being arrested. It is not necessary that the circumstances in question establish a *prima facie* case. *See R. v. Storrey, supra* and *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166.

[46] In my opinion, the key to determining if Cst. Fish had the necessary grounds to arrest Mr. LeBlanc is the extent to which he could rely on what the Crown referred to as the tip from his trusted friend and fellow police officer, Cst. Perry Astephan. I come to this conclusion due to a number of factors. First of all Cst. Fish made no relevant observations of the accused at the scene of the traffic stop.

[47] Secondly, Cst. Reeves, the officer who had the most contact with the accused at no time testified that he felt he had reasonable and probable grounds to arrest the accused. This is despite observing what he called highly irregular behaviour by the accused. I have no reason to doubt or discount the evidence of Cst. Reeves in his description of the actions of the accused. He took into account that people are frequently nervous when stopped by the police. He also took into account that the movements by the accused were at times consistent with looking for the current insurance card. He even described the glove box manoeuver. Despite of all of his observations, Cst. Reeves did not ever say that he believed that Mr. LeBlanc was hiding something, or that he had reasonable and probable grounds that he had a firearm or other contraband. Cst. Reeves is an officer of similar experience as Cst. Fish. Cst. Reeves had the same information about Mr. LeBlanc's reputation for being involved in the drug trade and role as an enforcer and known to police to be in possession of firearms.

[48] Despite all of the same information and having first hand information of the irregular behaviour of Mr. LeBlanc, there has been no suggestion that Cst. Reeves had reasonable and probable grounds to arrest Mr. LeBlanc for any offence.

[49] Cst. Reeves only testified about his heightened sense of safety concerns when he got into his car to start writing the planned Summary Offence Tickets. He got in his car, back out, in and then back out; and on the last exit going to the front

of his car and then, and only then, reading the name on the licence as being that of Jeremy LeBlanc. This was the trigger that caused him to request back up, in light of the observed actions by Leblanc. I find that he did not call back up to arrest Mr. LeBlanc, but due to his safety concerns. Indeed when Cst. Swallow arrived, Cst. Reeves then got into his car to again take up writing up the traffic tickets. It was very shortly afterwards that Cst. Fish arrived.

[50] As noted, Cst Fish testified that he decided to arrest based on the source information he had obtained from Cst. Astephan, what he knew about the accused, and what Reeves had told him while en route. Before turning to the contention of the Crown about the source information from Cst. Astephan, some analysis of the information that Cst. Fish had from Cst. Reeves is appropriate.

[51] Cst. Reeves testified that when he broadcast for back up he radioed that he had Jeremy LeBlanc stopped. He did not testify that he mentioned, let alone described, observing nervousness or any suspicious actions by the accused. Cst. Fish testified that he knew that Reeves was on a traffic stop as he initially broadcast the vehicle description. It was shortly afterward that he learned from Reeves that Jeremy LeBlanc was the driver and he was acting suspiciously, reaching or leaning to the passenger side and bobbing up and down and was very nervous.

[52] Cst. Swallow responded to the call for back up. He did not testify. The only other officer directly involved in the incident was Cst. Conrad. He testified that he recalled the radio transmission by Reeves in which he announced he had a traffic stop and who the driver was. Cst. Fish then asked dispatch to also put them on the call.

[53] I find that Cst. Fish was mistaken in his belief that he received any details from Reeves over the radio en route. It strikes me as unusual for an officer in Cst. Reeves' situation to have included such details in a simple call for back-up. It could happen, but Cst. Reeves did not testify that he did so. It is far more likely that Cst. Fish did receive some details from Cst. Reeves at the scene about the actions and demeanor of Mr. LeBlanc. I find that is where he obtained this information.

[54] The fact that Cst. Fish was emphatic it was, in essence prior to his arrival at the traffic stop he had decided to arrest the accused is troubling, but not fatal to the

issue of whether or not there were objectively reasonable and probable grounds to arrest the accused. First of all, in my opinion, the issue is what information was in fact known to a reasonable person standing in the shoes of the police officer when the arrest occurred. At least some of the behaviour of the accused during the traffic stop was communicated to Cst. Fish prior to the arrest process.

[55] I find that Cst. Fish did have, at least some information, from Cst. Reeves about the conduct of the accused prior to deciding that he had the grounds to arrest. In other words, Cst. Fish is mistaken in his testimony as to when he received the information from Cst. Reeves about the conduct of the accused, and that he made the decision to arrest once he had the information from Reeves about the behaviour by the accused.

[56] I have already concluded that the issue of the existence of reasonable and probable grounds turns on the import or significance of the so-called source information that Cst. Fish says he received from Cst. Astephan.

[57] It is well known that third party information, even if from a confidential source can be relied on by the police to provide reasonable and probable grounds. The leading case on this issue is that of *R. v. Debot*, [1989] 2 S.C.R. 1140. In that case one Cst. Gutteridge received confidential information from an informant that the accused and two others, Greg Carpenter and Gerry List, were going to meet later in the day to complete a drug transaction involving four ounces of speed. The informant told Cst. Gutteridge that the transaction was going to take place at Carpenter's residence, the speed was being brought into the area by a supplier named by the informant. The informant also advised the police that the information came from a conversation with Carpenter. Cst. Gutteridge had at least one previous dealing with the informant and described him as reliable.

[58] Cst. Gutteridge contacted Sgt. Briscoe of the local R.C.M.P. detachment and passed on the information he had received. All of the named participants in the predicted drug deal had involvement with drugs in the past. The police described the accused as a user and a trafficker, albeit he had only one drug related conviction and that was for a small amount of marijuana. Carpenter had a lengthy record for narcotics related offences. Officers were briefed with respect to the information from Gutteridge and surveillance set up on Carpenter's residence. A vehicle associated to the accused showed up at Carpenter's residence and occupants went into the home and returned five minutes later and left. The

registration of this vehicle was confirmed as belonging to the accused. Sgt. Briscoe instructed the surveillance officers to intercept and search this vehicle.

[59] Cst. Birs was one of the surveillance officers that stopped the accused. He confirmed the identity of the accused. The accused denied carrying any drugs. Birs told the accused that he had reasonable and probable grounds to believe he had speed on him and proceeded with a search which turned up an ounce of speed. The accused was then arrested and advised of his rights under the *Charter*. The accused was successful at trial in an application to exclude the results of the search on the basis of an infringement of his rights under ss. 8 and 10(b). The Ontario Court of Appeal reversed and ordered a new trial. The Supreme Court of Canada upheld the decision to order a new trial.

[60] The Court split with respect to the s.10(b) issue. On the s. 8 issue, Wilson J. wrote the majority judgement. She reasoned:

> [49] The Court of Appeal further suggested, at p. 221, that Constable Birs could also have relied on the order from his superior officer, Sergeant Briscoe, to stop and search the appellant. In my opinion, Constable Birs must rely on Sergeant Briscoe's order. Since the decision to stop and search the appellant was made by Sergeant Briscoe and not by Constable Birs, it is immaterial, in my view, what knowledge Constable Birs had when executing Sergeant Briscoe's request. Constable Birs was simply following orders; he had no decision to make upon which to bring his own knowledge and belief to bear. It would have made no difference had he known nothing about the case and had merely been on patrol in the area at the opportune time.
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> [50] The police officer who must have reasonable and probable grounds for believing a suspect is in possession of a controlled drug is the one who decides that the suspect should be searched. That officer may or may not perform the actual search. If another officer conducts the search, he or she is entitled to assume that the officer who ordered the search had reasonable and probable grounds for doing so. Of course, this does not prove that reasonable grounds actually existed. It does make clear, however, that the pertinent question is whether Sergeant Briscoe and not Constable Birs had reasonable and probable grounds. Regrettably and inexplicably, Sergeant Briscoe did not testify at the appellant's trial. The record only indicates what he was told by others who did testify. We are left in the unsatisfactory position of having to construct the grounds on which Sergeant Briscoe made his decision from the testimony of those who supplied him with the relevant information.

[61] Wilson J. identified the three concerns that must be addressed in weighing evidence relied on the police to justify a warrantless search; was the information predicting the commission of a criminal offence compelling; where the information is based on a tip originating from a source outside the police, was the source credible; and was the information corroborated by police investigation prior to making the decision to carry out a search. She stressed that weakness in one area may be made up, to some extent, by strengths in the other two.

[62] Wilson J. found the information to be sufficiently specific to warrant the attention of the police. The informant had identified the participants, and the courier, named the location of the offence and the time of day it was to occur. The informant also gave the basis for his knowledge- a conversation with one of the alleged participants. This was no mere bald conclusory comment or mere rumour or gossip.

[63] Here the so called source information from Cst. Astephan to Cst. Fish in the evening of January 26, 2007 was a mere conclusionary statement. The Crown acknowledges it to be so. Further, there was no information as to when the information was received by Cst. Astephan, how the informant came into possession of the informant, or anything about the reliability of the informant.

[64] Cst. Astehpan generated no official police reports as a result of this information, nor did the police in any way seek to act on it or otherwise investigate it. Nonetheless the Crown argues that Cst. Fish could act or rely on this information because it came from another officer and because that officer had years before, when they used to patrol Uniacke Square, provided confidential source information to Cst. Fish. Fish testified that he had acted on the information provided and it proved to be found to be reliable.

[65] I do not accept these arguments. While Cst. Fish would have no reason to doubt the sincerity of Cst. Astephan, he knew nothing about the primary source. This is somewhat analogous to the situation in *R.v. Simpson* [1993] O.J. No. 308 (Ont.C.A.). In that case the appellant had been convicted at trial of possession of cocaine for the purpose of trafficking. The accused had been a passenger in a vehicle that Cst. Wilkin had seen leaving a suspected crack house. Wilkin stopped the accused for investigative purposes and subsequently searched the accused when he saw a bulge in his pants.

[66] Shortly before the day of the vehicle stop, the officer had read an internal police memorandum by another officer that described the house as a suspected crack house. The author of the memorandum had received his information from an unidentified street contact. Cst. Wilkin knew nothing about the source, but had been given similar information by a member of the police morality squad. It was unclear if that officer's source of information was the same police memorandum. Doherty J.A. wrote:

> [68] Turning to this case, I can find no articulable cause justifying the detention. Constable Wilkin had information of unknown age that another police officer had been told that the residence was believed to be a "crack house". Constable Wilkin did not know the primary source of the information and he had no reason to believe that the source in general, or this particular piece of information, was reliable. It is doubtful that this information standing alone could provide a reasonable suspicion that the suspect residence was the scene of criminal activity.

[67] There have been a number of reported cases that have considered the ability of the police to rely on source information being passed on by fellow officers. In *R.v. Basset,* [2008] O.J. No. 3456 the police arrested the accused while he was travelling in a taxi. They found a handgun in his possession. The arrest was carried out on the request of Cst. Cox. A few days before the arrest Cst. Cox was told by an informant that the accused was "possibly in possession of a handgun", either a .25 or .22 calibre. Cst. Cox did not ask the informant how he knew this information, but believed the tip was reliable because the informant had provided reliable information in the past. In addition the police had a file on the accused that contained similar information. On the day of the arrest Cst. Cox just happened to see the accused leave a residence and get into a cab. He followed the cab and saw the accused leave a hotel and get into another cab. That is when Cst. Cox requested the Emergency Services Unit to effect an arrest of the accused.

[68] At trial Pomerance J. found that the rights of the accused under ss. 8 and 9 of the *Charter* were infringed or denied. She noted that the information there was "a possibility that the accused might be in possession of a firearm". It was vague, speculative and lacking in detail. It was impossible for the officer to discern whether the information was based on concrete knowledge or rumour and gossip.

[69] With respect to the claimed reliability of the source, she wrote:

> [20] The last criterion to be discussed is the credibility of the source. This is the only criterion that has any potential application in this case. The Crown argued that Constable Cox was entitled to rely on the tip because the informant had provided reliable information in the past. It is not clear to me that an informant's "track record," standing alone, can elevate a vague and unconfirmed tip to the status of reasonable grounds. In any event, there was no evidence to indicate the nature and extent of the informant's prior cooperation with the police, and therefore, no ability to conduct an independent assessment of the issue. The assertion of past reliability was, itself, a conclusory statement that did little to buttress the reliability of the tip.
>
> [21] Even if the informant was a credible person, there was nothing to indicate that the report was based on first hand knowledge as opposed to information passed on by others. In other words, the officer knew the identity of the *messenger*, but he did not know the identity of the *source*. Credibility cannot be assessed if the origin of information is unknown. For this reason, even the credibility criterion cannot justify reliance on the tip in this case.
>
> [emphasis in original]

[70] Although the law seems clear that for an arrest to be valid, it is the officer who directed or carried out the arrest or search who must have the requisite reasonable and probable grounds, there have been a number of cases that seem to suggest that an arrest will be valid if the Crown can establish that the information relied on by that officer was in fact worthy enough to support the arrest or search. For example in *R.v. Cheecham*,[1989] S.J. No. 521(C.A.) the Crown appealed an acquittal after the trial judge found the police search unreasonable and excluded the results of the search. One Sgt. Heigh received a call from a fellow R.C.M.P. officer that the accused was in town at a hotel in possession of a quantity of marijuana and would be leaving shortly. Sgt. Heigh instructed an officer to take steps to obtain a search warrant, but one was never produced at trial. The officer who gave the information to Sgt. Heigh was not called at trial. This caused the trial judge to conclude that it was therefore impossible to make any judicial determination as to the veracity or reliability of the informer, and hence impossible to find that reasonable and probable grounds existed.

[71] A similar approach was acknowledged in *R.v. Lal*, [1998] B.C.J. No. 2446 (C.A.). Murders had occurred in Vancouver as a result of a feud between two rival factions of a gang involved in drug trafficking. The police deployed emergency response team officers to provide 24-hour protection to protect one of the factions,

the members of the Dosanjh family. Cst. Rankin received specific information from his superior over his car computer that the driver of a distinctive car was considered armed and dangerous and a threat to the Dosanjh family members. Cst. Rankin had no idea of the source or reliability of the information. Cst. Rankin's superior was not called to testify.

[72] Cst. Rankin stopped the distinctive car as it approached the area of the Dosanjh residence. The accused was the driver. His hand shook vigorously as he handed his documents out the driver's window. Back up was called. The accused was asked to step out and he was searched. A fanny pack around his waist contained a semi-automatic loaded handgun. Ryan J.A. writing for the court, wrote:

> [24] The Crown submitted in this case that proof of the reliability of the information provided to Constable Rankin by Corporal McKay was unnecessary since a police officer should be entitled to rely on another officer's information without question. I agree that a police officer is entitled to act upon information given to the officer by another member of the police force. To suggest that police officers cannot act on the assumption that a fellow officer's advice is reliable is unrealistic and would unduly hamper law enforcement. But when the Crown is called upon at trial to justify a search based on reasonable grounds or a stop based on articulable cause, there must be some evidence placed before the trial judge that the police officer's information was in fact reliable or worthy of acting upon.

[73] This approach was adopted in *R .v. Dunbar*, [2008] N.S.J. No.290 (Prov. Ct.) Cst. Blair Hussey had been told that the accused could be in the area in possession of drugs. Cst. Hussey and his partner encountered the accused. Hussey directed his partner to arrest the accused for possession of cocaine. Cocaine was found on the search incidental to arrest. The information that came to Cst. Hussey was from another officer who had received a call from Cst. Willett of the Drug Section. Cst. Willett was the sole handler of a coded confidential informer who had advised him the previous day that he had personally observed the accused trafficking and was in possession of a large quantity of crack cocaine. Cst. Willett testified at trial as to his complete faith in the reliability of the informant, with whom he had been dealing with for two years. Derrick Prov. Ct.J. concluded that given Cst. Willett's confirmation of the source's reliability the information was both compelling and convincing and provided the necessary grounds to justify the arrest.

[74] Here Cst. Astephan did not testify. In the absence of evidence demonstrating the credibility of the source information, it was of little or no weight on any objective basis. It added nothing beyond an unsubstantiated confirmation of what the police already suspected - that Mr. LeBlanc was a drug enforcer, and in possession of a firearm.

[75] In terms of assessing the information according to the factors set out in *Debot*. the information predicting the commission of the offence was not compelling. It was a mere conclusory statement. There is no evidence that the information was credible. The information was not corroborated by the police before acting on it. Being a mere conclusory statement with absolutely no details, there was nothing that was capable of corroboration. I would note that to some extent the information from Cst. Astephan was hardly surprising in light of the general information Cst. Fish said he had with respect to the accused. Although he had a minor criminal record, Cst. Fish referred to the general police information about LeBlanc's involvement in one of the Spryfield gangs and his belief that he would have a reason to want to defend himself.

[76] Without details as to currency, source and reliability of the information, the conversation with Cst. Astephan really added nothing to the background information already known by both Cst. Reeves and Cst. Fish.

[77] The burden is on the Crown to demonstrate that Cst. Fish had the requisite reasonable and probable grounds to arrest Mr. LeBlanc. All that has been demonstrated is Mr. LeBlanc's reputation for being a drug enforcer, and all that entails, including likely possession of a firearm. As noted in *Debot, supra.* the reputation of a suspect maybe a relevant factor that can be considered as part of the total circumstances, but by itself would not constitute reasonable grounds. The only factor in addition to Mr. LeBlanc's reputation was his nervousness during the traffic stop. In light of all of the circumstances, I find this to be a close case, but on application of the correct legal principles, in my opinion, the Crown has not satisfied me that a reasonable person, standing in the shoes of Cst. Fish would have concluded that there were reasonable and probable grounds to arrest. The search was therefore not incidental to a lawful arrest.

Investigative Detention

[78] The Crown suggested that Cst. Fish had the requisite authority to search incidental to a lawful investigative detention. I do not find it necessary to carry out a detailed analysis of the principles surrounding the extent of police power to search for officer safety of the detainee and whether it would extend to the vehicle occupied by the detainee. Here there was no reasonable grounds to believe a recent offence had been committed and consequent police action to detain an individual reasonably suspected to have been involved in order to investigate.

[79] Cst. Fish simply moved to arrest the accused and carry out a search incidental to that arrest. To suggest that the police could rely on something less than reasonable and probable grounds to carry out the search of Mr. LeBlanc and his vehicle is to court the very danger warned of by Cory J. in *Mann* 2004 SCC 52, where he wrote:

> [37] This appeal marks the first opportunity for the Court to discuss whether a search incident to an investigative detention is authorized by law. Underlying this discussion is the need to balance the competing interests of an individual's reasonable expectation of privacy with the interests of police officer safety. In the context of an arrest, this Court has held that, in the absence of a warrant, police officers are empowered to search for weapons or to preserve evidence: *R. v. Golden,* [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 95. In the reasons following, I consider whether and to what extent a power to search incidental to investigative detention exists at common law. I note at the outset the importance of maintaining a distinction between search incidental to arrest and search incidental to an investigative detention. The latter does not give license to officers to reap the seeds of a warrantless search without the need to effect a lawful arrest based on reasonable and probable grounds, nor does it erode the obligation to obtain search warrants where possible.

Was the detention of the accused arbitrary

[80] Defence admits that the initial detention of the accused was lawful but contends it became arbitrary when the police focus changed from enforcing the *Motor Vehicle Act* to a detention with respect to suspected criminal activity, without reasonable and probable grounds, nor even reasonable suspicion for an investigative detention. It suggests that the subsequent detention and search of the accused and his motor vehicle was without reasonable and probable grounds and hence unlawful and arbitrary.

[81] A lawful detention is not arbitrary. Cst. Reeves had the lawful authority to stop and detain Mr. LeBlanc pursuant to the *Motor Vehicle Act* (see: *R. v. MacLennan*, [1995] N.S.J. No. 77 (C.A.)). The Defence never identified when they say it was that the lawful detention by Cst. Reeves changed, just that the detention was beyond the length of time necessary for the *Motor Vehicle Act* investigation.

[82] As noted above, Reeves never questioned Mr. LeBlanc about any suspected criminal activity. I find that he did not call for back up in order to further an investigation into a suspected criminal offence. He did so because he had safety concerns in light of what he knew of Mr. LeBlanc and his observations of his behaviour. Reeves waited for back up. When Cst. Swallows arrived Reeves went back to writing the traffic tickets. It was very shortly afterward that Cst. Fish came on the scene and within 20-30 seconds proceeded to arrest Mr. LeBlanc.

[83] Cst. Fish considered the accused detained when he told him to get out of the car as he was going to arrest him for possession of firearm. When the accused declined to do so Fish directed Cst. Reeves to move his patrol car to try to block an easy exit by the accused. I have no difficulty in finding that once Cst. Fish spoke to the accused that he was detained with a view to being arrested.

[84] I have found that the initial arrest and consequent search were without reasonable and probable grounds. However, not every arrest or detention without reasonable and probable grounds is arbitrary. This distinction was set out in *R.v. Duguay, Murphy and Sevigny* (1988), 18 C.C.C. (3d) 289, affirmed, [1989] 1 S.C.R. 93. MacKinnon A.C.J.O. wrote for the majority:

> It cannot be that every unlawful arrest necessarily falls within the words 'arbitrarily detained'. The grounds upon which an arrest was made may fall 'just short' of constituting reasonable and probable cause. The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be capricious or arbitrary.

[85] In my opinion, Cst. Fish honestly believed he had the necessary grounds to arrest Mr. LeBlanc. He was mistaken. His mistake came not from a reckless disregard of Mr. LeBlanc’s rights, but from relying on what he perceived to be the

reliability and credibility of the messenger of the information, Cst. Astephan rather than the source of the information.

[86] In addition, there was sufficient information to constitute some belief for Cst. Fish's actions. They were not arbitrary or capricious. I find no arbitrary detention.

Right to Counsel

[87] The Defence did not lay great stress on the contention that Mr. LeBlanc's rights under s.10(b) were infringed or denied as a stand alone basis to found a remedy under s.24(2) of the *Charter*. Rather it was suggested that if his right to counsel was infringed it would be an additional factor in any consequent s.24(2) analysis if there was a violation to be found of the accused's rights under ss. 8 and 9 of the *Charter*.

[88] For the following reasons I find that if there was a violation of Mr. LeBlanc's s. 10(b) rights, it was of a technical and rather inconsequential nature.

[89] Mr. LeBlanc was detained when Cst. Reeves stopped him. However, it is well established that during a legitimate motor vehicle stop the detainee's right to counsel is suspended (see *R.v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3; *R. v. MacLennan*, *supra*). I have no doubt, for the reasons already expressed that this was a legitimate motor vehicle stop. It did not change complexion until Cst. Fish proceeded to arrest Mr. LeBlanc. When he did so, he did not comply with the informational component of s.10(b), but proceeded to walk him to the rear of the Honda due to safety concerns. There he was turned over to the other officers. Fish then searched the vehicle for a firearm. It took him very little time to locate the handgun.

[90] I accept Cst. Fish's evidence that he had located the handgun while the accused was being cuffed. He put the time of discovery as being 2329 hours and of telling Mr. LeBlanc he was under arrest and of his right to counsel as 2330. In the meantime Cst. Reeves had handcuffed and searched Mr. LeBlanc. I accept Cst. Fish's evidence that he immediately advised the accused of his rights. There has been no suggestion that the informational component was deficient. Neither has there has been a suggestion that the police attempted to elicit evidence from the

accused until he had a reasonable opportunity to consult with counsel, or that he was not afforded such an opportunity once at the police station.

[91] The Supreme Court of Canada in *Debot, supra,* split on whether the right to be *informed* of the right to retain and consult counsel was suspended. The majority found that the requirement in s.10(b) to advise the arrestee without delay meant immediately. In the subsequent case of *R. v. Strachan* (1988) 46 C.C.C. (3d) 479 that only legitimate safety concerns or other exigencies can be relied on to justify any delay in advising the arrestee of his or her rights under s.10(b).

[92] Here the police did have legitimate safety concerns. In addition I would note that the Supreme Court was unanimous in *Debot* in concluding that the police are not obligated to suspend the search incident to the arrest until the detainee has had the opportunity to retain counsel. I find that Cst. Fish did not violate Mr. LeBlanc's rights under s.10(b) in failing to carry out the informational component of s.10(b) immediately on uttering the words of arrest. The police were dealing with a potentially volatile situation and justifiably wanted to ensure officer safety. Once Mr. LeBlanc was out of the Honda he still had not been searched. If the delay in advising him of his rights amounted to a violation, it was of a minor and, in the circumstances inconsequential nature.

IS THE GUN NONETHELESS ADMISSIBLE

[93] The principles to be applied are well known to determine if evidence obtained as a result of a Charter violation ought to be excluded pursuant to s.24(2). The test and the factors to be considered are set out in *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.). There are three categories: the fairness of the trial, the seriousness of the Charter violation and the potential that excluding the evidence would bring the administration of justice into greater dispute than admitting it.

[94] Here admission of the evidence would not affect the fairness of the trial. The evidence is real evidence. There is no issue that is anything other than non-conscriptive.

[95] In terms of the seriousness of the breach, the search was not an obtrusive one. I have no difficulty in concluding that Cst. Fish honestly believed he had the necessary grounds to arrest the accused. There was some identifiable basis to be

concerned about the safety of Cst. Reeves and other officers dealing with the accused. There was no bad faith by the police. There was no deliberate plan to violate the rights of the accused. The actions taken by Cst. Fish were motivated by a sense of urgency. In my opinion there was nothing unreasonable about how the police conducted the arrest or subsequent searches. While I do not minimize the violation by calling it technical or trivial, it was not so serious as to justify exclusion of the evidence.

[96] With respect to the third category, there are a number of things that favour admission of the evidence. The possession of a loaded firearm in a car is a very serious offence. The evidence is crucial to the Crown's case and the evidence is entirely reliable. Exclusion of such evidence must in the long term have some adverse effect on the administration of justice (See *R. v. Grant* [2006] O.J. No. 2179 para. 64).

[97] Taking into account all of the circumstances I am not satisfied that admitting the evidence would bring the administration of justice into disrepute.

SUMMARY AND CONCLUSION

[98] The Crown has failed to satisfy me that the police had the requisite reasonable and probable grounds to arrest the accused for the offence of possession of a firearm. There was no other lawful basis for the police to search the accused and his vehicle. As a consequence, the search of the accused and his vehicle violated his right under s.8 of the *Charter* to be secure against unreasonable search and seizure.

[99] However, there was no arbitrary detention of the accused. The actions of the police were not arbitrary nor capricious. Cst. Fish relied on what he believed to be reliable and credible information from Cst. Astephan. In these circumstances he made an error in judgement and while the totality of the circumstances did not amount to reasonable and probable grounds, it was close.

[100] In addition the police failed to immediately, and prior to searching the accused or his vehicle, advise the accused of his rights as required by s.10(b) of the *Charter*. However, the police had justifiable officer safety concerns. In the brief interlude before complying with s. 10(b) the police did not obtain or even seek to

obtain any conscriptive evidence from Mr. LeBlanc. Immediately after the gun was found, he was told he was under arrest and advised of his rights under the *Charter*. There is no suggestion that there was anything deficient in what he was told nor in the steps they took to afford him the necessary opportunity to exercise his right to counsel. Even if it could be said that there was a violation of the accused's s.10(b) rights, it was of a technical and inconsequential nature.

[101] After considering all of the circumstances admission of the evidence would not bring the administration of justice into disrepute. The application to exclude the evidence is dismissed.

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Beveridge J.