SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Farmakis, 2011 NSSC 101

Date: 20110310
Docket: Ant 316298
Registry: Antigonish

Between:

Her Majesty The Queen

Respondent

v.

Dimitrios Farmakis and Nickolas Sevastis

Applicants

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	October 25 and 26, 2010, in Antigonish, Nova Scotia
Counsel:	Denise M. Boudreau and Jan Murray for Respondent Frank Pappas, for Applicant Dimitrios Farmakis Tom Pentefountas for Applicant Nickolas Sevastis

By the Court:

Introduction

[1] The applicants, Dimitrios Farmakis and Nickolas Savastis, both of Montreal, Quebec, stand charged:

> THAT on or about the 30th day of November, 2007 at or near Antigonish, Nova Scotia, did possess property, to wit $182,830 Canadian currency, knowing that all or part of the property or proceeds was obtained or derived directly or indirectly as result of the commission in Canada of an offense punishable by indictment, contrary to section 354 of the **Criminal Code,** thereby committing an indictable offense, in violation of section 355 (a) of the said **Code**;
>
> AND FURTHER at the same time and place aforesaid the accused, transferred the possession of, send or deliver to any person or place, transport, transmit, alter, disposed of, or otherwise deal with, in any manner and by any means, property, to wit: cash, with the intent to conceal or convert the property, knowing or believing that all or a part of the property was obtained or derived, directly or indirectly, as a result of the commission in Canada of a designated offense, contrary to section 462.31 (1) (a) of the **Criminal Code,** thereby committing an indictable offense, contrary to section 462.31 (2) (a) of the said **Code**.

[2] Following preliminary inquiry into these charges, the applicants were committed to stand trial in Supreme Court. The matter is scheduled for trial in May of 2011 before a judge sitting without a jury.

[3] In this pretrial motion, the accused have brought an application pursuant to section 24 (2) of the **Canadian Charter of Rights and Freedoms** seeking the

exclusion of certain real evidence seized in the investigation of this matter. They also seek the exclusion of a statement alleged by the Crown to have been made by one of the accused, and which the Crown seeks to introduce as part of its case in chief.

[4] In support of the motion, the applicants allege violations of sections 7, 8, 9, 10 (a), and 10 (b) of the **Charter**. The alleged violation of section 7 is subsumed in the consideration of sections 9 and 10 and so will not be separately considered.

The Evidence

[5] Evidence on this motion was adduced from two witnesses, being Cst. Paul Howlett and Cst. Jerry Denis, both members of the RCMP stationed at Antigonish, Nova Scotia, at times relevant to the alleged offenses.

[6] Cst. Howlett testified that his first posting, following his admission into the RCMP, commenced in Antigonish in May of 2005. He worked general duty until September of 2007 at which time he was reassigned to Traffic Division. He had

been working a relatively short time in this position at the time of the events giving rise to these charges.

[7] At approximately 7:40 PM of November 30, 2007 he was conducting a radar patrol and traveling eastbound on Highway 104 just west of Antigonish. A westbound vehicle, later identified as being operated by Mr. Sevastis, was recorded traveling 127 km/h in a 100 km/h zone. The officer locked in the speed on the radar and after engaging his emergency equipment made a U-turn to pursue the vehicle and initiate a traffic stop.

[8] Mr. Sevastis responded by pulling his vehicle to the side of the road and the officer brought his police cruiser to a stop approximately 10 feet behind. Before approaching the vehicle, the officer advised his dispatch of the impending roadside check and called in the license plates, which were from Québec. He was advised that they were associated with a rental vehicle.

[9] Cst. Howlett exited his vehicle and approached the driver's side window of the suspect car. He observed two individuals sitting in the car and noted that in the back seat there were a number of items that caused him to believe that the

individuals may be sleeping in the car. These included a pillow, blankets, empty food and drink containers, DVDs and a DVD player.

[10] Upon request, Mr. Sevastis produced his driver's license and a copy of a rental agreement indicating that the vehicle was rented to Stavros Sevastis. The driver indicated that this was his father's name.

[11] While Mr. Sevastis was responding to the request for license, insurance and registration, a conversation took place as between the officer and the occupants. He asked whether there were "drugs, alcohol or weapons" in the vehicle to which Mr. Farmakis, seated in the front passenger seat, replied "no". In response to an inquiry as to where they were coming from, the occupants indicated that they had been visiting with a friend in Cornerbrook, Newfoundland and Labrador.

[12] After receiving these documents, Cst. Howlett returned to his police cruiser to prepare a Summary Offense Ticket (SOT) for the speeding infraction. While in his vehicle, he "ran" the name of Nickolaos Sevastis through CPIC (the computerized police information database). It reflected that Mr. Sevastis had no criminal history.

[13] While still sitting in his cruiser, Cst. Howlett reviewed the rental agreement and noted that the vehicle was rented on November 27, 2007, in Montréal, Québec, just three days earlier. Having regard to the distances traveled, and allowing for time required for ferry travel between Nova Scotia and Newfoundland, the officer formed the opinion that any visit with a friend could only have lasted "... for one or two hours...".

[14] Cst. Howlett had very shortly before this incident attended a Drug Interdiction Course. As result of information provided to him in the program, he formed the opinion that the situation before him was consistent with the indicia of drug trafficking. The particular indicia in this case included persons making "quick, short runs... continuously nonstop to ...where they're going", while operating vehicles rented by a third-party.

[15] Having concluded that there was something "fishy" about the occupants of the suspect vehicle he decided that he was going to attempt to obtain consent of the occupants to search their vehicle. However, before doing so he wanted to ensure that he had the assistance of a second officer and so radioed to Cst. Denis.

[16] Cst. Howlett's evidence is that he wanted a second officer on scene for officer safety reasons, and further to advise him, during the course of the intended search, if either of the occupants wanted the search stopped. Cst. Howlett was concerned that if he was in the vehicle searching while the suspects were outside, then he might not hear any protests against the search that might come from the applicants.

[17] Cst. Denis confirms that he received the call for assistance at around 7:45 or 7:50 p.m. and that he arrived on scene at 8 pm.

[18] Cst. Howlett says that it took him that length of time to complete the Summary Offence Ticket and denies that he deliberately delayed issuing the SOT to the driver while he waited for back up to arrive on scene.

[19] The testimony of Cst. Denis and Cst. Howlett varies slightly as to the sequence of events once Cst. Denis arrived on scene. Where their evidence differs I prefer the evidence of Cst. Denis who exhibited a clearer recollection of the events. He seemed to present a more consistent chronology than that of Cst.

Howlett. Cst. Howlett's evidence acknowledged, for example, that he couldn't recall whether Cst. Denis had arrived prior to the issuance of the ticket or not.

[20] Once Cst. Denis arrived, the two officers met in front of Cst. Howlett's vehicle. Cst. Howlett explained his suspicions about the suspect vehicle and his intention to seek consent to search it.

[21] After this, Cst. Howlett moved to the driver's door while Cst. Denis took up a position by the passenger side. Cst. Howlett issued the SOT to Mr. Sevastis, and returned his documents to him. He then asked Mr. Sevastis if he had any "drugs, weapons or alcohol in the vehicle" to which he said no.

[22] Cst. Howlett addressed Mr. Sevastis and said "Do you mind if I check?" He testified that Mr. Sevastis "looked" at Mr. Farmakis and then responded that he had "no problem" with the search request. Cst. Howlett told the occupants that they should "understand that if [he] found anything [they] could be charged with it". Mr. Sevastis replied that he understood. Cst. Howlett testified that he told Mr. Sevastis that : " He could tell me to stop ...he could tell me to stop at any point."

[23] Cst. Denis heard Cst. Howlett speaking to the driver, but could not hear the entirety of the conversation. He says that he heard the driver agree to the search and heard Cst. Howlett tell the driver that he would stop the search at any time if the driver requested this.

[24] In direct testimony, Cst. Howlett suggested that he told Mr. Sevasitis that he could "refuse" consent to the search. In cross examination, the officer was challenged with his testimony at the preliminary inquiry where he did not indicate that he told the driver that he could refuse. Initially he stated that he would "usually" say "you can tell me to stop", and that he didn't specifically recall using the word "refuse" when speaking to Mr. Sevastis. Under further cross examination he was asked whether in his choice of language he was "...leading that person to believe that you have the right to do what you're doing, right?" and the officer replied: "...I could see that could be interpreted that way".

[25] Cst. Howlett acknowledged that after this date he was contacted by a superior officer who pointed out to him that the RCMP have a specific form that is to be used when seeking to get consent to a search and that the form specifies that the officer is to tell the detainee that they have the "right to refuse" consent.

[26] Upon further questioning Cst. Howlett admitted that he did not tell Mr. Sevastis that he could “refuse” the search and that he never spoke to Mr. Farmakis about the question of consent.

[27] The two accused were directed by the police to take a position about 10 feet behind the suspect vehicle, immediately in front of Cst. Howlett’s police cruiser. They were under the control of Cst. Denis at this point. Cst. Howlett repeated that they could tell him to stop his search at any time. Cst. Howlett began his search in the front of the car and then moved into the back. He testified that he could smell fresh marijuana “coming from the back panel of the rear passenger side seat”. He thought it was coming from the trunk area.

[28] He opened the trunk electronically and began his search of that area. He observed an open suitcase with two or three empty duffle bags stuffed inside and two small overnight bags.

[29] The officer smelled inside the duffle bags and the suitcase they were in. He detected a “really, really strong smell of marijuana”, but no actual marihuana. The

smell was “fresh”. He then conducted a search of the two overnight bags which contained personal belongings such as clothing.

[30] The next discovery was of a small suitcase wrapped in a blanket. It was locked with a “jewellery box lock” and it too smelled of marihuana. Cst. Howlett asked the two suspects to identify who the suitcase belonged to. They did not answer. Cst. Howlett then advised them that they were “...being detained now for trafficking in a controlled substance.” They did not respond and he “gave them the charter, the police charge and warning from memory on the roadside.” which he described as follows:

> ...you have the right to retain and instruct counsel without delay. You also have the right to free and immediate legal advice by calling duty counsel. And because I don’t have the phone number I usually say with a number I can provide you.

[31] When asked if they understood the accused said that they did and that they wanted to speak to a lawyer.

[32] He then said:

> You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat, but anything you do say will be used as evidence.

The accused indicated that they understood this.

[33] Cst. Howlett says that he then:

> ...made a statement, basically, not a question, I was just telling them, I said, I believe that there's drugs, marihuana in that case. And ah, Mr. Sevastis responded, ah, it's not drugs.

[34] Cst. Denis has a different recollection of the exchange. He testified that after Cst. Howlett read the rights to the accused, and after they asked to speak to counsel:

> ... he [Cst. Howlett] asked them ah, who does that suitcase belong to? And nobody answered. He repeat [sic] that again, he say, who does that suitcase belong to? No answer. Nobody answer. He asked Mr. Sevastis, he asked him, um, any drugs in that suitcase? And he replied, no. And he asked him, any, what's in the suitcase? And nobody answered.

[35] I prefer the evidence of Cst. Denis to that of Cst. Howlett in this matter as well. His evidence was consistent within itself and definitive. Cst. Howlett's, while generally straightforward, exhibited instances of uncertainty, and was

sometimes inconsistent with earlier sworn testimony, and on material issues. e.g. whether he used the word “refuse” when seeking consent to search.

[36] Following this exchange, Cst. Howlett took control of Mr. Sevastis and Cst. Denis took control of Mr. Farmakis. Pat down searches for officer’s safety were being conducted of each when Mr. Farmakis was observed throwing an object into a nearby ditch. At that point both accused were placed under arrest for “possession of a controlled substance”, handcuffed and placed in the officers’ respective vehicles.

[37] Cst. Howlett went to the ditch and located what was determined to be a small plastic dish that contained approximately 5 grams of marihuana. He and Cst. Denis examined the substance and then returned to their vehicles. Each officer read the **Charter** caution and police warning from cards to Mr. Sevastis and Mr. Farmakis. Cst. Denis recorded the caution as being given to Mr. Farmakis at about 8:16 p.m. Cst. Howlett recorded this occurring with Mr. Sevastis at 8:20 p.m.

[38] A dog handler was called to the scene by Cst. Howlett, arriving at 8:25 p.m. The dog “hit” on the back seat and trunk area of the suspect vehicle. The small

locked bag was put on the roadside and the dog grabbed it causing the handler, Cpl. Hamilton, to advise that the dog believed there to be drugs in the bag. Cst. Howlett used bolt cutters to remove the lock and upon opening the bag located $182,330, but no drugs.

[39] The vehicle was later towed to a secure garage at the RCMP Detachment while the accused were transported there in separate cars by Cst. Howlett and Cst. Denis, arriving at 8:56 p.m.

[40] Once at the Detachment, custody of Mr. Sevastis and Mr. Farmakis was given over to Cst. Denis to enable the accused to contact counsel. At approximately 10 p.m., Cst. Howlett conducted a further search of the vehicle and seized a number of receipts and a blue book that contained $500 cash. At 10:10 p.m., he photographed the vehicle and the items seized in the search.

[41] The receipts present a timeline that would be consistent with the accused leaving Quebec on November 28, arriving in Newfoundland on the same date, or early on the 29th. There is a receipt for a hotel in St. John's on the night of the 29th

and one that show them still in that province on the 30th of November, earlier in the day from when they were stopped by Cst. Howlett.

Issues:

[42] The applicants seek the exclusion from evidence of:

(i) the statement alleged by Cst. Howlett to have been made by Mr. Sevastis at the scene;

(ii) the marihuana which Mr. Farmakis threw in the ditch;

(iii) the cash located in the locked suitcase; and

(iv) the documents and cash seized from the car during the search at the Detachment garage.

[43] The following are the issues triggered by this application:

1. Were the accused detained by Cst. Howlett? If so, was the detention arbitrary within the meaning of s. 9 of the **Charter**?

2. If the applicants were detained then was their s. 10(a) **Charter** right complied with?

3. If the applicants were detained then was their s. 10(b) **Charter** right complied with?

4. Do the applicants have standing to claim a privacy interest that is protected by s. 8 of the Charter?

5. Was there a breach of the accused's rights under s. 8 of the **Charter**?

6. If there were breaches of any of sections 7, 8, 9 and/ or 10 of the **Charter**, then what is the appropriate remedy under s. 24(2) of the **Charter**?

Issue 1. *Were the applicants detained by Cst. Howlett? If so, was the detention arbitrary within the meaning of s. 9 of the **Charter**?*

[44] The applicants have alleged a denial or infringement of their **Charter** protected rights by sections 9 and 10. The onus is on the accused to prove such

violations and on the balance of probabilities. Both sections require proof that there was a detention, within the meaning of the law.

[45] Detention may be physical or psychological, that is, the police may assume control over the movement of the person by physical constraint or by demand or direction. In *R. v Grant* 2009 SCC 32 McLachlin C.J. and Charron J., writing on behalf of the majority held that:

> 44 In summary, we conclude as follows:
>
> 1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
> a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

> b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[46] The accused were detained when the officer engaged his emergency equipment and compelled them to stop in response to the speeding violation. The question is how to characterize what occurred once the SOT was issued. At that point, the lawful detention of the accused in relation to the **Motor Vehicle Act** infraction was at an end.

[47] The applicants submit that the evidence demonstrates Cst. Howlett had, upon returning to his vehicle, almost immediately concluded that he would seek to search the accused's vehicle and so delayed issuance of the SOT until Cst. Denis arrived. - a period from approximately 7:45 pm to 8:00 p.m. The accused were not informed of the true reason for the detention which was the product of the officer's "hunch".

[48] The Crown says that the initial detention commenced at 7:40 pm with the traffic stop and was authorized under the **Motor Vehicle Act**. That lawful detention continued until 8:00 pm., when the SOT was issued and the reason for the initial detention ended.

[49] The Crown further submits that detention of the applicants only resumed once the "consent search" was completed and they were so advised of their detention for trafficking. They maintain that there was no detention between 8 pm and approximately 8:15 p.m., the period during which the first search and seizure occurred.

[50] In support of this proposition, I am pointed to the evidence of Cst. Howlett that if the applicants had refused consent to the search then he would have let them go.

[51] I do not agree that changing the purpose for the detention is a sufficient basis upon which to conclude that there is no detention. Instead one must consider all of the circumstances to make that assessment.

[52] The applicants had a legal obligation to comply with the officer's signal to stop the vehicle. They had no choice but to do so. In his first conversation with them Cst. Howlett asked for licence, insurance and registration, spoke of the rental agreement, where they had been and whether there were drugs, alcohol or weapons in the vehicle. He does not say in his evidence that he told them that the reason for stopping them was speeding.

[53] There was a delay of 15-20 minutes by which time the second police car arrived. The second officer took up a position by the passenger door while Cst. Howlett went to the driver to issue the SOT. At that point the doors by which the occupants could exit the vehicle were both blocked by police officers. While there was no vehicle in front of them blocking the way, they were still in the presence of the police and the subject of police inquiry.

[54] Cst. Howlett does not say that he, in any way, suggested to Mr. Sevastis that he was free to leave. Instead he immediately repeated his earlier inquiry with respect to alcohol, drugs or weapons and then asked if he could search the vehicle. There was no interruption in the circumstances of the detention.

[55] A reasonable person in the these circumstances would understand that they were the subject of a focused investigation. This was not a simple attempt to identify them, to offer general assistance to them or any other form of generalized police line of inquiry. The applicants had already been stopped for 20 minutes, most of which time Cst. Howlett was in his own vehicle. It is apparent that it was not open to the applicants to drive away. The arrival and the position taken by the second officer was consistent with an intent to enforce their detention. No reasonable person would think, in that circumstance, that they should just drive away after receiving the ticket.

[56] Cst. Howlett telling the applicants that they could tell him to stop the search is not the same as saying that they were free to leave. Once Mr. Sevastis agreed to the search, he and Mr. Farmakis were asked to exit the vehicle and directed by the police to a position several feet away from their car.

[57] When Cst. Howlett says that any objections to the search while he was conducting it were to be communicated by Cst. Denis, it was implicit that the applicants were to remain in the company of Cst. Denis. Indeed this was the

intention of the officers. Cst. Denis testified that after he and the two applicants took their position between the two vehicles:

> Cst. Howlett asked me to stay with them to make sure that I keep eyes on them, and then he started to search.

A reasonable person would certainly understand this to be an indication of a restriction on their liberty.

[58] I conclude that the applicants were detained from the initial traffic stop and that detention continued uninterrupted through the remainder of the events on the highway, during the transport to the Detachment, and while at the Detachment.

[59] Was there an infringement or denial of the applicants' rights set out in Section 9 of the **Charter?** That section reads:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

[60] What constitutes an "arbitrary" detention? The Supreme Court of Canada in *R. v Grant, supra* stated:

54 The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: "This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law": *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 88. Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

55 Earlier suggestions that an unlawful detention was not necessarily arbitrary (*see R. v. Duguay (*1985), 18 C.C.C. (3d) 289 (Ont. C.A.)) have been overtaken by *Mann*, in which this Court confirmed the existence of a common law police power of investigative detention. The concern in the earlier cases was that an arrest made on grounds falling just short of the "reasonable and probable grounds" required for arrest should not automatically be considered arbitrary in the sense of being baseless or capricious. *Mann*, in confirming that a brief investigative detention based on "reasonable suspicion" was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.

56 This approach mirrors the framework developed for assessing unreasonable searches and seizures under s. 8 of the **Charter.** Under *R. v. Collins*, [1987] 1 S.C.R. 265, and subsequent cases dealing with s. 8, a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner. Similarly, it should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary. We add that, as with other rights, the s. 9 prohibition of arbitrary detention may be limited under s. 1 by such measures "prescribed by law as can be demonstrably justified in a free and democratic society": *see R. v. Hufsky*, [1988] 1 S.C.R. 621, and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

(Emphasis added)

[61] In *R. v Mann* 2004 SCC 52 the court held:

> 34 The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.
>
> 35 Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have carte blanche to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.
>
> ...
>
> 45 To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are

> to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case.
>
> (Emphasis added)

The basis of the detention commencing at about 7:40 p.m. was not arbitrary. It was authorized by the **Motor Vehicle Act**.

[62] I accept that Cst. Howlett did extend the time to complete the SOT in order to await the arrival of Cst. Denis. It should not have taken 15 minutes to write out a simple Summary Offence Ticket for speeding. However, the difference in the time it should have taken, from that which it did take, is so insignificant that it is not material. Cst. Howlett's ulterior intentions did not undermine the legal authority for the stop and time required to issue the SOT.

[63] The officer's basis for the continued detention of the applicants was his opinion that the circumstances were consistent with those of a drug trafficker as his training at the Drug Interdiction course suggested. The factors that influenced him were not themselves illegal and there was no evidence of illegal conduct, such as the smell of drugs emanating from the vehicle. Neither did he have evidence to

suggest past criminal conduct by either applicant. In summary, the basis for the detention was:

i) The presence of empty food and beverage wrappers or containers, a pillow, blankets, DVDs and a DVD player in the back seat;

ii) The car was rented in the name of the driver's father;

iii) The distances traveled and the short time that could have been spent in Newfoundland;

[64] Cst. Howlett described, in direct examination, that he formed the opinion that "something was off base", that it "didn't make sense". In cross examination he agreed that he had "a suspicion that there might be some wrongdoing". He agreed as well that he did not have enough information to justify a search warrant.

[65] Cst. Howlett did have in mind general categories of possible offences being committed. i.e., drug related. However, the information Cst. Howlett was relying upon did not establish a clear nexus between the individuals he detained and a

recently committed, or developing criminal offence. There was no statutory or common law authority upon which he was permitted to detain the applicants.

[66] Having regard to all of the circumstances, I conclude that Cst. Howlett detained the applicants on a hunch, not on reasonable grounds, or grounds authorized by law and that the detention was arbitrary. As such, the applicants section 9 rights were infringed.

Issue 2. *If the applicants were detained then was their s. 10(a) **Charter** right complied with?*

[67] Section 10 of the **Canadian Charter of Rights and Freedoms** states:

> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right…

The onus is on the accused to establish on a balance of probabilities any alleged breach of section 10 (a) and/or 10 (b) and that as a result of the breach, that the evidence should be excluded under section 24 (2) of the **Charter**.

[68] Upon detention the obligation on the officer is to immediately inform the detainees of the reasons for the detention. The applicants submit that this was not done.

[69] The Crown's evidence shows that the applicants were informed that the reason for the intended search and hence for the detention was to determine the presence of unlawful drugs, alcohol or weapons. While not offence specific, there was sufficient information conveyed to the applicants to understand the jeopardy that these items would create if located during the search. They were told that if located, they would be charged. I am not satisfied that the applicants have shown on the balance of probabilities a denial or infringement of their section 10(a) rights.

Issue 3. *If the applicants were detained then was their s. 10(b) **Charter** right complied with*?

[70] The Supreme Court of Canada held, in *R. v. Debot* (1989), 52 C.C.C. (3d) 193 that the police are required to advise the detainee of the right to retain and instruct counsel "immediately" upon detention, unless there was an overriding issue of officer safety that created a justifiable delay.

[71] Cst. Howlett acknowledged that the section 10(b) rights were not provided to the applicants until they were verbally detained at approximately 8:15 p.m. There was no issue of officer safety or other factor that would justify the delay. The apparent reason for the delay is that Cst. Howlett did not believe that the applicants were "detained" until he encountered the locked suitcase at which point he advised them of their detention.

[72] I conclude that the **Charter** protected rights of the applicants as set out in section 10(b) of the **Charter** were infringed.

[73] With respect to the alleged statement made by Mr. Sevastis to Cst. Howlett pertaining to the contents of the locked suitcase I find the evidence of Cst. Denis demonstrated that Cst. Howlett attempted to elicit a statement from the detainee

after the informational component of section 10(b) was provided but before the implementational obligation of the right was satisfied. The police are required to refrain from attempting to elicit statements or other incriminating evidence from a detainee until s. 10(b) has been fully complied with. *see, R. v Manninen*, [1987] S.C.R. 1233. In light of the officers' failure to fulfill the implementational duty, I conclude that any statement elicited from either applicant, before they were given an opportunity to exercise their right to counsel was obtained in violation of s. 10(b).

Issue 4. *Do the applicants have standing to claim a privacy interest that is protected by s. 8 of the Charter?*

[74] The applicants impugn the searches at the roadside and at the Detachment.

[75] Section 8 of the **Charter** states that:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

The Crown does not dispute that the applicants had a reasonable expectation of privacy in the vehicle, but submit that it was a lower expectation of privacy than one may have, for example, in their homes. *see, R. v Harrison* 2009 SCC 34 at para 30.

[76] The Crown has not sought to distinguish Mr. Sevastis from his passenger, Mr. Farmakis, as having standing to advance this claim. This is a reasonable position to adopt in view of the fact that the two were obviously traveling together over an extended journey. Cst. Howlett's observation of the appearance of the interior of the vehicle suggested to him that the two were effectively living in the vehicle. There were two overnight bags in the trunk, consistent with each occupant having one. I am prepared to infer that the applicants were each exercising a measure of possession or control of the vehicle and of its contents and would have held a subjective expectation of privacy. When Cst. Howlett asked permission to search, Mr. Sevastis looked at Mr. Farmakis, indicating that Mr. Farmakis' input was invited.

[77] In all of the circumstances, there is a sufficient basis to support the mutually held view of the parties that the applicants had an expectation of privacy. I

conclude, notwithstanding the rental agreement or who was operating the vehicle at the time of the stop, that it was an equal expectation of privacy. I further conclude that an objective assessment of the circumstances support the finding that the applicants would have an expectation of privacy in the vehicle.

Issue 5. *If the applicants have standing, then was there a breach of the applicants' rights under s. 8 of the Charter*?

[78] All of the searches were conducted without warrant. A warrantless search is presumed to be unreasonable and contrary to section 8. *see, Hunter v. Southam,* [1984] 2 S.C.R. 145.

[79] For the search to be lawful the Crown must establish on the balance of probabilities that the search was authorized by law, that the law itself is reasonable, and that the manner in which the search was carried out was reasonable. *see, R v Collins,* [1987] 1. S.C.R. 265.

[80] The Crown submits that the various searches were lawful and for the following reasons:

i) First search of the vehicle : A consent search

(ii) Dog sniff of car, bags and locked suitcase: Incident to arrest

(iii) Search of the persons of the applicants: Incident to arrest

(iv) Search of the vehicle at the Detachment garage: Incident to arrest

The first search of the vehicle

[81] The Crown submits that the first search of the vehicle was lawful as it was executed after Cst. Howlett obtained the informed consent of Mr. Sevastis.

[82] The parties agree that whether the applicants gave an informed consent to search the vehicle is subject to analysis against the factors enunciated by Doherty J. writing in *R. v. Wills* (1992), 52 O.A.C. 321:

> 69 In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:
>
> (i) there was a consent, express or implied;

> (ii) the giver of the consent had the authority to give the consent in question;
>
> (iii) the consent was voluntary in the sense that that word is used in *Goldman, supra,* and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
>
> (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
>
> (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
>
> (vi) the giver of the consent was aware of the potential consequences of giving the consent.

[83] The applicants submit that Cst. Howlett failed to inform them of the right to refuse permission to search and thus condition (v) set out above has not been satisfied.

[84] This argument is based on the officer's admissions that he did not tell Mr. Sevastis that he had the right to refuse as stipulated in the RCMP's own form, and that the applicants could have interpreted his language as meaning that he had the right to search, which he did not.

[85] The Crown submits that the word “refuse” did not have to be used, providing that Mr. Sevastis was made aware of his right to do so. The Crown suggests that Cst. Howlett, in asking “Do you mind if I check?”, conveyed to Mr. Sevastis that he had the right to refuse permission to search. By telling Mr. Sevastis that he could stop the search at any time, it reaffirmed for Mr. Sevastis that he had the right to refuse consent to the search.

[86] The language used by Cst. Howlett is similar to that approved of by the Alberta Court of Appeal in the case of *R. v. Tran* 2010 ABCA 211. The exchange was as follows:

> 6 Topham maintained his suspicions, but still had no reasonable or probable grounds to detain or arrest the respondent or to search his vehicle. Topham asked the respondent whether he had any objections to a search of his vehicle. The respondent said "No." To clarify, Topham asked "No, you object to me searching the vehicle, or no, you don't mind?" The respondent replied, "No, go ahead." Topham testified that he then said: "Okay. So you don't object if I search your vehicle, understanding it's voluntary. You can stop me if you want, and if I find anything like drugs, cocaine, and marijuana, you'd be charged. " The respondent replied "It's okay."

This was held to comply with *Wills.* It differs in the respect that it was specifically noted that if agreed to it would be “voluntary” and the officer offered the detainee the option of objecting.

[87] I have concluded that the validity of the consent turns on whether the language used would convey to the authorized person that their consent to the search was voluntarily given. In this case, the officer's first question, "Do you mind...", seeks permission or consent. The purpose for the search was communicated to a person who was authorized to give that consent and who did so expressly. There is no evidence upon which to conclude that the consent given was the product of "police oppression, coercion, or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested." The potential consequences of a search that discovered contraband was explained. Finally, the right to withdraw consent and stop the search was clearly expressed. Mr. Sevastis stated that he would consent to the search and understood the instruction that he could stop the search by simply saying so. He did not do that.

[88] The search conducted of the vehicle was performed in a reasonable manner. Having regard to these facts, I find that there was an informed consent to the search and that there was no infringement or denial of the applicants' rights protected by section 8 of the **Charter.**

Search Incident to Arrest

[89] The Crown submits that the remaining three searches were lawful as being incidental to the arrest of the applicants.

Was the arrest lawful?

[90] In order for a search incident to arrest to be valid, the arrest itself must be lawful. An arresting officer must subjectively and objectively have reasonable and probable grounds upon which to base an arrest. If the arrest is invalid then the search will be also. *see, R. v. Caslake,* [1998] 1 S.C.R. 51, at para. 13.

[91] In the case of an arrest without warrant, the officer is statutorily authorized to effect an arrest where that officer has reasonable grounds to believe that the identified person "has committed or is about to commit an indictable offence" or who the officer "finds committing a criminal offence." *see,* section 495 **Criminal Code R.S.C. 1985, c. C-46**; *R v Storrey,* [1990] 1 S.C.R. 241.

[92] The applicants were told that they were detained for “trafficking in a controlled substance”, an indictable offence. They were told that they were under arrest for “possession of a controlled substance”, a hybrid offence for which consideration must be given to the restrictions upon arrest without warrant as set out in section 495(2) C.C..

[93] The bases upon which the applicants were arrested included:

i) the circumstances of the applicants that were consistent with the travel patterns of drug couriers as taught to Cst. Howlett in the Drug Interdiction course;

ii) the smell of fresh marihuana emanating from the back seat of the vehicle;

iii) the smell of fresh marihuana emanating from the duffle bags, the suitcase, and the locked suitcase in the trunk;

iv) the container of marihuana that Mr. Farmakis threw in the ditch during the search incident to their detention.

[94] I am satisfied that these facts provided both subjectively and objectively reasonable grounds to arrest the applicants. Having regard to the continuing investigation, including the anticipated search of the locked suitcase to obtain evidence of the offence, and the out of province residency of the two applicants,

there was sufficient basis, notwithstanding the provisions of section 495(2) **C.C.,** to arrest.

Were the searches incident to that arrest?

[95] Lamer C.J., writing in *Caslake, supra*, set out the requirements necessary to establish a lawful search that is incident to arrest:

> 25 In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier, supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

This approach was cited with approval by the court in *R v Nolet* 2010 SCC 24, at para. 49.

[96] The search of the vehicle, found to be done with consent of Mr. Sevastis, resulted in the discovery of evidence of possession of a controlled substance. This

gave sufficient reason upon which to detain and search the applicants. A valid and non intrusive pat down search caused Mr. Farmakis to throw away a container of marihuana. This further evidence justified the arrest.

[97] The subsequent search of the car and the locked suitcase were clearly incidental to that arrest. That cash, and not drugs, was located does not undermine the relationship between the reasons for the arrest and the search of areas where drugs were indicated. The amount of money and the surrounding circumstances were consistent with proceeds of drug trafficking. The searched area was causally connected to the applicants and the suspected criminal activity.

[98] As a result I find that the dog search of the vehicle, and of the locked suitcase, as well as the search of the locked suitcase by the officers was incident to arrest and lawful. The manner of the search was reasonable and there is no challenge to the validity of the law that authorizes search incident to arrest. I conclude that there was no violation of the applicants' **Charter** protected right under section 8.

[99] The search of the applicants was similarly valid.

[100] The remaining question is whether the search of the vehicle at the Detachment garage was also incident to arrest. The main complaint of the applicants is with the delay in conducting the search and proceeding without a warrant where there was no urgency. The vehicle was impounded, secure in police custody. The evidence that might be searched for was not perishable or subject to destruction by other means. They urge that the proper course for the police to follow was to obtain a search warrant. Failing to have done so, rendered the search warrantless and an infringement of section 8 of the **Charter.**

[101] The Crown again seeks to justify the search on the grounds that it was incidental to the arrest of the applicants.

[102] The arrests occurred at approximately 8:15 to 8:20 p.m. Cpl. Hamilton and the police service dog arrived on scene at 8:25 p.m. after which the search of the vehicle and the locked suitcase took place. The applicants were transported from the scene, leaving at 8:45 p.m. and arriving at the Detachment at 8:56 p.m. There was some delay in getting into the Detachment as it was occupied by persons

associated with unrelated matters. The officers parked nearby until the area was cleared to allow them to escort the applicants in.

[103] The applicants were escorted by Cst. Denis to areas where they could exercise their right to counsel.

[104] Once in the Detachment offices, Cst. Howlett met with his superior officer, Sgt. Perry and began to photograph the seized items which he then secured in an exhibit locker. He recorded that it was 9:45 p.m. when he secured the money.

[105] Approximately 15 minutes later he attended in the garage and commenced his search of the vehicle and to take photographs of the vehicle. He seized a number of receipts and the $500 in cash. When asked why he seized these items, he testified that it was done to establish a timeline for the travels of the applicants and to confirm that it was consistent with his “suspicions” of a “basically” non stop return trip to Newfoundland. The search, as with the earlier one, did not involve “tearing apart the vehicle or anything like that”. It was not intrusive.

[106] The courts in both *Caslake* and *Nolet* addressed the question of the temporal link between the arrest and the search alleged to be incident to that arrest. In *Caslake* the court sustained as lawful a delay of six hours between the arrest and the search of the impounded vehicle. The Court held:

> 24 The temporal limits on search incident to arrest will also be derived from the same principles. There is no need to set a firm deadline on the amount of time that may elapse before the search can no longer said to be incidental to arrest. As a general rule, searches that are truly incidental to arrest will usually occur within a reasonable period of time after the arrest. A substantial delay does not mean that the search is automatically unlawful, but it may cause the court to draw an inference that the search is not sufficiently connected to the arrest. Naturally, the strength of the inference will depend on the length of the delay, and can be defeated by a reasonable explanation for the delay.

[107] In *Nolet*, the court was considering a gap of 2 hours in relation to one search and held:

> 49 A search is properly incidental where the police attempt to "achieve some valid purpose connected to the arrest" including "ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial": *Caslake*, at para. 19 (emphasis added); *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at paras. 74-75. The appellants were under arrest for possession of the proceeds of crime. It was clearly "incidental" to this arrest to search the vehicle in which the cash was found for evidence of the criminal activity to which the money related: *R. v. Rao* (1984), 12 C.C.C. (3d) 97 (Ont. C.A.), and *Cloutier v. Langlois*, [1990] 1 S.C.R. 158. The officers' belief that this purpose would be served by a search of the trailer (given their previous roadside observation of the discrepancy in the dimensions) was itself reasonable. The important consideration is the link between the location and purpose of the search and the grounds for the arrest.

[108] In the circumstances of this case, the chronology demonstrates that Cpl. Howlett was methodically and efficiently carrying on his investigation of the applicants' suspected criminal activity. There are no unexplained gaps in the timeline and the overall time elapsed does not cause concern.

[109] The applicants were contacting counsel while Cst. Howlett was dealing with the physical evidence. It is apparent that he saw the search of the vehicle in the garage as a continuation of the roadside search.

[110] It was reasonable to conduct a further search of the vehicle in the safety and lighting conditions of the garage, which was done I find at the first reasonable opportunity. The search was clearly linked to the purpose of the arrest.

[111] I conclude therefore that the search of the vehicle at the garage was lawful as incident to arrest and that there was no violation of the section 8 **Charter** protected rights of the applicants.

Remedy

[112] I have concluded that the rights of the accused as secured by sections 9 and 10(b) of the **Charter** were denied. What is the appropriate remedy to respond to these violations?

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

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> Exclusion of evidence bringing administration of justice into disrepute
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[114] The framework for exclusion has been articulated by the Supreme Court of Canada in the case of *R v. Grant, supra.* The inquiry is objective and asks whether a reasonable person, informed of all relevant circumstances and the values underlying the **Charter**, would conclude that the admission of the evidence would

bring the administration of justice into disrepute. The focus is not only long term but also prospective.

[115] Section 24 (2) begins with the proposition that a breach causes damage to the administration of justice and so the remedy is intended to ensure that evidence obtained through the breach does not cause further damage to the justice system. The focus is societal systemic concerns and does not aim to punish the police or provide compensation to the accused. In considering section 24 (2), the court must have regard to the following:

> (1) the seriousness of the charter-infringing state conduct (i.e., admission may send the message that the justice system condones serious misconduct);
>
> (2) the impact of the breach on the charter protected interests of the accused (i.e., admission may send the message that individual rights count for little); and
>
> (3) society's interest in the adjudication of the case on its merits.

[116] The court must balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

1. Seriousness of the Charter Infringing Conduct

[117] The more severe or deliberate the state conduct that led to the violation the greater the need for the courts to dissociate themselves from the conduct through exclusion. State conduct varies on a spectrum from inadvertent or minor violations to evidence obtained through willful or reckless disregard of **Charter** rights.

[118] Cst. Howlett was a relatively new officer at the time of the traffic stop having been on the job for 2 years and working highway patrol for approximately 2 months. His conduct on this occasion was consistent with his prior approach to traffic stops. He testified that he regularly asked persons whom he stopped if they had “drugs, alcohol or weapons” in the vehicle, and that he regularly requested permission for consent to search vehicles, using the language that he used on this occasion. He acknowledged that he has changed his language and practice to conform to the use of the RCMP mandated form for consent searches.

[119] It is apparent that he did not appreciate the distinction in the character of the detention once he completed the tasks legitimately associated with the traffic stop. His suspicions of the applicants had an evidentiary basis that conformed with the

training he had received pertaining to drug traffickers. He seemed to be influenced by the question of a consent to search. If the detainee refused, then he says that they are told that they are free to leave, which is the correct thing to do. He did not appreciate however that a consent to search is not a consent to detention, or that once detained there was a right to counsel.

[120] The failure to provide the right to counsel in a timely manner was a result of the officer's imperfect understanding of the time of detention. He demonstrated a clear understanding of his section 10(b) obligations once he advised the applicants that they were being detained, and again when they were placed under arrest.

[121] The police are expected to know their obligations under the **Charter** and to fulfill them. I do not find any deliberateness on the part of Cst. Howlett in his failures to comply with sections 9 and 10 of the Charter. The duration of the arbitrary detention was brief, approximately 15 minutes. There was no physical detention in that time, meaning a laying on of hands by the police to the persons of the applicants.

[122] The officer's conduct was not "blatant and flagrant" in the context of the court's determination in *R v Harrison, supra*.

[123] On the spectrum of seriousness, I conclude that while the violations of the **Charter** were serious, the reasons behind the errors were the product of an under informed junior officer acting in what he thought, incorrectly, to be a lawful manner.

2. Impact on the Charter Protected Rights of the Accused

[124] The next question is to assess the degree to which the violations actually undermined the accused's interest protected by the section 9 and 10 (b) rights.

[125] The arbitrary detention was brief and minimally intrusive. There was no search of the persons of the applicants. There was nothing that could be construed as demeaning to the personal dignity of the applicants apart from the detention itself. *see, R v. Harrison* at para. 30. The vehicle search was subject to a lower expectation of privacy.

[126] I conclude that the arbitrary detention had minimal impact on the **Charter** protected rights of the accused.

[127] The right to counsel is fundamental in our system of justice and the expectation is that the police will properly and fully inform the detainee of that right, and provide him with the opportunity to implement the right should the detainee indicate that he intends to exercise the right to counsel.

[128] That did not take place here "immediately" upon detention as it should have and in consequence thereof the Crown will seek to introduce into evidence an alleged statement that may be considered as against interest. When potentially inculpatory evidence is elicited from the accused in direct consequence of the **Charter** breach, there is a serious impact on his right. The section 10 violation did not, however, generate the physical evidence nor the discovery of the physical evidence in the car.

3. Society's interests in adjudication on the merits

[129] The question to be answered is whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct.

[130] Therefore I must ask myself: Is the truth-seeking function of the criminal trial process better served by admission of the evidence, or by its exclusion?

[131] Reliability of the evidence is an important factor in this inquiry. The more reliable the evidence, the more this militates in favor of admission, and the converse is also true.

[132] Assessing the statement of Mr. Sevastis in light of the two versions of that verbal exchange with Cst. Howlett underscores the potential unreliability of the evidence. Exclusion of the statement does not undermine the prosecution's ability to proceed in light of the admissible evidence of the circumstances of the search and seizure, the elements that may speak to "possession" or the character of the seized funds, drugs or receipts.

[133] The charges are serious and the impact of an order to exclude the physical evidence of funds, drugs and receipts would impact on the case, perhaps causing it to be unsustainable. I have found that these were seized lawfully. There is no nexus as between these items and the breaches of sections 9 and 10 which would justify their exclusion.

4. The final step is to balance the three inquiries.

[134] I have concluded that a proper balancing of the three *Grant* factors favors an order to exclude the statement alleged to have been made by Mr. Savastis to Cst. Howlett.

[135] The physical evidence seized from the vehicle consisting of drugs, money and receipts will be admitted. The drugs seized after Mr. Farmakis allegedly tossed them into the ditch will also be admitted in to evidence.

Conclusion

[136] I conclude that the applicants have proven on the balance of probabilities that their **Charter** protected rights under sections 9 and 10 of the **Charter** were infringed or denied and that the statement alleged to have been made by Mr. Sevastis to Cst. Howlett will be excluded from evidence under section 24(2) of the **Charter.** It is unnecessary to consider the alleged violation of section 7 as the resolution of the admissibility of the statement has been resolved pursuant to sections 9 and 10 thus addressing the concerns expressed by the applicants.

[137] I have concluded that the search of the vehicle conducted prior to discovery of the marihuana possessed by Mr. Farmakis was done in a reasonable manner and with the informed consent of Mr. Sevastis.

[138] The search of the applicants was incident to arrest as was the further search of the vehicle, the interior of the locked suitcase containing the money, and the later search of the vehicle at the Detachment garage. These searches and seizures were conducted in a reasonable manner.

[139] The applicants have failed to establish an infringement or denial of their section 8 Charter protected rights.

Duncan, J.