

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Howell*, 2011 NSSC 284

Date: 20110424

Docket: CRH 325847

Registry: Halifax

Between:

Her Majesty The Queen

v.

William Frederick Howell

- Judge:** The Honourable Justice M. Heather Robertson
- Heard:** March 21, 22 and 24, 2011, in Halifax, Nova Scotia
- Decision:** March 24, 2011 (**Orally**) *re voir dire* to determine the issue of an alleged breach under s. 8 of the *Charter*; and the consequences as to whether the evidence obtained should be excluded pursuant to s. 24(2) of the *Charter*.
- Written Release:** July 22, 2011
- Counsel:** Jeffrey Moors, for the Crown
Matthew Darrah, for the defendant

Robertson, J. (Orally):

[1] This is my decision following the *voir dire* on the issue of an alleged breach of the applicant's rights under s. 8 of the *Canadian Charter of Rights and Freedoms*, and the consequences of the alleged breach as to whether evidence obtained should be excluded pursuant to s. 24(2) of the *Charter*.

[2] The facts of the case are not in dispute.

BACKGROUND

[3] This matter relates to an indictment for the possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act* ("CDSA") against Henri Jeffries and William Howell.

[4] On April 17, 2009, a CDSA warrant was obtained for apartment #217, at 1271 Church Street, in Halifax, Nova Scotia. Source information indicated that the tenant in apartment #217, Henri Jeffries, was trafficking cocaine.

[5] When the officers executed the CDSA warrant at approximately 18:15, Henri Jeffries and William Howell were the only occupants in the apartment. A Sobeys bag was found on the kitchen counter containing 212.8 grams of a white powder that was later determined to not be a known drug. A plastic bag containing three smaller bags of cocaine (8.3 grams, 9.8 grams and 2.5 grams) was found in the freezer behind and underneath a bag of ice. Ziploc sandwich bags, pieces of tinfoil, empty dime bags and a digital scale were also found in the cupboards. Documentation including bills were also found, with some addressed to Jason Weagle, while others were addressed to Henri Jeffries.

[6] Detective Constable Steven Langille, part of the entry team, took custody of Mr. Howell, handcuffed him and took Mr. Howell to the bathroom and searched him. Two small re-sealable bags containing approximately 0.5 grams of cocaine along with \$210.00 was located in his right sock. A cell phone was also found on Mr. Howell. While the cocaine was seized, the cash and cell phone were returned to Mr. Howell, and he was then arrested for possession of the cocaine by Constable Langille.

[7] Constable Garland Carmichael was also part of the entry team and took custody of Mr. Jeffries, handcuffed him and took him into custody. In his pat down search of Mr. Jeffries, he seized cash from his pockets and turned it over to Constable David Li, the exhibits' officer, who was responsible for the seizure and recording of all evidence on that night.

[8] Constable Carmichael also acted as the arresting officer and took both of the accused, Mr. Jeffries and Mr. Howell, into custody after their secondary searches had been completed, and took them from the apartment on Church Street to the Halifax Police Lockup, at Gottingen Street, in Halifax at 18:50 hours. He administered the warnings, read them their *Charter* rights and the caution.

[9] He testified that it was his practice in arresting the accused to arrest for whatever the charge is on the warrant. Under direct examination by Crown counsel, the following exchange took place respecting the nature of the charges:

Q. You mentioned earlier in your evidence uh, when you were explaining the factors that were going into your mind uh, looking at the phone uh, you mentioned that uh your understanding was that uh, Mr. Howell had been uh, charged with the uh, uh, 52 *CDSA* possession with the purpose of trafficking. Uh, had there been any documentation prepared at that point?

A. I don't believe so.

Q. Okay, and uh, you uh, uh, had read him his rights and caution uh, uh, did you indicate that to him when you read him his rights and caution, was that the uh, your understanding of the charge?

A. Yes, my, I can't remember exactly if I placed him under arrest for 52 or for possession. I do know it's, it's very common for, for me to place someone under arrest for whatever the charge is on the warrant, but I, I don't know exactly what I said I, it was either for commonly you are under arrest for possession of drugs, you're under arrest for trafficking drugs for what have you. But I did, did place him under arrest at that point in time.

[10] Next, he placed each of the accused in separate locked interview rooms (the Cubes) and remained outside in the common area, where he then wrote up his report.

[11] He first gave Mr. Jeffries a phone book to assist him in making a call. Constable Carmichael testified that he then received information that a second search warrant of other premises was in progress and he was asked to delay allowing either of the accused the right to make a call, to avoid the possibility they could give a warning of their own arrest to others.

[12] Constable Carmichael testified that he checked each of the accused in the Cubes and this was from time to time he checked each of the accused in the Cubes. At approximately 21:00 hours, Constable Carmichael's attention was drawn to a ringing cell phone and he testified he was surprised that Mr. Howell's phone had not been seized by Constable Langille, but was left in his possession. He seized the cell phone and saw that the screen on the front of the phone read missed messages. While the phone was in his possession, it began to signal again text messages coming in.

[13] He testified as to what he believe were the circumstances:

. . . circumstances that we were in at that point and time Mr. Howell's in an area where s. 11 CDSA warrant had been executed, been placed under arrest for possession for the purpose of trafficking, I've got two parties in custody, there were drugs found uh, at the residence or on, on one of the individuals. Um, all of these factors played into you know, the reasons why we're, you know, why we have the possession of this or why we would pick up a telephone and I believed that the activity that was happening on the phone indicated to me in my experience that this phone was being utilized for the purpose of communication to, for drug sales. The (inaudible) I accessed the phone and it uh you know, there were messages, there's I think four or five missed messages that were there and one message as I was accessing the phone, uh you know, happened to pop up saying you around looking to meet up or what have you. Uh, the exact text of those messages My Lady are in, are in my notes.

[14] Referring to his notes made that evening of the details of the messages, he testified on direct examination:

A. Uh, 20:50 I took the cell phone in the cubes area from Mr. Howell. 21:00 I checked the phone messages, the texts, I didn't check the actual voice mail messages um,

THE COURT: You might have to go a little slow so I can make some notes. Okay 21:00, 20:50 you took phone from the accused in the cubes area, 21:00

A. I checked the phone messages.

THE COURT: Checked phone messages okay.

A. And my notes indicate while I was checking I received, four messages were received.

THE COURT: Does that mean?

A. That they were coming, coming in.

THE COURT: New ones coming in?

A. Yeah and some of the messages that uh, that I noted here are dated April 17 at 17:25 from Tig Bony T I-G B-O-N-Y

THE COURT: 17:25

A. At 293-4446 "Hi, hey I was late getting her so I will get that stuff tomorrow - give me a buzz when you get up and around."

THE COURT: Okay.

A. And then dated uh, again the 17th at 19:12 hours from 403-6445 and just the word "around." Left scene - I'll get to that in a moment. Another message, uh dated April 17th at 19:19 hours uh from a contact called "North Street" 802-4380 "Hey, how's it going." Dated again April 17th at 20:15 from 240-8999 - the contact by the name of Bar Harbour "Aya, A-Y-A thanks for that today - all hands was pumped..need anotha one for buddy coming over to watch the hockey game - alright if he then the text drops off from there and then there is another text immediately following

Q. So just to make sure I write down the entirety of that text that you mentioned from Bar Harbour A-Y-A thanks for that today

A. "Aya.. thanks for that today. All hands was pumped..need anotha a-n-o-t-h-a one for buddy coming over to watch the hockey game. Alright if h - that's where it stops. And then the next text that comes in is um, dated April 17th 20:16 p.m. two of two and starts with "e stops by" and then

dated April 17th at 20:48 from Bar Harbour - contact known as Bar Harbour 240-8999 "Dood spelled d-o-o-d..you among the living? LOL" Dated April 17th 20:48 from contact known as Tom Brandon's bud 237-2630 "U, just the letter U, round tonight Bill?" Next text is dated April 17th at 20:36 from 476-0886 and the text says "Hey buddy, it's Ian, you free?" The next text is April 17th at 20:46 Joanne and Ian - phone number 209-9706, "Hey would you mind if Ian came by for one?" And dated April 17th 20:52 again from Joanne and Ian 209-9706 starts "or call me when you can." Next text dated April 17th 21:34 again from a contact Tig Bony 293-4446 "Hi, I don't know how you did it for six months, bored as fuck lol."

THE COURT: What's that person's name again?

A. Tig Bony - two separate words - T-I-G and then it's B-O-N-Y or bony or

THE COURT: Okay, thank you.

A. And then at 21:56 that's when I replied to uh, text from North Street and then continued uh with the text from uh Joanne and Ian.

Q. What did you reply to North Street?

A. From North Street uh, there was a text there uh, "hey!!!Billy!!!!U around!!!" and then we get into, into the going back and forth in relation to conversation, so

Q. What were those texts that you uh - so the text from North Street was "hey Billy u around - what time was that?"

A. That was around 21:56, yup.

Q. Okay, and then did you reply right away or uh

A. Yes, my reply "yeah..what's up" reply from North Street "how's its going man, what you up to tonight" my reply: I'm sorry do you want me to slow down?

Q. Yes, I want to get the context of this if I can so, North Street you said "Hey, yeah what's up..."

A. Yes

Q. What's up ... North Street replied what?

A: "How's it going man, what's you up to tonight" and that's what - the letter u and up, the number 2 night.

Q. What was your reply if any?

A. "Nuthin, n-u-t-h-i-n..had to make a run. What's up with you tonight".

Q. What, just while we're there, what would you uh, be meaning in your uh, communication in making about a run - what's that mean?

A. In the course of my time with the drug section communication follows some pretty open ended meanings uh, but some of them are very specific to drug trafficking. Making a run means that you are making a run to deliver drugs or pick up drugs for resupply. And, that's, that's my understanding of that statement and that's what I intended by that statement.

Q. Okay, what reply did you get if any from North Street to that?

A. North Street replied "Chilling at home." My reply "I'm going to be off and on in case you can't get me." North Street uh, "You want to come up" My reply was "Naw, -a-w, not for a couple of hours, you going to be up." North Street said uh, "Yes, message me to make sure though." And my reply was "okay".

Q. And uh, can you indicate uh, to the various uh, texts do, do you have times noted there for the various ones?

A. For the, for the uh, for the first number I do because uh, I'm going through and I writing the tombstone information on it um, and while I'm texting North Street the, I'm not able to keep track of the conversation or to write it down so I had to go back for that and unfortunately my last notation in relation to the text coming in and so forth is at 20:56 but I, immediately following that conversation I reply to Joanne and Ian.

Q. So you moved from North, your discussions with North Street over to Joanne and Ian?

A. Yes, because a text comes from them, from Joanne and Ian, “Uh Bill..you okay...” because at this point in time there had been no conversation by me with uh, with these people.

Q. Okay.

A. My reply “Yup, making a run..be back in a bit..my phone is a little weird tonight.” The response from Joanne and Ian, the letter k - “K..okay if Ian meets up with you? Just let know when and where”.

Q. Is that from them?

A. From them, yeah that’s continuation of that message. My reply “What’s he need” meaning what kind of drugs does he need, what’s he looking for to purchase. From Joanne and Ian “One” spelled out one and then another text immediately followed that “Full...” so that told me that they were looking for a gram of drugs. I didn’t know what kind of drugs but figured it was uh, but figured that it was drugs.

Q. Okay.

A. Because I didn’t know my response was “I’ve got green and white tonight.” Green and white are common terms that are used in the drug trade as marijuana and cocaine.

THE COURT: I figured that out. Alright, thank you

A. Uh “So I got green and white tonight..name your poison..lol”.

Q. Which I understand uh, uh from those who are significantly younger than me to mean laugh out loud.

A. That’s correct.

Q. Okay, and then what was your response?

A. From Joanne and Ian, “White of course, innocense is key” and “ha”

Q. Your response to uh, that?

A. “One full of our finest from the menu..it’s going to be an hour or so.” The next text is from Joanne and Ian, “K, where shall he meet you or are you cruising and can you pop by.”

Q. Where shall he meet you or are you cruising and something about pop by, sorry

A. And can, actually, and can pop by.

Q. Okay.

A. My reply “I’m out on the highway..coming back..I’ll text you..where does he want to meet? The next text from Joanne and Ian “We live by the Mount, where’s convenient for you, what highway?” My reply “Way out pass bagtown.”

THE COURT: What’s bagtown may I ask?

A. Sackville, My Lady. So, “way out pass bagtown ..you are on my way..say the tire place..I’ll text you when I’m close.” From Joanne and Ian “On the water side of Bedford Highway right..close to Food Bank, just checking.” My reply, “Yup” and from Joanne and Ian “Cool.” and that ended the text conversation.

Q. Was that all of the text uh messages that you received and sent that evening?

A. Yes.

[15] The respondent seeks to introduce these text messages as evidence at trial to support that William Howell had possession of cocaine for the purpose of trafficking.

ISSUES

1. Whether the search of the electronic data within the cellular phone subsequent to Mr. Howell’s arrest violated his rights under s. 8 of the *Charter*.
2. Whether the evidence obtained by the search of the cell phone should be excluded under s. 24(2) of the *Charter*.

[16] Mr. Darrah has correctly stated the law in his brief. Mr. Moors is in agreement with these references. Counsel only disagree with respect to the issue of seizure “incidental to the arrest.”

ARGUMENT

(a) Was there a search or seizure?

[17] It is the electronic data extracted from the cellular telephone which warrants the basis of this *Charter* application. Section 8 of the *Canadian Charter of Rights and Freedoms* provides protection from unreasonable search and seizure. To establish that s. 8 has been breached, it must be determined that the person claiming the breach has a reasonable expectation of privacy in the item that was searched (*R. v. Buhay*, [2003] 1 S.C.R. 631).

[18] Both counsel for the Crown and the defence agree there is a reasonable expectation of privacy in this cell phone, as articulated in *Buhay, supra*, at para. 18:

. . . The factors to be considered in assessing the totality of the circumstances include, but are not restricted to, the accused’s presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of subjective expectation to privacy, and the objective reasonableness of that expectation (*Edwards*, a para 45).

and *R. v. Polius*, [2009] O.J. No. 3074, at para. 52:

In my view, a person has, objectively viewed, a reasonable expectation of privacy in the contents of his/her cell phone. For a discussion of the nature and extent of the right to privacy guaranteed by s. 8 of the *Charter*, see *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.), *R. v. Edwards* (1996), 104 C.C.C. (3d) 136 (S.C.C.) and *R. v. Buhay*, [2003] 1 S.C.R. 631 at para. 24 where the Court said that “.. this protection extends not only to homes and personal items, but to information which we choose to keep confidential ..”. The information in a cell phone, computer or other electronic device may relate to aspects of life that are deeply personal. It may include:

- * Contacts, including names, addresses, phone numbers, e-mail addresses and other personal information;
- * Internet Explorer, including the history of accessing websites;
- * Calendars;
- * Photographs and videos;
- * Text Messages;
- * Voice Mail Messages;
- * E-mail Messages;
- * Missed Calls;
- * Call Logs; and
- * Call Identification.

and *R. v. Little*, [2009] O.J. No. 3278 at para. 120:

The subject matter of the search was information stored in the device. As the sole user of that cell phone, Mr. Little had a direct interest in it and its informational content. He did not testify on the *voir dire*, and so there is no direct evidence of a subjective expectation of privacy, but as the majority noted at paragraph 37 in *Patrick*, the subjective stage of the test is not a high hurdle. The Treo was a personal communication device in which the user could store information including photographs and text messages. A subjective expectation of privacy by Mr. Little in the cell phone and its informational content can be presumed.

(b) Was the search unreasonable?

[19] A search will be reasonable if it is authorized by law, if the law is reasonable and if the manner that the search was carried out is reasonable. (*R. v. Collins*, [1987] 1 S.C.R. 265).

(i) Evidence obtained in the execution of a search warrant

[20] In *R. v. Little*, the cell phone in question was seized during the execution of a valid search warrant. Section 489(1)(c) of the *Criminal Code* authorizes the seizure of items additional to those enumerated in the warrant where the police believe on reasonable grounds that those things would afford evidence in support of an offence (at para. 142).

[21] In *Little*, the cell phone was initially seized as blood was observed to be on it, and the police also wished to test the source of a 911 call. The telephone was examined at a later date, and photographs were found that were sought to be introduced at the trial for two counts of first degree murder. Justice Fuerst noted at para. 147 that “. . . to suggest that once police had lawful possession of the Treo they could examine its entire contents without obtaining a warrant authorizing its search is to ignore the nature of the item.” As such, the search of that cell phone was found to violate s. 8 of the *Charter*.

[22] While the cell phone was found on Mr. Howell while he was within the apartment that was the subject of the warrant, this phone was not seized until he was at the police station some time later. If the cell phone was seized incidental to Mr. Howell’s arrest, the issue would be whether this common law power encompasses the warrantless search and seizure of the text messages.

(ii) Searches incidental to arrest

[23] In *R. v. Caslake*, [1998] 1 S.C.R. 51, Chief Justice Lamer addressed the limits of searches incidental to arrest at para. 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 *Clouthier, 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.

[24] Chief Justice Lamer also held that “if the justification for the search is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested.”

[25] In *R. v. Polius, supra*, Justice Trafford added at para. 41 that “. . . any examination of an item beyond a cursory examination of it is not within the scope of the power to SITA (search incidental to arrest). Using other words, the evidentiary value of the item must be reasonably apparent on its face, in the context of all of the information known by the arresting officer. . . .”

[26] Justice Trafford also illustrated the similarities of a cell phone to a locked briefcase:

46 Similarly, where a person is arrested for trafficking in cocaine, while he was carrying a locked briefcase, the power to conduct a cursory inspection of an item within the control of the arrestee would not include a power to open the briefcase and inspect its contents. If, in all of the circumstances of the arrest, there was a reasonable basis for a belief that there may be evidence of the crime in the briefcase, the briefcase could be seized to preserve any evidence that it may contain. A warrant to search the locked briefcase would be required to make the seizure of its contents lawful. Compare *R. v. Mohamad*, [2004] O.J. No. 279 (C.A.) where the Court determined that, in the circumstances of the case, the SITA included a power to search an unlocked briefcase in a vehicle that was under the control of the arrestee.

47 It is this last example concerning the locked briefcase that is most pertinent in this case. A cell phone is the functional equivalent of a locked briefcase in today’s technologically sophisticated world.

[27] In *R. v. D’Annunzio*, [2010] O.J. No. 4333, the accused was arrested for sexual assault, and a cell phone was seized incident to arrest. The officer then searched the phone for possible evidence of a sexual nature, finding photos and a video that were sought to be introduced by the Crown as being relevant to his intention to commit the offence.

[28] Justice Blishen, in *D’Annunzio*, stated that at para. 13:

There is no dispute that Constable Cowan had reasonable and probable grounds to believe Mr. D'Annunzio committed a sexual assault on S.Y. and was therefore able to arrest Mr. D'Annunzio and search, and incident to that arrest, to seize anything in his possession for three purposes:

14 Number one, to ensure the safety of the police and the public; two, to protect the evidence from destruction, to preserve the evidence; and three, to discover evidence against Mr. D'Annunzio.

15 These purposes are outlined by the Supreme Court of Canada in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; in *R. v. Caslake*, [1998] 1 S.C.R. 51; and *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83.

16 The issue here is whether the common law power of search and seizure incidental to arrest encompasses, in the circumstances of this case, the warrantless search and seizure of the photos and videos on Mr. D'Annunzio's cell phone by Constable Cowan.

17 The arresting officer must have one of the three objectives in mind and, in addition, there must be an objective reason to believe the search and seizure is required in view of the objectives.

[29] Since the cell phone was in the possession of the police, information could be accessed at a later time one might suggest. The officer also was not looking for anything in particular and there was no urgency, so it was decided that there should have been an application made for a warrant authorizing the search.

[30] Justice Blishen, in *D'Annunzio, supra*, also outlined the rationale for obtaining a warrant for such information (at para. 26):

Requiring judicial authorization in the form of a warrant to search and seize information in a cell phone forces police to take time to give serious consideration to what information will likely be discovered and allows a judicial officer to impose terms and conditions so that only information within the scope of the warrant and related to the target offence can be accessed by police.

[31] So, in this case, it is submitted by defence counsel that Mr. Howell's cell phone was not seized at the time of the arrest since he was initially charged with only having possession of cocaine, and any evidence from the phone would not have had an impact on that offence. As such, there would not have been a

reasonable prospect of securing evidence of the offence for which the accused was being arrested for.

[32] Defence counsel says that, like in *D'Annunzio*, the information in the phone was examined in order to find evidence showing an intent to commit an offence (trafficking in this case) through examples of prior activity. Since the phone was seized at a later time, it is suggested that there would not have been an urgency in obtaining this information, and there was no issue over the possibility of the evidence being destroyed, since it was in the custody of the police.

[33] However, Mr. Howell was arrested along with Mr. Jeffries, pursuant to a search warrant, clearly directed toward *CDSA* trafficking offence. The purpose of the search was clearly related to the purpose of the arrest, even though there was a delay in Constable Carmichael's seizure of the cell phone.

[34] In *Caslake, supra*, Lamer, C.J. discussed the scope of a search warrant incidental to arrest at para. 16 and 17:

Scope can also refer to temporal limits on the power of search, which are at the core of the case at bar. The appellant suggests that the delay between the search and the arrest (six hours in this case) was too long to make the search "incident" to the arrest. In my opinion, the Court should be reluctant to set a strict limit on the amount of time that an elapse between the time of search and the time of arrest.

In my view, all of the limits on search incident to arrest are derived from the justification for the common law power itself: searches which derive their legal authority from the fact of arrest must be truly incidental to the arrest in question. The authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy. See the Law Reform Commission of Canada, Report 24, Search and Seizure (1984), at pg. 36. (For a more in-depth discussion, also see Working Paper 30, Police Powers -- Search and Seizure in Criminal Law Enforcement (1983), at p. 160.) This means, simply put, that the search is only justifiable if the purpose of the search is related to the purpose of the arrest.

[35] Although more than three hours had passed from the time of his arrest, Mr. Howell was being held as the charges against him were being processed and other investigations were also ongoing.

[36] The cell phone seized has a LED (Light Emitting Diode) screen on its face, telling Constable Carmichael there were missed messages. Indeed, the phone rung as he conducted his initial and cursory examination. There was no password protection on the phone.

[37] The language of the text messages were that, the police reasonably associate with the drug trade, Constable David Lane, who was qualified before the Court as an expert “in cocaine usage, the unlawful possession of cocaine, the unlawful possession of cocaine for the purposes of trafficking, methods used to avoid police detection, trafficking methods, pricing, packaging, jargon, drug houses, dial-a-doping and packaging methods,” testified that the language of the texts was drug jargon and that Mr. Howell’s possession of 2 x .5 gram packages also called 1/2 decks is consistent with “the small time trafficker ‘dial-a-dope’ operation.”

[38] The communications with Joanne and Ian were in “real time” and were directly related to the purpose of the search warrant and subsequent arrest.

[39] Cell phones, as Constable Carmichael testified, are the “bread and butter” of the drug trade and the means by which drugs are marketed on the street.

[40] Unlike *Polius*, Constable Carmichael was aware of the purpose of this drug arrest. He was part of the drug bust operation from the outset. He had a reasonable basis to believe that the cell messages and texts would be evidence of the crime for which the search warrant was executed (s. 5.2 *CDSA*) and the arrests made. Even if the original arrest of Mr. Howell was for possession (Constable Langille’s testimony), the ongoing investigation of the evening related to possession for the purpose of trafficking. Mr. Howell fell into the web of the investigation.

[41] Nor do I find Constable Carmichael’s interaction by text with Joanne and Ian to be too intrusive a search in the circumstances. This is not a situation where evidence could subsequently be revealed by a later forensic analysis of the phone.

[42] Constable Carmichael responded to Joanne ““K..okay if Ian meets up with you? Just let know when and where.” with the phrase “What’s he need” to which

she answered “One” “Full”. The deal was done and, in my view, it formed part of the evening’s continuing investigation. If not for Constable Carmichael’s quick response, evidence of the offence would have been lost. Certainly in his mind he was pursuing the investigation because, “the activity that was happening on the phone indicated to me in my experience that this phone was being utilized for the purpose of communication to, for drug sales”.

[43] Constable Carmichael was correct in his belief. In the result, the evidence of the text messages is admissible at trial in support of the charge against Mr. Howell. I need not therefore consider the operation of s. 24(2) other than to say that, in my view, exclusion of this vital evidence to the Crown would, in all the circumstances, being the administration of justice into disrepute, after analysis according to *R. v. Grant*, [2009] 2 S.C.R. 353 para. 71.

Justice M. Heather Robertson