SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Butterfield*, 2023 NSSC 406

Date: 20231205
Docket: CRT 510043
Registry: Truro

Between:

His Majesty the King

v.

Nathan Butterfield

DECISION
PRE-TRIAL VOIR DIRE MATTERS
Defence Applications
(1) Constitutional Challenge
(2) Charter Applications

Judge:	The Honourable Justice Jeffrey Hunt
Heard:	April 17, August 8, and September 6, 2023
Written Decision:	December 5, 2023
Counsel:	Leonard MacKay, Solicitor for the Crown Alexander MacKillop, Solicitor for the Defendant

By the Court:

Introduction

[1] While driving on Highway 104 near Bible Hill on August 15, 2020, Nathan Butterfield put his vehicle in the ditch. This triggered an encounter with police that culminated in his being charged with the following two offences:

> **THAT** on or about the 15th day of August 2020 at or near Colchester County, Province in Nova Scotia, he did possess a substance included in Schedule I, to wit cocaine, for the purpose of trafficking, contrary to Section 5(2) of the *Controlled Drugs and Substances Act;*
>
> **AND FURTHERMORE** at the same date and place did have in his possession a prohibited weapon, to wit pepper spray, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the *Criminal Code*.

[2] Mr. Butterfield has applied to exclude from his upcoming trial certain evidence seized by the police as a result of their interaction that day. He says the officer had no authority for his search of the vehicle. Accordingly, evidence seized from within the vehicle was obtained in a manner that violated his *Charter of Rights and Freedoms* protected rights.

[3] As a component of his application to exclude evidence, Mr. Butterfield is also advancing a constitutional challenge to a now repealed section of the Nova

Scotia *Cannabis Control Act*, SNS 2018, c. 3 ("*CCA*"). The section in question related to the search powers of the police.

[4] While the section has now been repealed, it was in force at the time of this arrest and search. The provision purported to permit vehicle searches with no requirement that the peace officer possess reasonable belief, or even reasonable suspicion, that the Act or regulations were being violated.

[5] The officer in the present case appeared to view the *Cannabis Control Act* as constituting at least a part of his authority to search.

[6] The Crown opposes the application to exclude evidence. They argue that any search and seizure violation would be so minor in nature that the admission of the seized evidence would not bring the administration of justice into disrepute.

[7] With respect to the challenged section of the *Cannabis Control Act*, while the Crown does not seek to defend the constitutionality of the section, they submit that the admissibility of the challenged evidence is not dependant on the operation of the provision.

[8] In the analysis to follow it will be my intention to remain mindful of the following comments from the Supreme Court of Canada in *R. v. Nolet*, 2010 SCC 24:

> 4 …[R]oadside stops sometimes develop in unpredictable ways. It is necessary for a court to proceed step by step through the interactions of the police and the appellants from the initial stop onwards to determine whether, as the situation developed, the police stayed within their authority, having regard to the information lawfully obtained at each stage of their inquiry.

Applications Advanced by Defence

[9] As referenced above, the Defendant is advancing two separate but related applications which are being addressed in this decision. These are as follows:

1. **Constitutional Challenge**

   The Defendant seeks a finding that s. 24(1)(a) of the Nova Scotia *Cannabis Control Act*, SNS 2018, c. 3, as it existed from 2018 to November 2021, was constitutionally inoperative by virtue of its non-compliance with s. 8 of the Canadian *Charter of Rights and Freedoms.* While the section no longer exists, it was in force on August 15, 2020. The government is not seeking to defend the constitutionality of the former provision.

2. **Section 8 and 9 *Charter of Rights and Freedoms* Applications**

   The Defendant alleges violations of his Charter rights to be free from unreasonable search and seizure and arbitrary detention. In the event a *Charter of Rights and Freedoms* violation is found to exist, the Defendant asks the Court to order the exclusion from trial of all evidence seized by police from within the vehicle.

[10] As to the structure of these reasons, I will begin by setting out the evidence introduced at the hearing. This consisted of the testimony of one RCMP officer. I

will then touch on the applicable burdens of proof before turning to the two applications advanced by Mr. Butterfield.

[11] It is not my intention here to re-state the entirety of the testimony of the officer. I will address the central elements and core items of relevance.

[12] I have however reviewed, weighed, and considered all the evidence in coming to my conclusions – even if I do not refer to every individual item here.

Evidentiary Record

Constable Gordon Carroll

[13] Constable Carroll was the sole witness called by the Crown. He is a 15-year veteran of the RCMP. On August 15, 2020, he was assigned to general duties and was patrolling Highway 104 in Colchester County.

[14] In the mid-afternoon he received a dispatch call advising of a motor vehicle accident close to his location. He proceeded up the divided highway and first had to pass the location of the accident going the other way in the opposite lanes. He crossed the median and returned to where the Butterfield vehicle was in the ditch off the highway. As he arrived at the scene, he saw that another officer, Constable Forthyse, had also just arrived.

[15] Constable Carroll observed a black Volkswagen SUV in the ditch off the highway. There was a male at the scene who identified himself as the registered owner. This was the Defendant, Nathan Butterfield.

[16] After the officer checked Mr. Butterfield's medical situation, he had him take a roadside alcohol screening test which he passed. Mr. Butterfield told the officers he had fallen asleep at the wheel, as he had been up for much of the night.

[17] Constable Carroll asked the Defendant about his driver's license and insurance. Mr. Butterfield advised he was the vehicle owner, which was insured and registered. Mr. Butterfield could not locate his driver's license, but believed it was in the vehicle.

[18] The officer testified that he asked Mr. Butterfield if he minded if he (Constable Carroll) went in the vehicle to search for the missing license. Later in his evidence Constable Carroll stated that, at that point, he did not consider he was doing this for any investigatory purpose. He simply wanted to locate the license. He stated that Mr. Butterfield gave consent for him to look for the license in the front of the vehicle.

[19] Constable Carroll went on to testify that, as he was around the outside of the vehicle, he detected what he described as the strong odour of raw fresh marijuana. While looking around the passenger side of the vehicle he noticed, in the center

console area, what he took to be some sort of government approved container for the sale of cannabis. He described it as a small cigarillo sized container. The officer opened it. He stated he did so in order to see if it could be the source of the cannabis smell. Inside was a partly burnt cannabis "roach" or cigarette. He did not believe this could have been the source of the strong raw cannabis smell. He closed the container and replaced it.

[20] During this search for the license, the officer looked in the glove box where he saw a container which he identified and believed to be a prohibited pepper spray device. The officer concluded at that point that Mr. Butterfield was arrestable for possession of a prohibited device. Constable Forsythe carried out an arrest of Mr. Butterfield on direction of Constable Carroll.

[21] Constable Carroll next raised with Mr. Butterfield the issue of the cannabis smell. Mr. Butterfield denied smelling anything and eventually went to the vehicle and produced the small, closed container the officer had looked at previously. He suggested that it may have been the source of the smell. Constable Carroll stated that he discussed with Mr. Butterfield the difference between the smell of fresh versus burnt cannabis.

[22] The officer next asked Mr. Butterfield for permission to undertake a consent search of the vehicle looking for the source of the strong smell he was detecting.

He stated that he explained to Mr. Butterfield that, if he provided consent, he could withdraw this at any time. Mr. Butterfield replied that he did not give consent and he proceeded to walk around the vehicle closing doors.

[23] Constable Carroll testified that, following Mr. Butterfield's refusal to provide consent, he next consulted with a senior colleague as to the operation of the Nova Scotia *Cannabis Control Act*. He testified that this discussion confirmed his understanding of the operation of the *Act*. He believed that he had grounds under the *Act* to search the vehicle as the driver had cannabis readily accessible in the front seat.

[24] On this basis Constable Carroll conducted a search of the vehicle but did not locate any cannabis or other illicit items at that time.

[25] The officer testified that following this negative search he began to think about the period of time the driver had been alone on scene after the crash and before arrival of the police. He concluded that Mr. Butterfield would have had an opportunity to remove any items of contraband from the vehicle and place them somewhere in the area.

[26] Constable Carroll began walking the ground in proximity to the SUV. He testified that approximately 10 feet in front of the vehicle he saw a small white coffee cup with a black lid. He described it as sitting in the grass. It appeared to

him to be new and not weathered by exposure to the sun or elements. What stood out to him was that it appeared to be a match to a second cup with a lid that he had observed in the passenger seat area of the SUV.

[27] He retrieved the cup from the grass and opened the lid. Inside he observed a clear pill bottle containing white powder as well as what he described as a powdery white brick in a vacuum seal package. He believed that the substance would prove to be cocaine. He testified that subsequent analysis confirmed it to be approximately 99 grams of cocaine.

[28] On the basis of his belief that Mr. Butterfield had placed the cup in the grass, he arrested and cautioned him for possession of a controlled substance.

[29] The final matters on which the officer gave evidence included the decision to tow the vehicle to the Bible Hill RCMP detachment and the search carried out there. He testified that, around the time the tow truck driver arrived on scene, it had started to rain. Through information he learned from the tow truck driver he concluded that, due to the rain and the terrain in which the SUV was sitting, it needed to be towed immediately before it became stuck. The vehicle was pulled from the ditch and taken to the Bible Hill detachment.

[30] The officer stated that one of the purposes of taking the vehicle to the detachment was to allow a "...proper search incident to arrest" to take place. This

further search was undertaken at the detachment. Constable Carroll testified there was a black kit bag located in the "back" of the vehicle. On cross examination, he later described this as the "trunk area" of the vehicle.

[31] Inside the bag was a zippered pouch that the officer described as "...difficult to see". This appeared to be a reference to the fact he had earlier carried out a search at the accident site that had not identified this zippered compartment.

[32] Inside the pouch were found some zip-lock bags of marijuana, two black tetra-packs stamped THC, as well as a cell phone.

[33] In cross examination, defence counsel suggested to Constable Carroll that he did not initially detect the smell of cannabis outside the vehicle. The officer stated that he believed he detected it outside first but conceded that he could not recall for sure.

[34] He was asked to comment on whether, when he obtained Mr. Butterfield's consent to look for the driver's license, he had advised that this consent could be withdrawn at any time. The officer stated he had not done so. The discussion of the right to withdraw consent came later when he and the Defendant were discussing a possible consent search for the source of the strong cannabis smell.

[35] Defence counsel put to Constable Carroll that, if the basis for the vehicle search was the presence of readily accessible cannabis to the driver, this could simply have been dealt with by way of a summary offence ticket. The officer accepted this would have been a possibility, but he believed the smell he was detecting was not coming from the small burnt roach, but rather from some other substantial source.

[36] Defence counsel went on to suggest that having found no cannabis (other than the small roach) in his on-scene search, Constable Carroll could have simply issued a SOT for the improper transport of cannabis or, alternatively, sought a search warrant. Constable Carroll stated that, while these were possible steps, he proceeded to make the decisions he did based upon his understanding of the operation of the Nova Scotia *Cannabis Control Act*.

[37] As to the subsequent search at the detachment, the officer confirmed that this search covered the full front and back seats as well as the trunk area. He agreed with defence counsel that the entire search was warrantless.

[38] Finally, Constable Carroll indicated that a fingerprint analysis was carried out on the coffee cup located outside the vehicle. He did not believe any fingerprints were identified. No DNA analysis was conducted.

[39] A decision was subsequently made to issue a summary offence ticket to Mr. Butterfield with respect to the cannabis located in the trunk of the vehicle. Consequently, the two remaining seizures relevant to this Indictment are the cocaine and alleged prohibited weapon.

[40] As noted above, while the original *Charter of Rights and Freedoms* application filed in this matter sought the exclusion of the weapon and the cocaine, this has now been narrowed to the weapon. The issue of possession of the cocaine will be contested at trial.

Standing of Applicant and Burdens of Proof

[41] The Crown does not challenge that Mr. Butterfield has standing to advance these applications.

[42] As to the applicable burdens, the Applicant must satisfy the Court on a balance of probabilities there has been an infringement of his *Charter of Rights and Freedoms* rights such that a remedy is required under s. 24(2): See *R. v. Collins*, [1987] 1 SCR 265.

[43] The Crown carries the burden of establishing grounds for lawful arrest, on both subjective and objective grounds. Once this is demonstrated, the burden shifts to the Defendant to establish, on a balance of probabilities, the existence of a s. 8

Charter of Rights and Freedoms violation stemming from any search connected to the detention or arrest: See *R. v. Besharah*, 2010 SKCA 2. A finding of lawful grounds for arrest would address any s. 9 unreasonable detention issue: See *R. v. Storrey*, [1990] 1 SCR 241.

[44] If any violation of a *Charter* protected right is found to exist, the analysis next moves to a consideration of s. 24(2) of the *Charter of Rights and Freedoms*, under which the exclusion of evidence is weighed. Under this provision, the Applicant must satisfy the Court, on a balance of probabilities, that the admission of the evidence would bring the administration of justice into disrepute: See *R. v. Grant*, 2009 SCC 15.

Application 1

Constitutional Challenge to Legislative Provision

[45] As noted above, neither the government nor the prosecution opted to defend the constitutionality of the former s. 24(1)(a) of the Nova Scotia *Cannabis Control Act*. This is understandable. It was a flawed section that no longer exists.

[46] The now repealed provision authorized motor vehicle searches with no requirement that the peace officer possess reasonable belief, or even reasonable suspicion, that the Act or Regulations were being violated. No other provincial cannabis control statute, created in response to the federal government's

legalization legislation in 2018, appears to have been drafted in such a fashion. The Nova Scotia wording was unique and flawed.

[47] When the Legislature acted in late 2021 to repeal and replace the section, the language was amended to bring it in line with other provincial statutes in Canada. The revised s. 24(1) requires the peace officer to have reasonable grounds to believe that a violation exists before the search power can be invoked.

Prior Judicial Consideration of s. 24(1)(a) *Cannabis Control Act*

[48] The former section was previously found to be inoperative by the Nova Scotia Provincial Court. In *R. v. Daniels* (No. 8296622, unreported March 4, 2021), Judge Simmonds concluded that the provision violated the right of the defendant in that case to be free from unreasonable search and seizure.

[49] In our system, the Provincial Court does not strike down legislation as unconstitutional. This is left to the Supreme Court. On a case-by-case basis, however, the Provincial Court may determine that a statute is inoperative against a particular accused, due to constitutional non-compliance.

[50] This is what occurred in the *Daniels* case. The search provision was found to be in violation of Mr. Daniel's right to be free from unreasonable search. The

evidence seized in that case was excluded from the trial. Following this decision, the Nova Scotia Legislature proceeded to repeal and replace the section.

[51] Given that the province does not seek to defend the former legislation, I can address this first issue in summary fashion. I should note that in considering this issue I found useful the following paper by Prof. Graham Mayeda, ***"The Constitutionality of Police Search Powers in Provincial Cannabis Control Legislation"***, (2021) 69 C.L.Q. 351.

Did the former section violate s. 8 of the *Charter of Rights and Freedoms*?

[52] Section 8 of the *Charter of Rights and Freedoms* encompasses the right to be free from unreasonable search and seizure. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Supreme Court of Canada held that the general standard for a lawful search is reasonable grounds to believe that an offence has been committed.

[53] Warrantless searches, such as those authorized by the former section 24(1)(a), are presumptively unreasonable: See *Hunter v. Southam* at page 161.

[54] Where legislation authorizes a warrantless search, the Crown bears the burden of displacing the presumption of unreasonableness: See *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, at paragraph 55.

[55] The presumption will be displaced, and the search deemed reasonable, where the search is:

> i. authorized by law;
>
> ii. the law itself is reasonable; and
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> iii. the manner of the search and seizure is reasonable.
>
> See *R. v. Caslake*, [1988] 1 S.C.R. 51, at para. 10; *R. v. Collins*, [1987] 1 S.C.R. 265, at paragraph 23.

[56] In this case the question is whether the legislative search provision itself was reasonable. In *R. v.* Goodwin, supra., the Supreme Court of Canada summarized the three factors to be considered in assessing whether the authorizing statutory provision is reasonable:

> 57 ...This Court has generally declined to set out a "hard and fast" test of reasonableness...this flexible approach remains compelling. This Court has nonetheless identified certain considerations that may be helpful in the reasonableness analysis, including "the nature and the purpose of the legislative scheme ..., the mechanism ... employed and the degree of its potential intrusiveness… and the availability of judicial supervision.
>
> [citations omitted]

Regulatory Search

[57] The Supreme Court has also recognized that "… the characterization of a search or seizure as either criminal or regulatory is relevant in assessing its reasonableness. Where an impugned law's purpose is regulatory and not criminal, it may be subject to less stringent standards": See *R. v. Goodwin*, paragraph 60.

[58] I accept that the Nova Scotia *Cannabis Control Act* is regulatory legislation. The nature and purpose of the statute demonstrates that this is the case. The Act touches on a wide range of activity related to the transportation and consumption of cannabis, specifically where these activities could intersect with issues of vehicle operation and public safety.

[59] While the *Act* contains offence and penalty provisions, they are as La Forest J. wrote in paragraph 40 of *R. v. McKinlay Transport*, [1990] 1 SCR 627, for "strictly instrumental reasons ... necessary to ensure compliance with the *Act*". These do not detract from the regulatory nature of the enactment: See *R. v. Goodwin*, at para. 31; *R. v. Nzita*, (2020), 465 C.R.R. (2d) 301 (Ont. C.J.), at paragraphs 31-36.

[60] Very often a finding such as this would be highly material in the weighing of the search power contained within the statute. For instance, a regulatory statute containing a reasonable suspicion standard might pass constitutional muster while a criminal statute search provision would be expected to be based in a reasonable belief that a violation had occurred: See discussion in *R. v. D.(C.D.),* 1988, 86 NSR (2d) 138. The difficulty with the former s. 24(1)(a) is that it contained <u>neither</u> standard.

[61] The former provision fails the test set out by the Supreme Court of Canada in *R. v. Goodwin.* As it previously read, s. 24(1)(a) violated s. 8 of the *Charter of Rights and Freedoms.* The only remaining question is whether the enactment could be saved by s. 1 as constituting a reasonable limit on the protected right.

Provision Not Saved Under Section 1

[62] Once again, I find that I can dispose of this question in summary fashion. No party argued that the provision could be saved by s. 1. It is easy to understand why this is the case.

[63] In order to justify an infringement on a fundamental right, the Crown must demonstrate that the infringing statutory provision has a pressing and substantial objective and the means chosen are proportionate to that objective: See *R. v. Oakes,* [1986] 1 SCR 103; *R. v. Nur,* 2015 SCC 15.

[64] While the legislation does meet the pressing and substantial objective test, it fails the assessment of proportionality and minimal impairment. These were also the conclusions of Judge Simmonds in *R. v. Daniels*. A standardless search power represents a constitutional overreach that cannot be justified.

Conclusion on Issue 1

[65] Accordingly, the former s. 24(1)(a) of the Nova Scotia *Cannabis Control Act* is found to be invalid. As the section was previously drafted, it was inconsistent with s. 8 of the *Charter of Rights and Freedoms*. The provision is not saved by s. 1.

[66] Pursuant to the operation of s. 52(1) of the *Constitution Act,* 1982, the former section, is declared to be of no force and effect.

[67] It was presumed by Crown and Defence that this would be the conclusion of the Court on this question. The submissions advanced by the parties with respect to the remaining issues on the *voir dire* were premised on an assumption that the section would be struck down.

Application 2

Claims for Exclusion of Evidence

[68] Turning now to the second application filed by the Defendant. There were important concessions by both sides during the course of supplementary submissions. I will briefly review these positions.

[69] In the original application filed by Mr. Butterfield, he argued that certain alleged cocaine, seized from the ditch area outside the vehicle, ought to be excluded from trial. This portion of the application was eventually withdrawn. The defence has made clear that it continues to challenge the issue of possession, among other points. These will be matters for the trial proper.

[70] For its part, the Crown initially took the position that the original vehicle search (that led to the location of the alleged prohibited weapon) was a consent search. It was eventually acknowledged by the Crown that this claim was unsustainable. Accordingly, the Crown conceded that a s. 8 violation had occurred. They maintained however that the seized evidence should not be excluded under s. 24(2) of the *Charter of Rights and Freedoms*.

[71] Turning to the remaining issues, as directed by the Supreme Court in *R. v. Nolet*, I intend to move through the following analysis of the interactions between police and Mr. Butterfield by examining what authority the police was said to be exercising at each stage of the encounter.

[72] In general, I will consider the encounter through these stages:

1. Initial roadside interactions.
2. Period of roadside detention.
3. Purported 'consent search' for license leading to seizure of alleged prohibited weapon.
4. I will reference the ditch search leading to seizure of disposable cup and cocaine, although the Defendant has now withdrawn the s. 8 challenge to admissibility.

[73] There were two separate seizures of evidence relevant to the Indictment. The officer first seized the alleged prohibited weapon (pepper spray) from the glove box. Shortly after that he located the disposable coffee cup allegedly

containing cocaine. This was found outside the vehicle in the grass approximately ten feet away from the vehicle.

Legal Framework

[74] Section 8 of the *Charter of Rights and Freedoms* provides:

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

[75] Section 24(2) of the *Charter of Rights and Freedoms* addresses the possible remedy for any violation:

> 24(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.

[76] The majority of the Supreme Court of Canada in *R. v. Edwards*, [1996] 1 S.C.R. 128 set out the following framework for a s. 8 analysis:

> 45 A review of the recent decisions of this Court and those of the U.S. Supreme Court, which I find convincing and properly applicable to the situation presented in the case at bar, indicates that certain principles pertaining to the nature of the s. 8 right to be secure against unreasonable search or seizure can be derived. In my view, they may be summarized in the following manner:
>
> > 1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed: See *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619.
> >
> > 2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places: See *Hunter*.

> 3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated: See *Pugliese*.
>
> 4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably: See *Rawlings*.
>
> 5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances: See *Colarusso*, at p. 54, and *Wong*, at p. 62.
>
> 6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
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> > (i) presence at the time of the search;
> >
> > (ii) possession or control of the property or place searched;
> >
> > (iii) ownership of the property or place;
> >
> > (iv) historical use of the property or item;
> >
> > (v) the ability to regulate access, including the right to admit or exclude others from the place;
> >
> > (vi) the existence of a subjective expectation of privacy; and
> >
> > (vii) the objective reasonableness of the expectation: See *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994), at p. 256.
>
> 7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

Initial Contact at Scene

[77] In many cases involving roadside seizure of evidence, the legal analysis would begin with consideration of the legality of the initial stop. Our facts present a somewhat different scenario.

[78] The police arrived on this scene in response to a report of a highway traffic accident. In such a situation the police will obviously have duties to perform that will entail interaction with the driver and contact with the vehicle. Pursuant to s. 78(2) of the *Motor Vehicle Act,* RSNS 1989, c. 293, a peace officer is empowered to request that an operator of a motor vehicle produce their driver's license.

[79] It has been recognized in many cases that, while a roadside encounter between police and motorist can begin as a matter of highway safety or motor vehicle enforcement, the officer may begin to build reasonable suspicion that other offences have been committed: See for instance the comments of Cacchione, J. in *R. v. Jones*, 2002 NSSC 101, at paragraph 35.

[80] In *R. v. Nolet*, 2009 SKCA 8 (aff'd by SCC), the Court observed:

> 84 In *R. v. Sewell*, which involved a search pursuant to a lawful investigative detention, Bayda C.J.S. endorsed the view of Tallis J.A. expressed in *Ladouceur* that officers did not need to ignore other legitimate aspects of their general duties and powers, **and when so engaged did not leave their perceptory senses — whether visual, olfactory or auditory** — at some other location. He echoed his colleague's view that police officers cannot reasonably be expected to avert their eyes from matters, criminal or otherwise, that could be observed by any vigilant member of the public.
>
> 85 The reasoning of the Chief Justice in *Ladouceur* on the question of "dual aims" highlighted another distinction that is critical to the analysis: he said a nominally lawful aim should not be used as a *plausible façade* for an unlawful aim. In other words, the lawful aim cannot be used as a pretext, ruse, or subterfuge to perpetuate the unlawful aim.
>
> See also: *R. v. Rajaratnam*, 2006 ABCA 333

[81] Accordingly, when he arrived at this scene, the officer was in the equivalent position to having made a lawful highway traffic stop. He had duties to perform, and these would necessarily bring him into contact with Mr. Butterfield and the SUV. He was not prohibited from making natural human observations in the course of these duties.

[82] Whether he later strayed outside the bounds of his proper authority is another matter.

[83] Constable Carroll testified that, in and around the area of the SUV, he could detect a strong odor of raw fresh cannabis. I accept this evidence. I also accept his statement that he concluded there had to be a source other than the small mostly consumed cannabis cigarette located in the front seat area of the SUV.

Mr. Butterfield Was Detained

[84] The Crown does not contest that, at least from the point Constable Carroll began asking for paperwork, Mr. Butterfield was detained. In his direct evidence the officer acknowledged that at such point he did not consider Mr. Butterfield free to depart: See *R. v. Orbanski*, 2005 SCC 37.

[85] When police have reasonable grounds to suspect that a person has a connection to a crime and the detention is necessary on an objective basis, the

police may detain a person for investigative purposes: See *R. v. Mann*, 2004 SCC 52, at paragraphs 43–45.

[86] Subject to certain limited exceptions which will be addressed shortly, as soon as an individual is detained, the police have an obligation to inform the detainee of their rights to counsel. This obligation is immediate: See *R. v. Suberu*, 2009 SCC 33, at paragraph 41.

[87] This obligation requires the police to inform the individual of their right to speak to a lawyer, provide them with a reasonable opportunity to exercise that right (except in urgent and dangerous circumstances), and to cease questioning the detainee until that reasonable opportunity has expired: See *R. v. Bartle*, [1994] 3 S.C.R. 173, at paragraph 17.

[88] However, the rights triggered upon detention are not absolute. For instance, the Supreme Court of Canada has determined that during brief roadside detentions a detainee's Section 10(b) *Charter of Rights and Freedoms* rights are suspended for the purpose of legitimate roadside investigations. See *R. v. Orbanski*, supra.; *R. v. Elias*, [2005] 2 S.C.R. 3.

[89] This has been found to apply as well in the case of provincial cannabis control legislation and the reasonable exercise of the powers granted under such

legislation: See *R. v. Grant*, 2021 ONCJ 90, at paras. 121–132; *R. v. Williams*, 2021 ONCJ 630, at paragraphs 74-75.

[90] A review of the applicable caselaw leads to the conclusion that, at the initial stage of the interaction, the officer had authority to briefly detain Mr. Butterfield for purposes of establishing compliance with provincial highway traffic and safety legislation.

[91] As is stated in a number of cases, he is not prohibited during this phase from making observations that can begin to build a reasonable suspicion or belief that other offences may have been committed. This is in fact what occurred in this case.

"Consent Search" for License – Seizure of Pepper Spray

[92] Constable Carroll testified that as a component of his on-scene duties he requested a driver's license from Mr. Butterfield. He was unable to produce it. He believed it to be somewhere in the vehicle. Air bags had deployed during the crash. The officer believed it was possible the license could have gone anywhere. Constable Carroll asked Mr. Butterfield if it was okay for him to take a look for it. The officer says permission was given and he looked around the front seat area of the vehicle without success.

[93] He continued his search for the license by opening and looking through the glove box area. It was at this point he identified and seized the pepper spray, which he believed to be a prohibited item. This precipitated the first arrest.

[94] It is necessary to categorize this initial search. Constable Carroll testified that when he asked Mr. Butterfield for permission to look for the license, he did not consider himself to be pursuing an investigation at that time.

[95] To determine whether a search is authorized by the common law, a court must assess: (1) whether the police actions fall within the general scope of any duty imposed on the police by statute or common law, and (2) whether, in all the circumstances, the police conduct involved is a justifiable use of the powers associated with the duty: See *R. v. Godoy*, [1999] 1 SCR 311, at paragraph 12, applying the UK Court of Appeal in *R. v. Waterfield***,** [1964] 1 QB 164.

[96] A number of Canadian courts have considered issues of police powers as they relate to licenses and vehicle registrations. Although an older judgment of the Supreme Court of Canada, the case of *R. v. Hufsky*, [1988] 1 SCR 621, at paragraph 638, continues to be cited on the issue of search as it relates to demands for motor vehicle and driver paperwork. The Supreme Court commented, in part, as follows:

> 26 … In my opinion the demand by the police officer, pursuant to the above legislative provisions, that the appellant surrender his driver's license and insurance card for inspection did not constitute a search within the meaning of s. 8 because it did not constitute an intrusion on a reasonable expectation of privacy. Cf. *Hunter v. Southam Inc*., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145. There is no such intrusion where a person is required to produce a license or permit or other documentary evidence of a status or compliance with some legal requirement that is a lawful condition of the exercise of a right or privilege.

[97] In addition to requiring production of various licensing documents, a police officer is also permitted to make visual inspection of the interior of a vehicle where they are carrying out their duties under statute. See *R. v. Ladouceur*, [1990] 1 SCR 1257 at pages 1286-87.

[98] In the present case, the officer did go further than simply asking for the license to be produced or scanning the vehicle interior. In the circumstances, did his hand search of the front of the SUV and glove box outstrip his authority?

[99] In *R. v. Belnavis*, [1997] 3 SCR 341, the Supreme Court of Canada dealt with a case where an officer looked through the glove box of a stopped vehicle, where the driver could not produce paperwork. The Court commented in part as follows:

> 28 Once the car had been pulled over and the driver said she did not have any ownership information, the officer had every right to look for documents pertaining to the ownership or registration of the vehicle. Similarly, he had the right to open the back door and look into the rear of the vehicle for safety reasons and to speak with the passenger in the back seat. See *R. v. Mellenthin*, 1992 CanLII 50 (SCC), [1992] 3 S.C.R. 615, at p. 623.

[100] The decision in *Belnavis* was considered more recently by the British Columbia Court of Appeal in *R. v. Burachenski*, 2010 BCCA 159:

> 13 The law is clear that the police are entitled to search a vehicle for identifying documentation when it is not produced by a driver who is being investigated for an offence. See *R. v. Belnavis, [1997]3 SCR 341* at para. 28. **(emphasis added)**

[101] In the present case, the officer specifically testified that the initial search he was making for the license was not for an investigatory purpose.

Consent Search Question

[102] I want to comment on this issue of whether this initial search can be categorized as a consent search. When testifying, the officer referred to having sought and obtained consent from Mr. Butterfield. This was also the initial position taken by the Crown in submissions. In subsequent submissions, the Crown conceded that any consent obtained here was not legally sufficient. A review of the caselaw allows us to understand why this concession was made.

[103] Consent searches, while permissible at law, can be highly problematic. Can an individual who is detained give an effective and informed waiver? Constable Carroll did not consider Mr. Butterfield free to leave during these initial inquiries. The Crown does not challenge the point that Mr. Butterfield was detained at this stage. Relying on the caselaw above, they do argue that during the relatively brief

"roadside stop" portion of the interaction, there would have been no obligation to provide right to counsel.

[104] Returning to the issue of consent to search, the Supreme Court of Canada has directed that the following has to be found to establish a valid consent:

1. There was a consent, either express or implied;
2. The consenting party had the authority to consent;
3. Consent was voluntary and not the product of police oppression, coercion or other external conduct negating the freedom to choose to give consent;
4. The consenting party knew the nature of the police conduct to which they were being asked to consent;
5. The consenting party knew they had the ability to refuse the search;
6. The consenting party was aware of the potential consequences of giving the consent, including a general understanding of the jeopardy resulting from the police conduct about which consent was being sought.

See: *R. v. Borden*, [1994] 3 SCR 145.

[105] The Crown bears the burden of proving these elements. Only then can a valid and informed waiver be found to exist: See *R. v. Reeve***s**, 2017 ONCA 365.

[106] Proving a free and voluntarily waiver from someone who is detained will always pose challenges for the Crown. It was clearly logical for the Crown in this matter to conclude that, in these circumstances, they would be unable to meet the burden of proving a valid consent search.

[107] Even after conceding that the search could not rise to the level of a true consent search, the Crown argued that the Court ought to consider any violation of

Mr. Butterfield's s. 8 to have been at the low end of the spectrum of violations. They submit this is a highly relevant consideration under the s. 24(2) analysis to be conducted pursuant to *R. v. Grant*, 2009 SCC 32.

Conclusion as to Initial Search Leading to Prohibited Weapon

[108] This was not a consent search and *Cannabis Control Act*, s. 24(1)(a) provided no authority under which the officer could search.

[109] Furthermore, the officer testified he was not investigating a suspected offence at this stage. I conclude that this removes this search from the scope of the authority discussed by the Supreme Court of Canada in *R. v. Belnavis*. There was no arrest at this relatively early point in the interaction. Accordingly, the power to search incident to arrest was not in play.

[110] The location of the alleged prohibited weapon triggered the first arrest of the accused. In this way, the situation very much mirrors the sequence of events in the newly released Supreme Court of Canada judgment in *R. v. Zacharias*, 2023 SCC 30. In this decision, the Supreme Court analyzes a situation where a seizure of contraband made in contravention of s. 8 leads to a detention that must be considered arbitrary.

[111] While the situation is always contextual, the majority of the Court provided direction on how these issues ought to be treated in the *R. v. Grant* analysis to be conducted under s. 24(2) of the *Charter of Rights and Freedoms*.

[112] I have concluded that this initial search was conducted in violation of Mr. Butterfield's s. 8 rights to be free from unreasonable search and seizure. This led to an arbitrary detention. Whether, as a result, the alleged prohibited weapon (pepper spray) ought to be excluded will be addressed in the s. 24(2) analysis to follow.

Location of Disposable Cup – Seizure of Cocaine

[113] The location and seizure of the disposable cup allegedly containing cocaine was originally a significant part of this application. As noted previously, the Defendant eventually withdrew this component of the request for *Charter of Rights and Freedoms* relief.

[114] Mr. Butterfield will continue to challenge at trial other matters relating to the alleged cocaine. These will include the element of possession.

***R. v. Grant* Analysis**

[115] The Court has concluded that the alleged prohibited weapon was seized in violation of the Defendant's s. 8 right to be free from unreasonable search and seizure.

[116] Evidence obtained in violation of a *Charter of Rights and Freedoms* protected right will be excluded under s. 24(2) if, considering all the circumstances, its admission would bring the administration of justice into disrepute. This determination requires a balancing assessment involving three broad inquiries:

1. The seriousness of the *Charter* infringing stage conduct;
2. The impact of the breach on the *Charter* protected interests of the accused; and
3. Society's interest in the adjudication of the case on its merits.

See: *R. v. Grant*, supra.

Seriousness of *Charter of Rights and Freedoms* Infringing Conduct

[117] The consideration of this factor focuses on the severity of the state conduct that led to the *Charter of Rights and Freedoms* breach, which includes an analysis of whether the breach was deliberate or wilful, and whether the officers were acting in good faith.

[118] We must consider whether the conduct is such that the Court is required to denounce the behavior by separating itself from the conduct. The greater the level

of state misconduct, the greater will be the need to disassociate from the conduct. Wilful or flagrant *Charter of Rights and Freedoms* violations will tend to support exclusion.

[119] Any violation of a constitutionally protected right is serious. Where it may fall on the spectrum is a matter of context and evidence. Good faith errors must be reasonable: See *R. v. Paterson***,** 2017 SCC 15 at paragraph 44.

[120] There was no element here of intrusive or abusive personal search of an individual. The search did not involve a residence. The absence of such factors may tend to move the violation away from the most serious end of the spectrum.

[121] The Court has reviewed a number of cases in which police error or over-reach was based, at least in part, on confusion as to the state of the law. Justice Cote, in separate concurring reasons in *R. v. Stairs*, 2022 SCC 11, commented as follows:

> 163 As my colleague Karakatsanis J. reaffirmed in *R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518, at para. 126 (concurring in the result), "where the police act on a mistaken understanding of the law where the law is unsettled, their *Charter*-infringing conduct is considered to be less serious" (citing R. v. Cole, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 86-87; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 69 and 71; see also *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 77; *Fearon*, at para. 93; S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at §19:40).
>
> 164 I therefore accept the Crown's submission that the seriousness of the infringement in this case is attenuated by the uncertainty of the law regarding residential searches incident to arrest at the relevant time. …

See also: *R. v. Wawrykiewycz*, 2020 ONCA 269.

[122] I find that the present case has some similar aspects. The officer was acting in a situation where there was some degree of legal uncertainty. He believed he had certain powers imparted by the *Cannabis Control Act*. Additionally, he sought and believed he had consent for a document search.

[123] All these factors can have a role at the balancing stage in determining how important it is for the Court to distance itself from the impugned conduct where a violation has been found to exist.

[124] I accept the position of the Crown that the officer's actions do not fall within a range of flagrant behavior that would demand strong denunciation. Taking a contextual view of the entirety of the interaction here, I conclude that the police decision making process, while flawed, was not at the severe end of the spectrum.

[125] This is not the clearest instance of police misconduct or malfeasance that would call out for condemnation by the Court.

Impact on Protected Interests

[126] Under this second stage of the analysis the inquiry involves the extent to which the breach actually undermines the interests protected by the right infringed: See *R. v. Grant*, paragraph 76. In the context of a s.8 breach, the focus is on the

magnitude or intensity of the individual's reasonable expectation of privacy, and on whether the search demeaned his or her dignity: See *R. v. Belnavis*, at paragraph 40. This latter consideration cannot be said to have been engaged in these circumstances.

[127] Importantly, the interests engaged here were not core privacy interests such as biographical data, conscripted personal evidence (such as DNA), nor a confession. Rather it was real evidence. This tends to lessen the seriousness of the impact for balancing purposes, but without entirely eliminating it as a factor.

[128] The place searched was a vehicle. There is a diminished expectation of privacy in a vehicle being operated on a public highway. This is a highly regulated sphere of activity.

[129] I earlier made mention of the newly released decision of the Supreme Court of Canada in *R. v. Zacharias*, supra. I have considered the comments of the Supreme Court on the issue of how a reviewing court ought to weigh consequential breaches, such as an arbitrary detention that flows from a wrongful search and seizure. Of specific assistance was the s. 24(2) analysis of the majority, including the discussion at paragraphs 70-73.

[130] Overall, in considering the effects on the *Charter of Rights and Freedoms* protected interests of the Defendant, I have concluded that while these interests

have been negatively impacted, these impacts do not fall at the extreme end of the spectrum. This factor would only weakly to moderately favour exclusion.

Society's Interest in Hearing on Merits

[131] Society's interest in the adjudication on the merits is significant. The evidence constitutes reliable and probative evidence in the prosecution of an offence. Its exclusion "would result in the absence of evidence by which the appellant could be convicted": See *R. v. Plant*, [1993] 3 S.C.R. 281.

[132] While it would be a rare situation where this factor would not favour inclusion, this third inquiry must not be permitted to overwhelm the s. 24(2) analysis: See *R. v.* Côté**,** 2011 SCC 46 at paragraph 48; *R. v. Harrison,* 2009 SCC 32 at paragraph 40. It is nonetheless entitled to appropriate weight.

[133] In the circumstances of this case, this final factor weighs heavily against exclusion of the evidence.

Balancing of Factors

[134] As was pointed out in *R. v. Harrison*, supra:

> 36 The balancing exercise mandated by s.24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance to determine whether having regard to all the circumstances admission of the evidence would bring the

> administration of justice into disrepute. Disassociation of the justice system from police conduct does not always trump the truth-seeking interest of the criminal justice system. Nor is the converse true. In all cases it is the long-term repute of the administration of justice that must be assessed.

[135] If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admission: See *R. v. McGuffie*, 2016 ONCA 365, at paragraph 63.

[136] I have considered the well-presented arguments on each side. The position of the Crown is that the officer in this case cannot, by any reasonable measure, be viewed as having acted in a shocking or oppressive manner. While a technical breach may have occurred, it is not a scenario that would result in damage to the administration of justice.

[137] In all the circumstances, I have concluded that the evidence ought not be excluded. On these particular facts, the Defendant has not carried his burden of establishing that the admission of the evidence would tend to bring the administration of justice into disrepute. I find support for this conclusion as well in the majority reasons of the Supreme Court in *R. v. Zacharias*, supra.

Summary of Conclusions

[138] Although there was a search and seizure violation, the weighing process under s. 24(2) of the *Charter of Rights and Freedoms* does not result in the exclusion of the challenged evidence.

Hunt, J.