
CANADA / JUDGMENT

R. v. Clayton

2007 SCC 32

COURT

Supreme Court of Canada

DECIDED

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R. v. Clayton

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2007 SCC 32

Report

[2007] 2 SCR 725

Case number

30943

Judges

McLachlin, Beverley; Bastarache, Michel; Binnie, William Ian Corneil; LeBel, Louis; Deschamps, Marie; Fish, Morris J.; Abella, Rosalie Silberman; Charron, Louise; Rothstein, Marshall

On appeal from

Ontario

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 30943

Decision Content

SUPREME COURT OF CANADA

Citation: R. v. Clayton, [2007] 2 S.C.R. 725, 2007 SCC 32

Date: 20070706

Docket: 30943

Between:

Her Majesty The Queen

Appellant

and

Wendell Clayton and Troy Farmer

Respondents

- and -

Attorney General of Canada, Attorney General

of British Columbia, Canadian Association of

Chiefs of Police, Canadian Civil Liberties Association,

and Criminal Lawyers' Association (Ontario)

Intervenors

Coram: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

Reasons for Judgment:

(paras. 1 to 54)

Concurring Reasons:

(paras. 55 to 132)

Abella J. (McLachlin C.J. and Bastarache, Deschamps, Charron and Rothstein JJ. concurring)

Binnie J. (LeBel and Fish JJ. concurring)

R. v. Clayton, [2007] 2 S.C.R. 725, 2007 SCC 32

Her Majesty The Queen Appellant

v.

Wendell Clayton and Troy Farmer Respondents

and

Attorney General of Canada, Attorney General

of British Columbia, Canadian Association of

Chiefs of Police, Canadian Civil Liberties Association,

and Criminal Lawyers' Association (Ontario) Intervenors

Indexed as: R. v. Clayton

Neutral citation: 2007 SCC 32.

File No.: 30943.

2006: June 19; 2007: July 6.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Arbitrary detention — Search and seizure — Roadblocks — Search power incidental to investigative detention — Police officers responding to report that prohibited firearms openly displayed in parking lot by blocking exit from lot and preventing two accused from leaving in their vehicle — Officers asking accused to exit vehicle — Officers searching accused — Accused carrying prohibited firearms — Whether police conduct in detaining and searching accused constitutional — Whether search incidental to investigative detention unreasonable — Canadian Charter of Rights and Freedoms, ss. 8 , 9 .

Criminal law — Police powers — Search incidental to investigative detention — Whether police officers acting within scope of common law police powers when they detained and searched accused.

A 911 call recorded at 1:22 a.m. reported that four of about ten “black guys” in a parking lot in front of a strip club were openly displaying handguns. The caller identified four vehicles. The dispatcher put out a gun call and a number of police immediately responded. At 1:26 a.m., Constables R and D positioned their police vehicle at the rear exit of the club’s parking lot. Almost immediately, a car left the area identified by the 911 caller and drove towards the exit. It was not one of the four cars referred to by the 911 caller. R and D stopped the car at 1:27 a.m. On stopping the car, they observed that the occupants, F and C, were black males. D approached F, the driver, and told him that there had been a gun complaint. He asked F to step out of the car and became concerned for his safety because F protested twice before getting out of the car. He asked F to put

his hands on the top of the car. Meanwhile, R approached C and began questioning him. C gave strange and evasive answers and stared straight ahead, avoiding eye contact. He was wearing gloves even though it was not “glove weather”. R asked C to get out of the car and to place his hands on the rear of the car. C got out of the car but stood blocking R’s visual access to the inside of the car. When R put his hand on C’s shoulder to direct him to the back of the car, C shoved R and ran away. D and R chased him while another constable, M, watched F. After police officers in front of the club subdued C, R searched him and found a loaded, prohibited handgun in his pocket. M arrested F for possession of a loaded prohibited weapon. F was searched and a loaded prohibited handgun was found under his jacket.

The trial judge held that the initial stop of both accused was lawful but that their further detention and search violated ss. 8 and 9 of the Canadian Charter of Rights and Freedoms . He admitted the guns into evidence under s. 24(2) of the Charter . The accused were convicted of carrying concealed weapons and the possession of loaded, prohibited firearms but appealed successfully to the Court of Appeal on the basis of alleged violations of ss. 8 and 9 of the Charter . The evidence of the handguns was excluded by the appellate court and acquittals on all charges were entered.

Held: The appeal should be allowed and the convictions should be restored.

Per McLachlin C.J. and Bastarache, Deschamps, Abella, Charron and Rothstein JJ.: R and D lawfully exercised their common law powers when they detained and searched the accused. There was no violation of ss. 8 or 9 of the Charter . [19] [49]

A law authorizing detention is subject to Charter scrutiny. The common law regarding police powers of detention requires the state to justify any interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive than reasonably necessary to address the risk. In determining the boundaries of police powers, caution is required to ensure the proper balance between enabling the police to perform their duties and the accused’s liberty and privacy interests. The determination will focus on the nature of the situation, including the seriousness of the offence; the information known to the police about the suspect or the crime; and, the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether the nature of the stop is no more intrusive than reasonably necessary. Searches incident to an investigative detention can be justified if the officer believes, on reasonable grounds, that his or her safety, or that of others, is at risk. [21] [26] [29] [31]

In the totality of the circumstances, the initial detention of the accused was reasonably necessary to respond to the seriousness of the offence and the threat to safety inherent in the presence of prohibited weapons in a public place and was temporally, geographically and logistically responsive to the circumstances known to the police. It was a justifiable use of police powers associated with the police duty to investigate the offences described by the 911 caller. The police

had reasonable grounds to believe that there were several handguns in a public place. This represented a serious offence, accompanied by a genuine risk of serious bodily harm to the public. Requiring the police to stop only those vehicles described by the 911 caller would impose an unrealistic burden on the police, inconsistent with their duty to respond in a timely manner to the seriousness of the circumstances. [33] [37] [41]

The continued detention of the accused was also justified. The police view that the accused were implicated in the offence under investigation was reasonable. They knew that some people leaving the parking lot would have guns and that the suspects were black males. Both accused came from the scene of the reported crime, in the first vehicle to leave the lot within minutes of the 911 call, and matched the 911 caller's description. [45-47]

D and R's safety concerns justified the searches of both accused as incidental to their lawful investigative detentions. The relevant time for assessing D and R's conduct is the time of the actual search and seizure. By that time, they had the requisite subjective and objective grounds to search the accused. [48-49]

Per Binnie, LeBel and Fish JJ. : On occasion the Crown will argue (as here) that a common law which authorizes police conduct that infringes individual Charter freedoms may nevertheless be justified in the larger interest of society. The majority applies the pre-Charter test set out in *Waterfield*. However, continued use of the *Waterfield* approach without modification not only adds to the problematic elasticity of common law police powers, but sidesteps the real policy debate in which competing individual and societal interests should be clearly articulated in the established framework of Charter analysis. The common law *Waterfield* test should be modified where police claim a common law power that is challenged on Charter grounds by requiring a court first to determine whether the power claimed by the police exists at common law, and if so whether the common law would, if valid, authorize police interference with Charter rights, and finally whether the interference thus authorized can be justified under s. 1 of the Charter . If necessary, the court may also have to determine in a particular case whether the power was exercised reasonably by the police in the totality of the circumstances. [59-61]

Individuals going about their ordinary business should not be blocked by the police and required to account for themselves unless there exists legal authority for the detention. When the police blocked the accused's car, they were implementing a strategy to stop all cars without any criteria to select the drivers to be stopped. The accused were arbitrarily detained within the meaning of s. 9 of the Charter . [62] [65-66]

Justification for the accused's arbitrary detention must come from statute or the common law. Here there is no statute and no existing jurisprudence authorized the blockade. The trial judge found that unlike in *Mann* the police here did not have reasonable grounds for individualized suspicion of the accused when they stopped their car. Nor was the initial detention of the accused based on the police power to detain in dangerous circumstances such as when a violent crime has been committed or as in *Murray* when dangerous criminals are in fresh flight. Nor can the police turn to case law that affirms the lawfulness of a blockade in support of road safety because

the roadblock in this case had nothing to do with road safety. It is contended that at common law, however, the police may authorize blockades to stop, detain and question motorists where interference with an accused's liberty is reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the police interference. [58] [67-68] [70-71] [81] [84] [86] [98]

At common law, police interference with liberty interests must be necessary to carry out a police duty. Police duties include the preservation of the peace, the prevention of crime, and the protection of life and property. Here the police had reasonable grounds to believe that a serious crime had been committed and that the perpetrators might be apprehended by a quick roadblock. Gun calls import a threat to public order and concerns for safety. In this case, the proximity of the roadblock to the reported offence, in place and time, increased the likelihood of effective police action and any interference with exiting motorists was of relatively short duration and of slight inconvenience. The roadblock was authorized at common law. [68-69] [90] [99-100]

The common law ostensibly authorized limited infringement of motorists' Charter liberties. The purpose of the roadblock was to determine the whereabouts of guns reported in a 911 call and to obtain information leading to the arrest of those guilty of the reported firearms offences. A law authorizing the roadblock must necessarily include interference with civil liberties of passing motorists to the extent reasonably necessary to achieve the purpose of the blockade. The law afforded the police an initial opening to engage with the motorists who were stopped, and to proceed (or not) according to whatever information emerged from a view of the occupants and the vehicle's interior and some quick screening questions. [72] [97]

The common law authority of detention by a carefully tailored blockade in response to a 911 gun call constitutes a reasonable limit under s. 1 of the Charter on the rights of the accused guaranteed by s. 9 of the Charter to be free of arbitrary detention. Section 1 is the proper place to weigh the accused's individual rights against society's collective rights. The protection of society from the flaunting of illegal handguns in a crowded public place is clearly a pressing and substantial public purpose. An investigation prompted by a gun call engages fundamental issues of public peace and public order. Handguns pose a serious and growing societal danger. The roadblock was a rational response to the 911 gun call. The blockade in this case minimally impaired the accused's right to be free from arbitrary detention. The roadblock was tailored to the information given to the police and anything less than a full blockade would not have served the purpose of the roadblock. The salutary effects of the roadblock exceeded its deleterious effects. [102] [106] [108] [113] [115-118] [122]

On the facts here the police exercised their blockade powers reasonably "in the totality of the circumstances". It would not have been prudent for the police to assume that the people reported by the 911 caller would necessarily leave in the vehicles described by the caller. The police should not be required to rely on an unknown 911 caller's ability to recognize vehicle makes. The blockade involved no more than a brief imposition on the time of motorists departing from the parking lot. The police did not overreach their powers by stopping the accused. [121-122]

The searches of the accused did not violate s. 8 of the Charter . By the time C was asked to step out of the car, the police had sufficient individualized suspicion to detain and search him. His appearance corresponded to the 911 call and he was wearing gloves on a warm night explicable by a concern about fingerprints. When C was told police were responding to a gun call he bolted. The gun found when he was searched was properly admitted into evidence. The case of F is more problematic but it would have been unrealistic to treat F as unconnected to C. Both, being black, fit the general description by the 911 caller. F was quickly leaving the parking lot immediately after the gun call in the same car as C. Once sufficient grounds arose to require C to get out of the car and submit to a search for reasons of police safety, it would have been foolhardy for the police to leave F, possibly armed, in the car. There were sufficient grounds for a pat-down search of F for officer safety incidental to his continued detention. His gun thereby disclosed was also properly entered into evidence. [123-124]

Cases Cited

By Abella J.

Applied: *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52; referred to: *R. v. Murray* (1999), 136 C.C.C. (3d) 197; *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Simpson* (1993), 79 C.C.C. (3d) 482; *Dedman v. The Queen*,

[1985] 2 S.C.R. 2; Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31; *R. v. Felawka*, [1993] 4 S.C.R. 199; *R. v. Waterfield*, [1963] 3 All E.R. 659.

By Binnie J.

Applied: *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Oakes*, [1986] 1 S.C.R. 103; discussed: *R. v. Murray* (1999), 136 C.C.C. (3d) 197; *R. v. Waterfield*, [1963] 3 All E.R. 659; distinguished: *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52; *R. v. Simpson* (1993), 12 O.R. (3d) 182; referred to: *R. v. Orbanski*, [2005] 2 S.C.R. 3, 2005 SCC 37; *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Stenning*, [1970] S.C.R. 631; *Knowlton v. The Queen*, [1974] S.C.R. 443; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Wray*, [1971] S.C.R. 272; *Hogan v. The Queen*, [1975] 2 S.C.R. 574; *Terry v. Ohio*, 392 U.S. 1 (1968); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3, 2003 SCC 38; *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173; *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1; *Perry v. State of Florida*, 422 So.2d 957 (1982); *R. v. Swain*, [1991] 1 S.C.R. 933; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. Stone*, [1999] 2 S.C.R. 290; *R. v. Spence*, [2005] 3 S.C.R. 458, 2005 SCC 71; *United States v. Clipper*, 973 F.2d 944 (1992); *Printz v. United States*, 521 U.S. 898 (1997); *R. v. Collins*, [1987] 1 S.C.R. 265.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 , 8 , 9 , 24 .

Crimes Act 1961 (N.Z.), 1961, No. 43, s. 317B.

Criminal Code, R.S.C. 1985, c. C-46 .

Law Enforcement (Powers and Responsibilities) Act 2002 (N.S.W.), 2002, No. 103, s. 37.

Police and Criminal Evidence Act 1984 (U.K.), 1984, c. 60, ss. 1, 4.

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Police Powers (Vehicle Interception) Act 2000 (Tas.), 2000, No. 46, s. 5.

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Stribopoulos, James. "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005), 31 Queen's L.J. 1.

APPEAL from a judgment of the Ontario Court of Appeal (McMurtry C.J.O. and Doherty and Lang JJ.A.) (2005), 196 O.A.C. 16, 194 C.C.C. (3d) 289, 27 C.R. (6th) 197, 129 C.R.R. (2d) 82, [2005] O.J. No. 1078 (QL), setting aside the accused's convictions for unlawfully carrying concealed weapons and possessing loaded prohibited firearms. Appeal allowed.

Michal Fairburn and Lisa Joyal, for the appellant.

Heather A. McArthur and Mara Greene, for the respondent Wendell Clayton.

Deepak Paradkar, Faisal Mirza and S. Jay Passi, for the respondent Troy Farmer.

Robert W. Hubbard and Marian E. Bryant, for the intervener the Attorney General of Canada.

M. Joyce DeWitt-Van Oosten, for the intervener the Attorney General of British Columbia.

Greg Preston and Bonnie Bokenfohr, for the intervener the Canadian Association of Chiefs of Police.

Jonathan C. Lisus and Christopher A. Wayland, for the intervener the Canadian Civil Liberties Association.

Frank Addario and Jonathan Dawe, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of McLachlin C.J. and Bastarache, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

1 Abella J. — Within minutes of receiving a 911 call indicating that a number of persons were openly displaying handguns in a strip club's parking lot, the police stopped the first car leaving from the lot's rear exit. The car's two occupants, Wendell Clayton and Troy Farmer, were searched. Each had a loaded semi-automatic handgun, weapons prohibited by the Criminal Code, R.S.C. 1985, c. C-46 . The issue in this appeal is the constitutionality of the police conduct in stopping and searching Clayton and Farmer.

I. Background

2 At 1:22 a.m. on Friday, September 24, 1999, a dispatcher received a 911 call from an agitated caller who said he was inside a Coffee Time donut store across the street from the Million Dollar Saloon, a strip club. He said there were about ten "black guys" in the parking lot at the front of the club and that four of them had handguns "like glocks". He said about their guns that "they had them and took them out and they put them back in all together". He was able to identify four cars in the parking lot because their headlights were on: a black GMC Blazer, a black Jeep Cherokee, a tan-coloured Lexus LS and a white two-door Acura Legend. The Blazer had already left the parking lot when the call was made.

3 At 1:24 a.m., the dispatcher called the police in the area and told them that a 911 caller "can see a bunch of male blacks with guns out front of the Million Dollar . . . [C]omplainant saw approximately 10 parties. Four of them with guns". The dispatcher then described the four vehicles, indicating that the Blazer had left. A number of police immediately converged on the club, and set up perimeter surveillance posts around it.

4 There are two entrances to the club's parking lot, one in front and one at the rear. At 1:26 a.m., P.C. Andrew Robson and P.C. Jeff Dickson positioned their vehicle so they could watch the rear exit. The purpose of the "perimeter", according to P.C. Dickson, was to "make sure everything stays inside it". Almost immediately, a black car drove from the front of the building towards the rear exit. P.C. Robson and P.C. Dickson blocked the exit, stopping the car. On stopping the car, they observed that the two occupants were black males.

5 The police got out of their cruiser and approached the car, a Jaguar. It was not one of the four vehicles specifically identified by the 911 caller. P.C. Robson went to the passenger's side where Clayton was sitting and P.C. Dickson approached the driver, Farmer.

6 P.C. Dickson told Farmer that there had been a gun complaint and asked him, for his own safety, to step out of the car. In his words:

For my safety I wanted to — just so I could see around. I could see around, make sure he didn't have — wasn't holding a gun. And if he stepped out I could see his hands better. Might be able to see anything if there was anything in pockets or anything. So, it's just to see in the car, if there's anything maybe on the seat

Farmer responded, "You've got to be kidding." P.C. Dickson again asked him to get out of the car. Once again Farmer protested, saying "This is ridiculous." P.C. Dickson asked him a third time and was met with the same response. Farmer finally got out of the car.

7 Suspicious because of Farmer's reluctance to get out of the car and concerned for his safety, P.C. Dickson asked him to turn around and put his hands on the top of the car. He explained his conduct as follows:

A. After he got out I asked the driver if he could turn around and put his hands on top of the car.

Q. Why? Why did you ask him to do that?

A. For my safety. Like, at this point I had no idea what — just that it's suspicious of what was going on. I wanted to make sure I could see everything first. Like, right away I asked him to turn around. I was going to — I had the full intention, right at that time, to search the driver. I went to put my hand on him.

Q. And why were you planning to search the driver?

A. Just that, this time with the seriousness of the call, and everything with the description, we were just going to see if he was carrying any weapons.

8 Clayton was in the passenger seat. P.C. Robson told Clayton that their car had been stopped because there had been a gun call and they were looking for guns. Clayton told him that they had just arrived at the club, prompting P.C. Robson to ask why they were leaving. Clayton paused and again said, "But we just got here." When asked if they had seen anything at the front of the club, Clayton repeated, "We just got here."

9 During this discussion, Clayton stared straight ahead, making no eye contact. P.C. Robson noticed that Clayton was wearing black leather driving gloves despite being the passenger and the night being, as P.C. Robson said at trial, “certainly not glove weather”.

10 Because of the gloves, the way he was responding to his questions, and the fact that this was the first and only car to leave the area, P.C. Robson asked Clayton to get out of the car in order to search it. P.C. Robson testified that since Clayton was “a heavy set individual”, it would be easier to search the two-door sports car if no one occupied the seat. Clayton complied, but looked nervous and was swaying from side to side, blocking visual access to the inside of the car. For his own protection, P.C. Robson asked him twice to move to the rear of the car and place his hands on the car where he could see them, but Clayton simply responded that he had nothing on him. P.C. Robson then put his hand on Clayton’s shoulder to direct him to the back of the car. Clayton shoved him, causing him to lose his balance, and ran towards the front of the club.

11 P.C. Dickson, who was with Farmer but saw the struggle, joined P.C. Robson in chasing Clayton. He turned Farmer over to P.C. Lance Mulholland, who had stopped his cruiser behind P.C. Robson’s.

12 When they got to the front of the club, P.C. Robson and P.C. Dickson found Clayton lying on the ground, subdued by other officers. While Clayton was on the ground, one of the club’s bouncers told the police that Clayton was one of the men with the guns. P.C. Robson escorted Clayton, who had by now been handcuffed, back to the police cruiser. On their way back, P.C. Robson asked Clayton if he had any guns. When Clayton nodded, P.C. Robson asked where it was. Clayton told him it was in his pant pocket, and P.C. Robson pulled what turned out to be a loaded semi-automatic pistol from Clayton’s pocket. There were eight rounds of ammunition in the gun.

13 P.C. Mulholland, who had seen the struggle between Clayton and P.C. Robson, ordered Farmer to put his hands on the car roof. Because, after a few seconds, he said he heard P.C. Robson confirm over the radio that Clayton was in custody and had been in possession of a firearm, P.C. Mulholland immediately arrested Farmer for possession of the gun found on Clayton. He then turned Farmer over to another officer, P.C. Pidano, who found a loaded handgun when he lifted Farmer’s jacket.

14 The trial took place prior to this Court’s decision in *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52. Relying on *R. v. Murray* (1999), 136 C.C.C. (3d) 197 (Que. C.A.), a decision which affirmed the constitutionality of a roadblock, the trial judge, Durno J., held that the initial stopping of Farmer and Clayton’s vehicle was lawful, but that the further detention and search violated ss. 8 and 9 of the Canadian Charter of Rights and Freedoms. He declined, however, to exclude their guns from the evidence under s. 24(2), concluding that the Charter breaches occurred in a “fast-paced situation” in which the officers had “little time for reflection”, that the admission of the guns into evidence would not affect trial fairness, that there was no bad faith on the part of the police, and that the exclusion of the guns would do more to bring the administration of justice into disrepute than their admission ([2001] O.J. No. 2393 (QL)). Both Farmer and Clayton were convicted of unlawfully carrying a concealed weapon and possessing a loaded prohibited firearm.

15 In the Ontario Court of Appeal, Doherty J.A., writing for a unanimous court, allowed Farmer and Clayton's appeals, quashed the convictions, and entered acquittals on all charges ((2005), 194 C.C.C. (3d) 289). The court concluded that the "roadblock" was unlawful because there was no imminent danger and because the police did not tailor their intervention to stop only the four vehicles identified in the 911 call. Had they properly tailored their response, Farmer and Clayton's vehicle would not have been detained. As a result, their detention and subsequent searches violated ss. 9 and 8 of the Charter .

16 In its s. 24(2) analysis, the Court of Appeal found the Charter breaches to be of such severity as to justify the exclusion of the evidence. The court concluded that, in stopping the car, the police did not turn their minds to the ancillary powers doctrine and consider the limits of their powers. This failure, the court concluded, was a result of the training they had received, which "left no room for a fact-specific assessment once a 'gun call' went out" (para. 84). The guns were therefore excluded to send an "emphatic" message to the police about their "institutional failure", which the court found "significantly aggravate[d]" the seriousness of the breach.

17 The Crown appealed, arguing, persuasively in my view, that the police had lawful authority for the methodology used in this case and that, accordingly, there were no violations of ss. 8 or 9 of the Charter .

II. Analysis

18 The Crown conceded that the initial stopping of Clayton and Farmer resulted in their detention within the meaning of s. 9 of the Charter . The Crown also acknowledged that the subsequent police examination of the interior of the car and its occupants constituted a search for the purposes of s. 8 . Those provisions of the Charter state:

- 8. Everyone has the right to be secure against unreasonable search or seizure.
- 9. Everyone has the right not to be arbitrarily detained or imprisoned.

19 If the police conduct in detaining and searching Clayton and Farmer amounted to a lawful exercise of their common law powers, there was no violation of their Charter rights. If, on the other hand, the conduct fell outside the scope of these powers, it represented an infringement of the right under the Charter not to be arbitrarily detained or subjected to an unreasonable search or seizure.

20 The following passages from Mann are instructive:

A detention for investigative purposes is, like any other detention, subject to Charter scrutiny. Section 9 of the Charter , for example, provides that everyone has the right "not to be arbitrarily detained". It is well recognized that a lawful detention is not "arbitrary" within the meaning of that provision. Consequently, an investigative detention that is carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the Charter .

...

The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. [Emphasis added; paras. 20 and 40.]

Thus, a detention which is found to be lawful at common law is, necessarily, not arbitrary under s. 9 of the Charter. A search done incidentally to that lawful detention will, similarly, not be found to infringe s. 8 if the search is carried out in a reasonable manner and there are reasonable grounds to believe that police or public safety issues exist.

21 The statement that a detention which is lawful is not arbitrary should not be understood as exempting the authorizing law, whether it is common law or statutory, from Charter scrutiny. Previous decisions of this Court are clear that where a detention by police is authorized by law, the law authorizing detention is also subject to Charter scrutiny: *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257. The courts can and should develop the common law in a manner consistent with the Charter: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 875-78. The common law regarding police powers of detention, developed building on *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.), and *Dedman v. The Queen*, [1985] 2 S.C.R. 2, is consistent with Charter values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.

22 The key question in this appeal, therefore, is whether the police were acting within the scope of their common law police powers when they detained Clayton and Farmer. These common law powers were described by Doherty J.A. in his reasons at paras. 35-37 with great clarity, requiring no further refinement here:

The powers and duties of constables at common law were described in *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.) at 661:

In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

The powers of police constables at common law, often described as the ancillary police power, as set out in *Waterfield* have been accepted by the Supreme Court of Canada as part of the Canadian common law in several decisions rendered both before and after the proclamation of the Charter : see e.g. *Knowlton v. The Queen* (1973), 10 C.C.C. (2d) 377 (S.C.C.) at 379-80; *Dedman v. The Queen* (1985), 20 C.C.C. (3d) 97 (S.C.C.); *R. v. Godoy* (1999), 131 C.C.C. (3d) 129 (S.C.C.) at 135-36; *R. v. Mann* [(2004), 185 C.C.C. (3d) 308 (S.C.C.)], at 320-1. The power of the police to detain for investigative purposes in some circumstances and the power to search as an incident of arrest are two of the better known examples of the exercise of the common law ancillary police power: *R. v. Mann*, *supra*; *R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.) at 107-108.

Where the prosecution relies on the ancillary power doctrine to justify police conduct that interferes with individual liberties, a two-pronged case-specific inquiry must be made. First, the prosecution must demonstrate that the police were acting in the exercise of a lawful duty when they engaged in the conduct in issue. Second, and in addition to showing that the police were acting in the course of their duty, the prosecution must demonstrate that the impugned conduct amounted to a justifiable use of police powers associated with that duty: *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) at 23-24. [Emphasis deleted.]

23 Doherty J.A. accepted that the first prong of the analysis was met in this case. In his view, which I share, the police “were clearly acting in the course of their duty to investigate and prevent crime” when they stopped the car and detained its occupants (para. 38). It is true that the police had no specific statutory authority for the initial stop but, as Doherty J.A. pointed out, and as s. 42(3) of the Police Services Act, R.S.O. 1990, c. P.15, confirms, “[i]t is . . . well established that the police power to interfere with individual liberties reaches beyond those powers specifically enumerated in statutes” (para. 34).

24 On the specific facts of this case, however, Doherty J.A. was not persuaded that the conduct was a justifiable use of police powers associated with their duty. With great respect, the facts lead me to a different conclusion. I agree with the trial judge, Durno J., that on the information available to the police, they were justified in stopping “all vehicles” emerging from the parking lot and “would have been derelict in their duties had they sat by and watched vehicles leave” (para. 56).

25 In *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 18, this Court accepted the following test developed by Doherty J.A. in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), at p. 499, for assessing whether police interference with individual liberties was justified:

[T]he justifiability of an officer’s conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.

26 In determining the boundaries of police powers, caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what is reasonably necessary to perform their duties in protecting the public. It was expressed by Le Dain J. in *Dedman*, as follows:

The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [p. 35]

27 The Court's most recent delineation of this complex assessment is found in *Mann*, where Iacobucci J. described the interplay as follows:

[O]ur duty is to lay down the common law governing police powers of investigative detention in the particular context of this case.

. . . Over time, the common law has moved cautiously to carve out a limited sphere for state intrusions on individual liberties in the context of policing. The recognition of a limited police power of investigative detention marks another step in that measured development. It is, of course, open to Parliament to enact legislation in line with what it deems the best approach to the matter, subject to overarching requirements of constitutional compliance. [Emphasis added; paras. 17-18.]

28 *Mann* dealt with the detention of an individual walking on the sidewalk during the investigation of a break and enter. The Court concluded that the detention was lawful since the accused not only closely matched the description given by the radio dispatcher, which had included the age, race, height, weight, and clothing of the suspect, but also because the accused was only two or three blocks from the scene of the reported crime. While the circumstances in this case are different from those in *Mann* since the police in this case were obviously unable to identify any particulars about the occupants before their initial detention, some of the analysis in *Mann* is nonetheless helpful in assessing whether the police were acting within the scope of their common law powers:

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 officers' 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 officers' duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test. [Emphasis added; para. 34.]

29 The Court, as previously noted, also clarified in Mann that searches incident to an investigative detention could be justified if the officer believes “on reasonable grounds that his or her own safety, or the safety of others, is at risk”:

The officer’s decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition. [para. 40]

30 The justification for a police officer’s decision to detain, as developed in Dedman and most recently interpreted in Mann, will depend on the “totality of the circumstances” underlying the officer’s suspicion that the detention of a particular individual is “reasonably necessary”. If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. As explained in Mann, searches will only be permitted where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk.

31 The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

32 In my view, both the initial and the continuing detentions of Clayton and Farmer’s car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention.

33 The police set up the initial stop in response to a 911 call identifying the presence of about ten “black guys”, four of them with guns. The police described what they were doing as setting up perimeter surveillance posts to secure the confined geographical area where the offence they were investigating had reportedly taken place. The police had reasonable grounds to believe that there were several handguns in a public place. This represented a serious offence, accompanied by a genuine risk of serious bodily harm to the public. The police were entitled to take reasonable measures to investigate the offence without waiting for the harm to materialize and had reasonable grounds for believing that stopping cars emerging from this parking lot would be an effective way to apprehend the perpetrators of the serious crime being investigated.

34 Like Doherty J.A., I am of the view that, as he indicated at para. 56 of his reasons, the information conveyed by the 911 call provided reasonable grounds for the police to believe that “several individuals were committing serious firearms-related criminal offences in front of the club” and that “those individuals who had vehicles would leave the parking area through one of the two available exits”. As Doherty J.A. pointed out, the 911 system assumes that the police will react in a timely fashion to the information provided and that the police should be entitled to rely on such information.

35 The seriousness of the offences being investigated and the potential risk to public safety were also relied upon by Durno J. to conclude that the initial detention was a justifiable use of police powers. Additionally, he noted that the detention took place within minutes of the 911 call; that only those leaving the parking area were restricted in their movement; and that the exits from the parking area were the principal escape routes for those seen with guns.

36 Doherty J.A. acknowledged that the purpose of stopping the car was “to apprehend individuals in possession of dangerous weapons and seize those weapons before they could be used in criminal activity to harm others” (para. 41). Significantly, he also accepted that the information received by the police represented “a significant and undeniable danger”:

Criminal conduct involving the use of firearms, especially handguns, is a serious and growing societal danger. The law abiding segment of the community expects the police to react swiftly and decisively to seize illegal firearms and arrest those in possession of them. The risk posed to the community by those in possession of handguns gives an added significance to police efforts to seize those weapons and apprehend those in possession of them beyond the always important police duty to investigate and prevent criminal activity. [para. 41]

(See also Reference re Firearms Act (Can.), [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 45; R. v. Felawka, [1993] 4 S.C.R. 199, at p. 211.)

37 I part company with him, however, when he concludes that notwithstanding the seriousness of the crimes and the inevitability that the perpetrators would use one of the exits, the police were not entitled to stop a car leaving the area unless it and the occupants matched exactly the information provided by the 911 caller as to the make of the vehicles or the casual clothing of the men in the parking lot. The detention of Clayton and Farmer’s car was, as a result, found by him not to be sufficiently tailored to the circumstances because the police had decided to detain every car leaving the parking lot instead of just the four vehicles specifically described in the 911 call. With great respect, in my view requiring the police to stop only those vehicles described in the 911 call imposes an unrealistic burden on the police in this case, and one inconsistent with their duty to respond in a timely manner, at least initially, to the seriousness of the circumstances.

38 It is true that the caller described only four cars of the several in the parking lot, but the four vehicles described in the call were part of a larger scenario: four men with guns, part of a larger group of about ten men, all of whom were standing outside in the parking lot at the front of the strip club, none inside their vehicles, and any one of whom may have used a car other than those specifically described. The police set up their vehicles at the exit of the club’s parking lot so as to detain only those vehicles in the parking lot at the time. Stopping a car emerging from this site was, with respect, an eminently reasonable response to the safety issues at stake.

39 The police timing was also responsive to the circumstances. They received the 911 call at 1:22 a.m. The officers in the area were notified at 1:24 a.m. and P.C. Robson and P.C. Dickson arrived at the rear exit of the parking lot at 1:26 a.m. By 1:27 a.m., within five minutes of the 911 call and one minute of their own arrival at the strip club, they had detained Farmer’s vehicle.

40 The police had reasonable grounds to believe that public safety was at risk, that handguns could be in the possession of those leaving the parking area, and that stopping cars leaving that area could result in their apprehension. The steps taken by the police in this case in stopping the car, based on the information they had, were reasonable and reasonably tailored to the information they had.

41 In the totality of the circumstances, therefore, the initial detention in this case was reasonably necessary to respond to the seriousness of the offence and the threat to the police's and public's safety inherent in the presence of prohibited weapons in a public place, and was temporally, geographically and logistically responsive to the circumstances known by the police when it was set up. The initial stop was consequently a justifiable use of police powers associated with the police duty to investigate the offences described by the 911 caller and did not represent an arbitrary detention contrary to s. 9 of the Charter .

42 Having concluded that their initial detention was constitutionally permissible, the next issue is whether the conduct of the police in further detaining and searching Clayton and Farmer was justified.

43 Doherty J.A. concluded that, had he found the initial stop to be constitutional, the subsequent removals and searches of the occupants would have been a justified exercise of police powers:

In my view, legitimate police safety concerns justify a “pat-down” search of occupants removed from vehicles at a roadblock where the police have information that provides reasonable grounds to believe that one or more of the individuals detained at the roadblock may be armed. I do not think the police can be put in a position where they may have to turn their back on the occupants of the vehicle without first conducting a “pat-down” search. While my conclusion that a “pat-down” search would be warranted extends the police power, it also significantly increases the interference with individual liberty occasioned by the roadblock stop. As that interference grows, arguments which are said to make the conduct justifiable must become all the more compelling. [para. 67]

44 This analysis is logically compelling given the purpose of the detention and the reasonableness of the police view, at the time, that Clayton and Farmer were implicated in the criminal activity under investigation. The police knew that some of the people leaving the parking lot would have guns. They also knew that the suspects were black males in the parking lot of the Million Dollar Saloon. After stopping the Jaguar, the police discovered that both occupants matched the race of the suspects mentioned in the 911 call, that Clayton was wearing leather gloves despite being a passenger and despite the weather not being glove weather, and that Clayton was giving strange and evasive answers to P.C. Robson's questioning. The trial judge found that Clayton was behaving in a way that gave rise to a reasonable suspicion that he might be in possession of a firearm. That gave the officer reasonable grounds for suspecting that he was one of the four men who had a gun in the parking lot.

45 Moreover, P.C. Dickson testified that he became concerned for his own safety because it took three requests to get Farmer out of the car. The police already knew that the vehicle driven by Farmer came from the scene of the reported crime, that it was the first vehicle to leave the parking lot within minutes of when the crime was reported, and that it avoided leaving by the front exit, where the other officers were arriving, and instead headed towards the rear exit.

46 Taken together, these facts, objectively, gave rise to the reasonable suspicion that the occupants of the Jaguar could be in possession of the handguns reported in the 911 call, and that, as a result, the lives of the police officers and of the public were at risk, justifying their continued detention. This constellation of circumstances was such that the police were required to, and did, respond quickly and appropriately to the information they had about the possession of guns by individuals in this particular parking lot. They treated the two occupants as equally likely to be connected to the serious crime under investigation. They were reasonable in taking this approach once they saw that both individuals, in a car that had just left the crime scene, matched the general description they had.

47 I accept Doherty J.A.'s conclusion that had the police stopped the vehicle and discovered that the occupants did not correspond to the description given by the 911 caller, they would have had no reasonable grounds for the continued detention of the occupants. For example, had the caller described individuals who were white, the police would not have had reasonable grounds for the continued detention of non-white occupants. On the particular facts of this case, however, based on their subsequent observations, there were reasonable grounds, as required by Mann, for the police to conclude that the two occupants of the car they had stopped were implicated in the crime being investigated.

48 The officers' safety concerns also justified the searches incidental to the detention. The trial judge based his finding that Farmer's and Clayton's s. 8 rights were violated on his conclusion that the decision to search them was made before the officer had the objective grounds to do so. This, it seems to me, ignores the fact that the relevant time is the time of the actual search and seizure. By that time, the officers had the requisite subjective and objective grounds. Intention alone does not attract a finding of unconstitutionality. It is not until that subjective intent is accompanied by actual conduct that it becomes relevant. We would otherwise have the Orwellian result that Charter breaches are determined on the basis of what police officers intend to do, or think they can do, not on what they actually do. The Charter protects us from conduct, not imagination, and even a benign motive may not justify objectively unreasonable police conduct.

49 Nor did the trial judge accept P.C. Mulholland's evidence that he had overheard the information about Clayton's arrest and possession of a gun on the radio. In my view, however, this finding is not determinative. Since the search of both occupants was justified for safety reasons as incidental to the detention, it does not matter whether P.C. Mulholland received a radio transmission telling him that a handgun had been found on Clayton when he arrested Farmer. In all the circumstances, the search was necessarily incidental to the lawful investigative detention and, consequently, there was no violation of s. 8 .

50 Having found no breaches of Clayton's and Farmer's Charter rights, it is unnecessary to undertake a s. 24(2) analysis. It is, however, worth addressing the Court of Appeal's conclusion that the "institutional failures" of the police to adequately train their officers "significantly aggravate[d]" the seriousness of the breach in this case.

51 In their testimony, the police did not expressly advert to the factors relevant to the exercise of their ancillary powers or explain the way they balanced the pros and cons of deciding whether to set up the perimeter surveillance. What is under constitutional scrutiny is the police conduct, not police training. The officers' good faith in carrying out their duties is the issue in this case. To go further and examine the training behind such conduct would risk transforming the inquiry into a protracted pedagogical review of marginal relevance to whether the police conduct itself represented a breach of sufficient severity to warrant excluding the evidence.

52 There is no doubt that police training is important, but there was no evidence in this case that these police officers were in fact the subject of improper training. The evidence was that the officers were trained to treat all "gun calls" seriously as "high risk takedowns". This is not tantamount to being trained to ignore the specific facts and circumstances of each case in favour of indiscriminate detentions, searches and arrests, as the Court of Appeal concluded. Police officers need hardly be told that guns pose significant threats to their safety and that of the public. These are threats that they rightly take seriously. It cannot be inferred, from the fact that this common sense conclusion was inculcated in police officers, that they were therefore trained to understand a "gun call" as a source of authority to undertake whatever "measures could lead to the recovery of the weapons and the apprehension of the offenders". Such a conclusion is not supported by the record or, more importantly, by the findings of the trial judge.

53 I agree with the trial judge who found that the police in this case were responding to legitimate safety concerns in a "fast-paced" situation. Measuring the police's conduct towards Clayton and Farmer against the law and the factual context, it can hardly be said that it reflected bad training, let alone bad faith justifying the exclusion of the evidence.

III. Conclusion

54 I would therefore allow the appeal and restore the respondents' convictions.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

55 Binnie J. — This appeal requires the Court to consider the common law powers of the police in the course of a criminal investigation and in particular to consider whether the police may detain individuals against whom they have no particular grounds of suspicion having regard to the guarantees set out in the Canadian Charter of Rights and Freedoms . The appellant argues that in the context of a 911 gun call the police may do so, and may thereafter proceed by incremental steps (as new information becomes available to the police to focus suspicion on particular individuals) to further detain, search and possibly arrest the individuals in question. In short the appellant's argument is driven by the special dangers encountered by the police in dealing with a 911 gun call, and the appeal will be dealt with on that basis.

56 In the early hours of September 24, 1999, the Brampton police responded to a 911 gun call recorded at 1:22 a.m. The caller was across the street from a night club called the Million Dollar Saloon. He identified himself, and then said (in part):

There's like four black guys out there and they all have guns on them. I mean they're out there with guns, there's like, there's like about ten of them but four of the[m] have guns.

...

Ya, right outside the front door, right like . . . the bouncer and the owners and everything I think the[y're] inside, but these guys are outside and I was getting ready to leave and as I was leaving right, and as I was leaving I saw them they were holding they were like holding their guns, they had them and took them out and they put them back in all together, there's like ten guys, but I only seen four guys with guns but I mean that's still four guys, you know that's a lot.

(Appellant's Record, at p. 293)

The police regarded the information as reliable. They responded immediately. The officers whose conduct is at issue in this case arrived on the scene at 1:26 a.m. (i.e., within five minutes of the gun call) and arrests of both respondents had been made by 1:28 a.m. The respondents were caught by a police blockade as they attempted to drive away from the parking lot of the club. They were each armed with loaded semi-automatic handguns (termed by the 911 caller "glocks" with clips). The defence rests largely on the fact that at the time the police stopped the respondents' car, the police had no more grounds to suspect their involvement in the firearms offences than they did the involvement of anyone else milling about outside the club or leaving its parking lot. However, the trial judge believed the police blockade to be authorized by the common law, and admitted the guns as evidence stating:

While it is not possible to draw a bright line rule as to which circumstances would justify stopping all vehicles, given the information available to police, they were justified here. They would have been derelict in their duties had they sat by and watched vehicles leave.

([2001] O.J. No. 2393 (QL), at para. 56)

57 At trial, the respondents were convicted of carrying concealed weapons and of possession of loaded prohibited firearms but appealed successfully to the Ontario Court of Appeal on the basis of alleged violations of their Charter rights against unreasonable search and seizure (s. 8) and arbitrary detention (s. 9). The evidence of the handguns was excluded by the appellate court and acquittals on all charges entered ((2005), 194 C.C.C. (3d) 289). The Crown now appeals to this Court. I believe the appeal should be allowed.

A. Developing the Proper Approach

58 The appeal raises serious issues of crime, public safety and civil liberties. There does not exist in Canada a general police power of investigative detention. *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, so held. Parliament is the appropriate body to consider and enact measures that lay down

the particular circumstances in which investigative detention is permitted. However, Parliament has not yet enacted a law governing the police response to a situation such as we have in this case. Resort must therefore be had to the common law powers of the police, an area of the law beset with both uncertainty and controversy. My colleague Abella J. formulates the applicable test as follows:

The justification for a police officer's decision to detain, as developed in *Dedman* and most recently interpreted in *Mann*, will depend on the "totality of the circumstances" underlying the officer's suspicion that the detention of a particular individual is "reasonably necessary". [para. 30]

In my view, with respect, the "reasonably necessary" test is not a Charter test, and is not an adequate substitute for proper Charter scrutiny. Accordingly, while I agree with Abella J. that the appeal must be allowed, I reach that conclusion by a different route.

59 If a police power to establish a blockade of all motorists is to be upheld, this extension of police powers should be done by revisiting the basic principles that underlie the body of common law police powers. Many of what were formerly called civil liberties are now more properly considered to be constitutional rights and freedoms. An asserted common law police power that is challenged on Charter grounds should be subjected to the usual Charter analysis that requires the Court to articulate the individual's asserted Charter right (here ss. 8 and 9) and measure it against the countervailing societal interests (s. 1) in an open and candid manner. The growing elasticity of the concept of common law police powers must, I think, be subjected to explicit Charter analysis. Accordingly, I propose to proceed as follows: firstly, does the alleged police power exist at common law; secondly, if so, does the claimed police power authorize interference with Charter rights including an individual's reasonable expectation of privacy (s. 8) or result in arbitrary detention (s. 9); and, thirdly, if so, is the law authorizing the infringement (in this case a common law) justified as a reasonable limit under s. 1 of the Charter ?

60 If the existence of the police power is found to be constitutional, a fourth question may arise in a particular case: was the power thus established exercised reasonably in "the totality of the circumstances"? (*Mann*, at para. 44)

61 An alternative approach adopted by my colleague Abella J. is to proceed solely by way of the two-step pre-Charter test first expressed by an English court in *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.), although since then sparingly used in that country and then usually for a different purpose (see P. Healy, "Investigative Detention in Canada", [2005] Crim. L.R. 98). On that view there is no need to articulate a Charter analysis because in theory the Court will develop the common law in a manner that is consistent with the Charter . My colleague writes:

The statement that a detention which is lawful is not arbitrary should not be understood as exempting the authorizing law, whether it is common law or statutory, from Charter scrutiny. [para. 21]

We thus agree on the need for “Charter scrutiny”. It seems to me problematic in a case like this, however, to say the authorizing law is subject to Charter scrutiny without in fact subjecting the authorizing law to any recognizable Charter scrutiny. My preference is to conduct “Charter scrutiny” using our usual Charter framework of analysis rather than calling in aid a British case like *Waterfield* decided almost 20 years before the Canadian Charter came into existence. No reason is given by my colleague for creating a different scheme of Charter scrutiny for common law police powers from that which the courts have developed for statute law (and applied, as will be seen, to other areas of the common law). The *Oakes* test, unlike *Waterfield*, is based on the wording of the Charter itself. Moreover, common law police powers illustrate a serious difficulty, I believe, with my colleague’s approach. On occasion an Attorney General will argue (as here) that a common law which authorizes police conduct that infringes individual Charter freedoms may be justified in the larger interest of society. In a number of cases we have held that a common law power may infringe a Charter right but nevertheless be upheld under s. 1, or as it is sometimes put, we have found a Charter infringement but not a Charter violation. Conflating in a *Waterfield*-type analysis the consideration of the individual’s ss. 8 and 9 rights and society’s s. 1 interests can only add to the problematic elasticity of common law police powers, and sidestep the real policy debate in which competing individual and societal interests are required to be clearly articulated in the established framework of Charter analysis.

62 I believe the approach taken here is consistent with the view taken by the Quebec Court of Appeal in an earlier police blockade case, *R. v. Murray* (1999), 136 C.C.C. (3d) 197, where Fish J.A., as he then was, observed at the outset of his reasons that: “In my view, the respondent was not detained arbitrarily when his vehicle was stopped at the roadblock. Had I found otherwise, I would nonetheless have allowed the appeal, since I believe that respondent’s detention was lawful in virtue of a police officer’s powers at common law and that any resulting infringement of s. 9 of the Charter was justified under s. 1 as a ‘reasonable limit prescribed by law’” (pp. 203-4 (emphasis added)).

63 It is not only bad people who were leaving the Million Dollar Saloon on September 24, 1999. Individuals going about their ordinary business, even in the small hours of the morning, should not have their way physically blocked by the police and be required to account for themselves unless there exists a Charter -proof legal authority for the detention.

B. The Crux of the Dispute

64 The facts are outlined in the decision of Abella J. The key issue in this case is whether the initial detention of the respondents by way of a roadblock of all vehicles leaving the club parking lot (i.e., irrespective of the type of vehicle) was constitutional. The trial judge held that it was. In doing so he relied on *Murray*. The trial judge decided that the police, having lawfully stopped the car, were entitled to look inside to verify the absence of firearms to assure their own safety, and based on the initial inspection, the police were permitted to go further and “ask the occupants questions, to get them out for a car search, and to search the occupants” (para. 66). It was on the issue of the lawfulness of the initial detention that the Ontario Court of Appeal differed from the

trial judge. As Doherty J.A. stated:

I would add that had I found the roadblock stop to be constitutional, I am in substantial agreement with the trial judge's observations concerning the steps that the police were entitled to take as incidental to a roadblock stop where they had reason to suspect that an occupant of one or more of the vehicles to be stopped is armed. [Emphasis added; para. 67.]

The Ontario Court of Appeal considered the initial detention to be unconstitutional because the police had decided that no vehicle would be permitted to leave the parking lot unsearched. In its view, the roadblock was insufficiently tailored to the precise information provided by the 911 caller. In particular, the 911 caller's description of the gunmen's vehicles did not match the make or style of the respondents' "sporty" Jaguar.

65 I agree with the courts below that it is important to address in turn each stage of what transpired outside the Million Dollar Saloon, namely the initial detention, the subsequent search, and the eventual arrest of the respondents. Each stage carried with it constitutional limits on police intervention, and the seeds of further police intervention should circumstances, as they developed, warrant. As to the outcome, I agree with the Court of Appeal that to be constitutional a roadblock must be "tailored" to the information known to the police. Where we disagree is that, in my view, the roadblock in this case was as "tailored" as circumstances and the purpose of the roadblock permitted. Providing that other requirements of a lawful roadblock were met, I believe the Court of Appeal erred in setting the convictions aside on the "tailoring" objection.

C. The Roadblock Constituted an Arbitrary Detention

66 At the time the respondents' car was stopped, the police had not only decided to stop all cars but they were implementing that strategy. When the police swung their vehicle in front of the respondents' car preventing its forward movement, there was "significant physical or psychological restraint" (Mann, at para. 19). As Le Dain J. held in the context of the random roadblock at issue in *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 29:

Because of the intimidating nature of police action and uncertainty as to the extent of police powers, compliance in such circumstances cannot be regarded as voluntary in any meaningful sense. The possible criminal liability for failure to comply constitutes effective compulsion or coercion.

See also *R. v. Orbanski*, [2005] 2 S.C.R. 3, 2005 SCC 37, at para. 31.

67 The question then arises whether the initial detention here was arbitrary. I believe that it was in the sense that all cars exiting the parking lot regardless of description were subject to a roadblock and that within this universe of vehicles "there were no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure" (*R. v. Hufsky*, [1988] 1 S.C.R. 621, at p. 633; see also *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, at p. 1276). As in *Ladouceur*, however, I would uphold the law authorizing such an arbitrary detention under s. 1.

D. Common Law Police Powers

68 A detention unsupported by law is arbitrary. As stated in Mann, at para. 15:

Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law.

Police powers are not co-extensive with their duties. Dickson C.J. made the point in his dissent in Dedman, at p. 12, quoting Professor Leigh:

The police have long functioned under a regime of wide duties but limited powers. That is to say, that while they are under general duties to prevent crime, and breaches of the peace and to detect criminals, they do not have all those powers which, it might be thought, would be reasonably necessary for them to do so.

(L. H. Leigh, *Police Powers in England and Wales* (1975), at p. 29)

A society that valued police efficiency and effectiveness above other values would be a police state. The appellant acknowledges that Parliament has not given statutory powers to the police to do what they did in this case. He is therefore obliged to rely on the common law, in particular *Waterfield* and the Canadian cases that cite and build upon *Waterfield*, including *R. v. Stenning*, [1970] S.C.R. 631; *Knowlton v. The Queen*, [1974] S.C.R. 443; *Dedman*; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *R. v. Godoy*, [1999] 1 S.C.R. 311; *Murray*; *R. v. Simpson* (1993), 12 O.R. (3d) 182 (C.A.), and *Mann*. Such common law powers are recognized by s. 42(3) of the Ontario Police Services Act, R.S.O. 1990, c. P.15:

42. . . .

(3) A police officer has the powers and duties ascribed to a constable at common law.

69 Police duties, at common law, include “the preservation of the peace, the prevention of crime, and the protection of life and property” (*Dedman*, at p. 32). (It is worth recalling the comment of the trial judge in this case that the police “would have been derelict in their duties had they sat by and watched vehicles leave” (para. 56 (emphasis added)). However, even at common law, a balance must be struck between the competing interests of the police duty and the liberty interests of individuals. Interference with liberty interests must be justifiable. How is this to be assessed? Le Dain J. says in *Dedman*, at p. 35:

Turning to the second branch of the *Waterfield* test, it must be said respectfully that neither *Waterfield* itself nor most of the cases which have applied it throw much light on the criteria for determining whether a particular interference with liberty is an unjustifiable use of a power associated with a police duty. There is a suggestion of the correct test, I think, in the use of the words “reasonably necessary” in *Johnson v. Phillips*, [[1975] 3 All E.R. 682]. The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [Emphasis added.]

70 Dedman was a pre-Charter prosecution arising out of a random roadside stop on February 4, 1980 aimed at impaired drivers (though the case did not reach this Court until 1985). The accused had been charged with refusing to comply with a demand for a breath sample and he then challenged the Reduce Impaired Driving Everywhere (R.I.D.E.) program of random spot checks of motor vehicles, which at the time lacked any statutory authority. He claimed the police had no power to do what they did. The majority of our Court disagreed, speaking through Le Dain J. (over the dissent of Dickson C.J. supported by Beetz and Chouinard JJ.). In the majority view, the public interest in combatting drunk driving outweighed the relatively minor intrusion on the lives of randomly selected members of the motoring public, and the police power of random stops was “reasonably necessary” to perform their duty to maintain public safety on the roads, an area of activity that is in any event licensed and highly regulated.

E. The Dedman Balance

71 Dedman and Murray establish that in some circumstances the common law authorizes police blockades to stop, detain and question motorists. The issue is to determine whether the common law power extended to the circumstances in this case to bring the police within their common law power. In making that determination the Court should accept the lead of our earlier cases and move cautiously and incrementally (Mann, at para. 18). If greater strides are to be made in delineating the outer limit of a “blockade” power, they should be made by Parliament.

72 Identifying the purpose of the blockade is important. Here, it was to determine the whereabouts of the guns and to obtain information leading to the arrest of those guilty of the firearms offences reported by the 911 caller. The power sought by the appellant must perforce include interference with civil liberties to the extent reasonably necessary to enable the police to achieve the purpose of the blockade. Otherwise, the blockade would likely be ineffectual and should not have been set up in the first place. However, as Doherty J.A. observed, such interference requires a strong public interest:

The significant interference with liberties of an indeterminate number of people occasioned by the roadblock stop, combined with the fact that the individuals stopped are targets of a police investigation and may face criminal jeopardy as a result of the police action, demands a strong state interest to justify police interference with individual liberties. The state interest in the investigation of crime and the apprehension of criminals is sufficiently strong to justify the kind of interference necessitated by a roadblock stop only where the police have reasonable grounds to believe that a serious crime has been committed and reasonable grounds to believe that the roadblock stop will be effective in that it will apprehend the perpetrator. [Emphasis added; para. 53.]

As stated earlier, even if the common law power is shown to exist, it must be exercised reasonably having regard to the “totality of the circumstances” (Mann, at para. 44).

73 It will be noted that the asserted police power is narrow and sensitive to context. The appellant acknowledges as much in his factum:

Lest there be any doubt, this appeal is not about roadblocks used as general crime detection tools. Rather, it is about roadblocks used to address serious safety concerns. Here we focus on roadblocks directed at serious criminal offences that have, are occurring or are about to occur — serious criminal offences that threaten the safety of an individual or the community at large. If the police got a tip that a potential fraudster was removing boxes of important documents from a warehouse, a general roadblock to intercept the documents, however probative they may be of the commission of the fraud, would be a potentially disproportionate response to that crime. While, no doubt, the public has an interest in the investigation and meaningful prosecution of fraud, the interference with liberty and privacy interests may exact too great a toll on the constitutional interests of the travelling public to permit a roadblock. But, this appeal isn't about the retrieval of paper, it's about the retrieval of guns, which, to state the obvious, engages a wholly different public interest. [para. 51]

This approach reflects a Dedman balancing test in cases of a blockade that is neither random nor specific, i.e., where the police have no reasonable grounds to suspect a particular motorist more than any other motorist being detained, but the public interest is thought to be paramount.

74 Dedman and its progeny have been sharply criticized by some academics, e.g., Professor Healy characterizes the Canadian view of Waterfield as “something of a Trojan horse for the expansion of police powers” (p. 107). Waterfield, he complains, “does not allow the courts to transform unlawful police conduct into lawful police powers” (p. 103). See also J. Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the Charter ” (2005), 31 Queen's L.J. 1, at p. 19.

75 I agree with the critics that Waterfield is an odd godfather for common law police powers. In its country of origin it has lived a rather modest existence, in part because the U.K. Parliament has been far more active than the Canadian Parliament in defining police powers, see e.g. the Police and Criminal Evidence Act 1984 (U.K.), 1984, c. 60, ss. 1 and 4. The same is true of the various legislatures in Australia and New Zealand. The Tasmanian Police Powers (Vehicle Interception) Act 2000 (Tas.), 2000, No. 46, for example, provides at s. 5 that a senior police officer may establish a roadblock on a public street or road-related area if he or she reasonably believes that: (a) it would significantly improve the prospects of apprehending or locating a person who (i) has committed an offence punishable upon indictment, or (ii) is or may be endangering the property, life or safety of another person; (b) it is necessary to establish the roadblock for the protection of life or property; or (c) an offence has been, is being or is likely to be committed and that, for the purpose of performing his or her functions, it is necessary to detain a vehicle, a driver or a passenger in or on a vehicle. See also the New South Wales Law Enforcement (Powers and Responsibilities) Act 2002 (N.S.W.), 2002, No. 103, s. 37; the Queensland Police Powers and Responsibilities Act 2000 (Qld.), 2000, No. 5, s. 26; the South Australia Summary Offences Act 1953 (S.A.), 1953, s. 74B, and the New Zealand Crimes Act 1961 (N.Z.), 1961, No. 43, s. 317B.

76 Criticism of Dedman's use of Waterfield began with a broadside from Dickson C.J. in the same case, dissenting, at p. 15:

A police officer is not empowered to execute his or her duty by unlawful means. The public interest in law enforcement cannot be allowed to override the fundamental principle that all public officials, including the police, are subject to the rule of law. To find that arbitrary police action is justified simply because it is directed at the fulfilment of police duties would be to sanction a dangerous exception to the supremacy of law. It is the function of the legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law.

Nevertheless, the contrary view espoused by Le Dain J. prevailed, and the majority view has been adopted and applied in a number of our subsequent cases, including *Cloutier v. Langlois* (1990), *Godoy* (1999) and *Mann* (2004). I not only accept this line of authority but I agree with it. It is all very well for the courts to ask Parliament to take legislative action, but Parliament has not seen fit to do so. In the meantime, guns and gun-related violence are a growing problem in some urban areas and the police are sent in to deal with it. Building a composite picture of police common law powers by way of narrow precedents is not a quick fix but in the absence of Parliamentary action it is the least worst solution.

77 Whether *Waterfield* was or was not a sound basis for the majority view in *Dedman* may still be a matter of historical and academic interest, but I take the law established by the majority in *Dedman* as my point of departure.

78 I do not believe the *Dedman* analysis and the s. 1 analysis are duplicative of one another. While both involve a measure of balancing, *Dedman* is a creature of the common law, and nothing is said explicitly in that case about the presumptive paramountcy of “the liberty interfered with” or putting the onus on the Crown to “demonstrably justify” the measure as a “reasonable limit”. Nor does Le Dain J. speak explicitly of such concepts as minimal impairment. The Charter standard is higher. The pre-Charter common law position was more loosely framed in recognition perhaps of the reality that relevant evidence would generally have been admissible even if the police conduct was unauthorized: *R. v. Wray*, [1971] S.C.R. 272; *Hogan v. The Queen*, [1975] 2 S.C.R. 574.

79 *Dedman* was released on July 31, 1985, more than four months after *R. v. Oakes*, [1986] 1 S.C.R. 103, was argued (March 12, 1985). As both cases were pending before the judges of our Court at the same time, it is inconceivable that the Court did not expect that a common law police power sanctioned by *Dedman* would, in the case of prosecution of post-Charter offences, be subjected to the more rigorous *Oakes* analysis. *Dedman* should not provide an end run around *Oakes*. Those with legitimate concerns about the common law limits of police powers should be able to take comfort, I think, from the fact that identification of the existence of a police power under *Dedman* is only a first step in the full-blown Charter analysis. An asserted common law power may survive the “ancillary power” test but nevertheless fail the *Oakes* test. If the asserted police power is “reasonably necessary” (as this phrase is interpreted in *Dedman*, at p. 35) for the police to do their duty and the common law authority for such conduct is Charter compliant, then society will have some assurance that a decent balance has been struck.

F. This Case Is Not Covered by Precedent

80 The first step is to determine whether at common law the police possessed the power to put in place a blockade in the circumstances here. Initially a court should look at the existing jurisprudence, in particular *Dedman*, *Simpson*, *Mann* and *Murray*. If (as I believe) none of these cases provides authority for what was done in this case, the “balancing test” derived from *Dedman* must be applied. The Court must determine whether the common law rule, if it exists, authorized the police to do what they did here. If not, of course, there was no legal foundation for the police conduct and there is no limitation on constitutional rights “prescribed by law” capable of being saved under s. 1 of the Charter .

(1) The Relevant Police Power Is Not Found in *Mann* (or *Simpson*)

81 The detention and searches in this case do not come within the narrowly targeted police power of investigative detention based on “individualized suspicion” initially formulated in *Simpson* and elaborated upon in *Mann* as follows:

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. [Emphasis added; para. 34.]

Mann and *Simpson* used the “articulable cause” justification found in the U.S. Fourth Amendment jurisprudence for so-called *Terry* stops, see *Terry v. Ohio*, 392 U.S. 1 (1968); *Indianapolis v. Edmond*, 531 U.S. 32 (2000), at p. 44. I do not believe that *Mann* can or should be divorced from this pedigree. Moreover, I think it is crucial to distinguish between what the police knew at the time of the detention, and what they knew after the initial detention when for the first time they had an unobscured look at the occupants. In *Mann*, the police had a good view of the person stopped before the stop, and proceeded to stop the detainee because his physical appearance matched that of the crime suspect “to the tee” (para. 5). Here, there was proximity of the vehicle to the crime scene in terms of time and location, but nothing else at the time their vehicle was stopped linked the vehicle or the occupants to the description given by the 911 caller, as the trial judge noted:

I am satisfied neither officer knew the occupants were black when they stopped the car. [para. 43]

Even after stopping the car, the only relevant description of the individuals from the 911 call was that they were all black (trial judge, at paras. 6 and 9-10). Accordingly, I agree on this point with the trial judge who concluded, using the language of *Simpson*, that:

... did the officers have grounds to stop the vehicle for an investigative detention? They did not, because they lacked articulable cause to detain the vehicle and occupants. It cannot be said there existed objectively a constellation of discernible facts giving rise to articulable cause to detain the applicants for investigation. [para. 49]

82 In *Simpson*, a police officer decided to patrol the area around a residence he suspected to be a crack house. His knowledge and suspicion of this residence were entirely derived from an internal police memorandum written by another officer and apparently based on information provided by an unidentified “street contact”. While patrolling the area, the officer observed a car in the driveway of the residence. The sole occupant, a woman, got out of the car, leaving the motor running, and went to stand inside the doorway of the residence. After a short time, she returned to her car accompanied by the appellant, *Simpson*. The woman drove away with *Simpson* in the passenger seat. Aside from these observations, the officer had no knowledge of either the woman or *Simpson*. He nevertheless decided to follow the car, and after doing so for a short distance, directed the car to pull over. He told *Simpson* to get out of the car. The officer noticed a bulge in *Simpson*’s front pant pocket. He asked *Simpson* what it was and *Simpson* responded, “Nothing.” The officer directed *Simpson* to take the object from his pocket, then grabbed *Simpson*’s hand and removed a bag containing cocaine. On these facts, the Ontario Court of Appeal concluded the seizure to be unlawful, per *Doherty J.A.*, at pp. 201-2:

... the totality of the circumstances — the whole picture — must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

...

... an assessment of the whole picture must yield a particularized suspicion ... that the particular individual being stopped is engaged in wrongdoing.

These cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.

83 My colleague *Abella J.* finds sufficient justification (at para. 44) for the conduct of the police in the facts that once the respondents’ car was stopped and after the officers had had a chance to look at the occupants, the officers were able to observe that:

- (i) the occupants were black, thus matching (in part) the 911 call information even though the make of their car did not;
- (ii) the passenger wore driving gloves for a night described as certainly not “glove weather”; and
- (iii) on being questioned, the passenger gave “strange and evasive answers”.

As pointed out by the trial judge, however, none of these circumstances were known to the police at the time of initial detention. At that point there was no “clear nexus” of “individualized suspicion” linking Clayton and Farmer to the alleged crime. All that was known at that time is that a “sporty Jaguar” was making its way towards the parking lot exit, and the description given by the 911 caller did not include a “sporty Jaguar”.

(2) The Claimed Police Power Is Not Found in Murray

84 Murray was another roadblock case. The question in that case, as framed by Fish J.A., was “whether the police, exercising their common law powers, may in appropriate circumstances restrain the free flow of traffic in a circumscribed area for the sole purpose of capturing dangerous criminals in fresh flight” (p. 203). A robbery had been committed by three armed individuals. The police, seeking their arrest, set up a roadblock on a bridge which was a likely avenue of escape from the scene of the crime, and were stopping all vehicles that were capable of hiding three fleeing criminals. These individuals had brandished their guns in the course of the robbery and were reasonably suspected of being willing to use them again. The accused Murray was a member of the public who was stopped and questioned. He was driving a pick-up truck. A piece of canvas capable of hiding the armed fugitives obscured the police view of the back of the vehicle. A police officer removed it and discovered smuggled cigarettes. The court concluded that the detention was a valid exercise of a police common law power, as was the search incidental to detention. A violent crime (armed robbery of a bank) had already been committed, the suspects were known to be fleeing the scene. At p. 204, Fish J.A. notes that “[t]here were apparently three robbers. The officers were given a general description of one of them, considered by the Hawkesbury police to be extremely dangerous — capable, indeed, of firing on pursuing officers.” Fish J.A. describes the robbery suspects as “dangerous criminals in fresh flight”. In the present case the police had no information that a violent crime had been committed, nor were they looking for “dangerous criminals in fresh flight” who were “capable, indeed, of firing on pursuing officers”. Such circumstances were considered in Murray to be an adequate justification in the absence of “individualized suspicion”. Those circumstances are not present here.

(3) The Claimed Police Power Is Not Found in Dedman

85 While Dedman authorizes a roadblock in the absence of any individualized suspicion of particular motorists, who are stopped at random, the reasoning in Dedman has to do with road safety. As Le Dain J. said in the course of his reasons:

The right to circulate on the highway free from unreasonable interference is an important one, but it is, as I have said, a licensed activity subject to regulation and control in the interest of safety. [p. 36]

86 In a Dedman situation it will not even be clear to the police that any crime has been committed at all. A decision that affirms the lawfulness of a blockade in support of road safety does not authorize a blockade of every car to enable the police to look for evidence of a crime that has nothing to do with road safety.

(4) Applying the Dedman Balance

87 The methodology adopted in Dedman is helpful even though its result does not cover this case. The components to be weighed here are different. A similar “balance” was described in Cloutier v. Langlois:

... whether such an invasion is reasonable in light of the public purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals. [pp. 181-82]

Cloutier v. Langlois was a post-Charter case in which an accused claimed he had been “assaulted” by a police officer conducting a search incidental to arrest on November 3, 1983. It was held citing Dedman that the search incidental to a valid arrest was authorized by the common law.

88 I therefore proceed to apply the Dedman methodology to the new and different situation presented by this case. For convenience, I repeat the test as Le Dain J. formulated it:

The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [p. 35]

G. The Common Law Police Authority Sought to Be Established in This Case

89 The appellant seeks to establish common law authority for the police (1) to form a blockade (2) on receipt of information the police consider reliable (3) about serious firearms offences underway or recently committed (4) limited to the premises where the offence allegedly occurred (5) sufficiently soon after the alleged incident to give police reasonable grounds for belief that the perpetrators may be caught.

90 Reliance is placed on some of the observations of Doherty J.A. in the court below:

Where the police do not have grounds to suspect any specific person or persons, the use of a roadblock stop cannot be justified in furtherance of the police duty to investigate and prevent crime unless the police have reasonable grounds to believe both that a serious crime has been committed and that the roadblock stop may apprehend the perpetrator.

... If those prerequisites exist, then other factors, like those considered by the trial judge and the availability of other less intrusive investigative alternatives, will have to be taken into account. [Emphasis added; paras. 53-54.]

On this view, with which I agree, it is of importance that the police were in fast pursuit (i.e., they arrived on the scene within five minutes of the 911 call) and limited their blockade to the parking lot of the premises identified by the 911 caller. The police, in my view, had reasonable grounds to believe in these circumstances that a “serious crime ha[d] been committed” and that by means of a quick roadblock the perpetrators “might” be apprehended.

91 The trial judge did not treat the common law power as “‘carte blanche’ to detain and search every car, driver and passenger in the vicinity” (respondent Clayton’s factum, at para. 34). What the trial judge said was:

The initial stop is permitted as a brief detention to screen cars leaving the area. The early observations of the occupants and contents from outside the car, as well as the questions may lead to nothing else being permitted. Determination must be made on a case by case basis, and a vehicle by vehicle basis, in each roadblock. [para. 70]

92 Of course, hypotheticals can be invented to test the outer limits of this approach. Suppose, instead of the Million Dollar Saloon, the police received a similar 911 gun call from the Toronto Skydome at a time when 5,000 cars were attempting to leave the parking areas all at once after a ball game. The answer, of course, is that the weight given to the different variables in this Dedman analysis would not be the same. As the trial judge said, “[d]etermination must be made on a case by case basis, and a vehicle by vehicle basis, in each roadblock” (para. 70). I see no error in such an approach. The blockade must be tailored to the information possessed by the police and executed reasonably “on the totality of the circumstances” or not at all.

93 As to what may follow the initial roadblock detention, I agree with the trial judge that:

Officers stopping a vehicle in similar circumstances are entitled to question the occupants to determine if they had information about the incident. From those questions and answers, a decision would have to be made whether to let the car go or detain it for further investigation if articulable cause [i.e., “individualized suspicion”] existed. [para. 67]

94 On this basis I agree with the trial judge that the police had the common law power to do what was done in this case.

95 It may well be objected, by the appellant amongst others, that to restrict the determination in this case to “serious firearms offences” will provide insufficient “guidance” for future police conduct. General guidance is a matter for Parliament. Courts are required to adjudicate specific fact situations. Common law develops by the accumulation of a variety of precedents before (if at all) more generalized principles can be deduced. It would be contrary to our tradition and our function to generalize first and let the precedents accumulate afterwards. In my view, we have not yet reached the point in this difficult area where the precedents justify broader treatment. Parliament, on the other hand, can take a much broader view of what is required, and it is to be hoped that legislators in this country will address the issue of police powers in a comprehensive way, as has been done in many other common law jurisdictions.

96 I also acknowledge that the approach taken by the trial judge and the Court of Appeal of assessing police conduct one step at a time as events unfold, an approach with which I agree, does not provide an easy rule for the police to follow. However, we are dealing here with common law which deals in specifics, not statute law which deals in generalities. The common law is replete with invocations of reasonableness and balance whose application is context specific. The notion that police have legal authority to do what is reasonably necessary having regard to a

balance of relevant circumstances in a blockade is no less self-executing than the common law governing the degree of force permitted when a civilian performs a lawful arrest (*R. v. Asante-Mensah*, [2003] 2 S.C.R. 3, 2003 SCC 38, at para. 24), or a parent intervenes to chastise a child (see a discussion of its common law origins in *Blackstone's Commentaries on the Laws of England*, Book I, 1765, c. 16, referred to in *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173, at p. 185). Rules cannot be made more “black letter” than the subject matter permits.

97 The comments of Doherty J.A. regarding “systemic failings” in police training should be read in this light. The common law does not hand the police a simple “rule” which can be applied without much training or forethought. The law requires individual police officers to make difficult decisions under fast-moving conditions. The common law affords the police an initial opening to engage with the motorists who are stopped, but the vehicle stop may lead nowhere, depending on what information emerges from a quick police view of the occupants and the vehicle’s interior and some quick screening questions. Without adequate training the police may find themselves over-reacting or under-reacting to this information. I agree with Doherty J.A. that police training is critical to the successful utilization of their common law powers of detention and search.

98 As cases are added to the jurisprudence, a clearer picture of the contours of this branch of the common law police power will emerge. Authority was found in *Dedman* because of the major problem of road carnage produced by mixing alcohol and driving. The blockade in *Murray* was held to be authorized because of reliable information about “dangerous criminals in fresh flight” and the limited number of escape routes which made the blockade likely to be effective. “Imminent danger” characterized the situation in *Godoy* where the 911 caller’s message was suddenly terminated without explanation. In *Simpson and Mann*, the police power was held to authorize the stop because “individualized suspicion” of the persons being stopped tilted the balance in favour of police action; in neither case, unlike *Murray*, was the person stopped known to be dangerous. On the other hand, in *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1, the Ontario Court of Appeal declined to find that a roadblock targeting a biker gang was authorized by a generalized apprehension of a potential (rather than imminent) breach of the peace.

99 The importance of the particular facts cannot be overemphasized. If instead of a gun call, the 911 caller had reported that a hostage or kidnapped child was being spirited out of the parking lot in the trunk of an unidentified car, and the information was considered reliable, few judges would question the authority at common law of the police to act. Equally, few would deny the validity of a police roadblock following a local jail break in an attempt to round up escaping prisoners: *Perry v. State of Florida*, 422 So.2d 957 (Fla. Dist. Ct. App. 1982). The present case is not one of “imminent danger”. It lacks the urgency of a kidnapping or the existence of “dangerous criminals in fresh flight” (*Murray*, at p. 203) who were “capable, indeed, of firing on pursuing officers” (*Murray*, at p. 204). On the other hand, a “gun call” imports a threat to public order including real concerns for the safety of the investigating officers. Canadian society has emphatically rejected the existence of the sort of “gun culture” that affects some societies, and

rightly expects the police to be able to respond effectively to 911 “gun calls”. Here, the proximity in terms of place (the blockade was limited to cars exiting the property where the guns had been sighted) and proximity in time (the police were on the scene within five minutes of the 911 call) greatly increased the likelihood of effective police action. (While the effectiveness itself of police action does not confer legitimacy, the absence of likely effectiveness would argue strongly against a valid blockade.) The tip was hot. Quick police action promised success. As in *Dedman*, the interference with exiting motorists was “of relatively short duration and of slight inconvenience” (p. 36).

100 The common law famously adapts itself to the evolution of society. A balance that might have tilted the law in favour of civil liberties in a society less infected with an urban gun problem now tips the other way, remembering of course that in my view (with which not all members of the Court agree) such claims to common law police authority should still be subject to more structured Charter review.

H. The Common Law Power to Detain Motorists by Way of a Blockade Included the Power to Impose Arbitrary Detentions of Short Duration Together with Searches Incident to Detention to Assure Police Officer Safety

101 On the facts, I believe the police roadblock in this case, although authorized by the common law, did infringe the respondents’ rights under s. 9 of the Charter , which states as follows:

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

An arbitrary detention can be upheld if found to be prescribed by a law which in itself constitutes a reasonable limit under s. 1 (see *Hufsky and Ladouceur*). It is in this sense, I believe, that the obiter in *Mann* that “a lawful detention is not ‘arbitrary’” (para. 20) should be understood. A detention, though arbitrary, may still be constitutional if the law on which the detention rests is a “reasonable limit” within the meaning of s. 1 . The specific point in *Mann* itself was that a detention based on individualized suspicion is based on rational criteria and is not, therefore, arbitrary.

102 The common law is no more immune from Charter scrutiny than is statute law, as the Court has repeatedly held, see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Daviault*, [1994] 3 S.C.R. 63, and *R. v. Stone*, [1999] 2 S.C.R. 290. The Charter applies to the common law when “the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom” (*Dolphin Delivery*, at p. 599; see also P. W. Hogg, *Constitutional Law of Canada* (5th ed. supp. (loose-leaf)), vol. 2, at p. 37-25).

103 The initial detention of the respondents in this case was arbitrary in the sense that there was no individualized suspicion of them or the vehicle in which they were travelling (which did not match the 911 caller’s description) or other criteria to “tailor” the roadblock more precisely. The respondents’ s. 9 rights were thus infringed (subject to the law giving rise to the infringement being justified under s. 1). It is conceded by the appellant that the action of the police had

nothing to do with a description of the individuals stopped but was a general roadblock based on considerations of public safety and crime investigation. These are collective values which the appellant says justifies infringement (which he considers to be relatively minor in nature) of the individual rights of the respondents and others detained by the roadblock. This is a debate that should take place under s. 1 .

104 As to s. 8 , Mann holds that in a lawful detention situation the police may undertake a pat-down search if the officer believes “on reasonable grounds that his or her own safety, or the safety of others, is at risk” (para. 40). The issue on the proper scope of the search is clouded in this case because (unlike Mann) the presence of handguns not only constitutes a police safety issue but constitutes the evidence of the offence being investigated. It is not possible to say here, as it was in Mann, that the police went too far when their search proceeded beyond safety considerations to evidence collection. Here, the two purposes were intertwined and not separable. Nevertheless, I would affirm that after the police officers had observed the respondents and engaged in conversation with them, the police had authority here to conduct a pat-down search incidental to their continued detention. It would be illogical to hold that a pat-down search is justified where the detention relates to a non-violent offence (as in Mann) but not where the police are facing serious issues of personal safety when responding to a gun call. As noted by Cory J. in *Mellenthin*:

There have been more than enough incidents of violence to police officers when vehicles have been stopped. [p. 623]

Equally, it would be illogical to be solicitous of the safety of individuals who may or may not be at risk at the calling end of the 911 call (Godoy, at para. 20) but not of the safety of the police who, in the course of roadblock duty, are putting themselves, at least potentially, in harm’s way. If evidence of the crime emerges in the course of a valid pat-down search incidental to the detention for the purpose of police safety, the evidence will be admissible. It is of prime importance, therefore, to determine if the initial detention in this case was authorized by a law that is itself saved under s. 1 .

I. The Common Law Power of Detention by Blockade at Issue in This Case Is Saved by Section 1

105 The proper Charter approach to the s. 1 salvage of a common law power or rule is set out in *Swain*, per Lamer C.J., at pp. 978-79:

If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to reformulate the common law rule so as to avoid an infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the Charter . As was noted at the outset of this analysis, this Court has stated that a limit “prescribed by law” within the meaning of s. 1 may arise from the application of a common law rule as well as from a statute or regulation.

See also *Dolphin Delivery*, B.C.G.E.U. and *Daviault*.

106 In this case, the appellant seeks recognition of a common law power of detention that, were it not justified under s. 1, would be invalid. Thus here, as in Swain, “there are good reasons to go on to consider the application of s. 1 in this case, within the guidelines enunciated in *R. v. Oakes*” (p. 979). The appellant insists that in the context of a 911 gun call police should have a limited power of arbitrary detention. Section 1 is the proper place to weigh the individual rights asserted by the respondents against the collective rights of society. In my view, as stated, an asserted police power may qualify at common law as “ancillary” to police duties while still failing the more structured and exigent test under s. 1 established in *Oakes*.

107 As the Court did in Swain, I proceed forward on the basis of the *Oakes* analysis.

(1) Pressing and Substantial Objective

108 The importance of the public purpose is manifest. This was not an investigation of a garden variety crime. The investigation was prompted by a gun call, which engages fundamental issues of public peace and public order. Neither the public nor the police can be expected to tolerate guns flourished or waved about in a crowded public place. As Doherty J.A. acknowledged in the court below with regard to the “serious and growing societal danger” posed by handguns:

The police were investigating criminal activity, hoped to apprehend individuals in possession of dangerous weapons and seize those weapons before they could be used in criminal activity to harm others. Criminal conduct involving the use of firearms, especially handguns, is a serious and growing societal danger. The law abiding segment of the community expects the police to react swiftly and decisively to seize illegal firearms and arrest those in possession of them. The risk posed to the community by those in possession of handguns gives an added significance to police efforts to seize those weapons and apprehend those in possession of them beyond the always important police duty to investigate and prevent criminal activity. [para. 41]

109 More specifically, the Court may take judicial notice for present purposes of statistics analysed in published reports of the federal Department of Justice; see the discussion of judicial notice in *R. v. Spence*, [2005] 3 S.C.R. 458, 2005 SCC 71, at paras. 63 and 65:

It is when dealing with social facts and legislative facts that the Morgan criteria, while relevant, are not necessarily conclusive. There are levels of notoriety and indisputability. Some legislative “facts” are necessarily laced with supposition, prediction, presumption, perception and wishful thinking. Outside the realm of adjudicative fact, the limits of judicial notice are inevitably somewhat elastic. . . .

. . .

. . . a court ought to ask itself whether such “fact” would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the “fact” to the disposition of the controversy. [Emphasis in original.]

110 In my view, we may take judicial notice of the following information for the purpose of evaluating the objective said to be pressing and substantial:

(i) “Homicide in Canada” (2005), 26:6 Juristat 1

- “Following a substantial increase in 2004, the national homicide rate climbed another 4% in 2005 to 2.04 victims per 100,000 population, marking its highest point in nearly a decade.

...

There were 222 victims killed by a firearm in 2005, 49 more than the previous year. This is the third consecutive annual increase in firearm homicides. Handguns accounted for about 6 in 10 firearm homicides.” [p. 1]

- “In 2005, the most common method used [to commit homicide] was shootings, accounting for one-third (34%) of all homicides.” [p. 4]

- “In 2005, handguns accounted for 58% of all firearm-related homicides whereas rifles/shotguns and sawed-off rifles/shotguns accounted for 30% (Table 7)” [p. 5]

- “Over the past decade, the number of homicides involving gangs reported by police has steadily increased (Table 11). . . .

The biggest increase occurred in the province of Ontario, where the number of gang-related homicides doubled from 14 in 2004 to 31 in 2005. Most of the increase in Ontario was in Toronto. . . .

Compared to other types of homicide, those that are gang-related more often involve firearms. Over two-thirds (69%) of gang-related homicides were committed with a firearm, usually a handgun, compared to just over one-quarter (27%) of non-gang-related killings.” [p. 8]

(ii) Canada. Department of Justice. Research and Statistics Division. Firearm Statistics: Updated Tables, January 2006, Tables 15 and 17

- The rate of “Offensive Weapon Offences”, which include carrying, pointing, or possessing prohibited weapons or restricted weapons without authorizations has increased from 50 per 100,000 population in 2000 to 57 per 100,000 in 2004.

- The number of “Discharge Firearm With Intent” offences has increased from 140 in 2000 to 225 in 2004.

- The following are the percentages of violent crimes involving firearms in which a handgun was used in 2004:

- Homicide: 72.0%

- Attempted murder: 71.9%

- Sexual Assault: 66.7%

- Non-sexual assault: 46.9%
- Kidnapping: 76.1%
- Robbery: 85.1%

(iii) Canada. Department of Justice. Canadian Firearms Centre. Firearms, Accidental Deaths, Suicides and Violent Crime: An Updated Review of the Literature with Special Reference to the Canadian Situation, Working Document by Yvon Dandurand, September 1998

· “International studies tend to show . . . a strong statistical association between gun ownership levels and gun-related homicides.” [p. 34]

· “The killing of police officers in the line of duty is another area that illustrates the difference between firearm violence in the two countries. According to Gabor [Firearms and Self-defence: A Comparison of Canada and the United States (1997), at p. 12], when the relative number of sworn officers in the two countries is taken into account, a U.S. police officer is seven times more likely to be killed than a Canadian officer. In the United States, out of the 74 police murders which occurred in 1995, 83.7 percent involved the use of a firearm; it was a handgun in 58.1 percent of cases (Federal Bureau of Investigation, 1997 [Law Enforcement Officers Killed and Assaulted: 1995]).” [p. 35]

111 Even in the United States where a gun culture is far more entrenched than in this country, courts have on occasion recognized that “gun calls” raise issues of a different order from other situations; see, e.g., *United States v. Clipper*, 973 F.2d 944 (D.C. Cir. 1992), per Buckley J. for the court, at p. 951:

The hazards that the illegal use of firearms presents to officer and citizen alike are well documented. Therefore, a police officer responding to a tip involving guns may properly take these hazards into consideration when balancing the suspect’s interests against the “need for law enforcement officers to protect themselves and other prospective victims of violence.” *Terry*, 392 U.S. at 24

The U.S. court contrasted a gun call with a tip involving possession of drugs:

If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in “controlled buys.” Where guns are involved, however, there is the risk that an attempt to “wait out” the suspect might have fatal consequences.

112 The respondents cited numerous U.S. precedents to support their argument, noting that the trial judge had found that in the United States there is no “firearm exception” to the usual Fourth Amendment jurisprudence (para. 64). This is true but it is not surprising in a society where the right to bear arms is sometimes asserted to be a personal right guaranteed by the Second Amendment (see *Printz v. United States*, 521 U.S. 898 (1997), per Thomas J. concurring at p. 938, fn. 2). Canadian society marches to the beat of a different drummer where firearms are concerned.

113 The protection of society from the flaunting of illegal handguns in a crowded public place is clearly pressing and substantial, in my view.

(2) Rational Connection

114 In this respect I adopt the reasoning of Fish J.A. in *Murray* where he pointed out that “[t]he justification for this police action is inextricably connected to its purpose” (p. 210). In that case, the police stopped all vehicles that were approaching from the direction of the robbery and that were capable of hiding three fugitives. Fish J.A. continued:

There was thus a rational connection between respondent’s detention and the lawful justification for the roadblock. And I am not prepared to hold that his detention was nonetheless arbitrary because the police lacked additional and more particularized grounds to suspect that he was personally implicated in the robbery. [Emphasis added; pp. 210-11.]

115 The roadblock in this case was a rational response to the 911 gun call. A random stop of some vehicles would not have served the purpose.

(3) Minimal Impairment

116 The difficult issue is whether the police power at common law “minimally impairs” the right, or is proportional to the importance of the pressing and substantial purpose of the common law rule.

117 Up to this point, it seems to me, my analysis is more or less in harmony with that of Doherty J.A., albeit differently structured. It is at the point of “minimal impairment” that we part company. Doherty J.A. writes on the “tailoring issue”:

My difficulty is not that the police relied on the information provided by the 911 caller, but that they chose to ignore significant parts of that information when they decided they would stop every vehicle leaving the parking area regardless of whether it or its occupants bore any resemblance to the descriptions provided by the 911 caller. [para. 60]

At para. 62, Doherty J.A. states what I take to be the heart of his decision:

As indicated above, the ancillary power doctrine is very fact-specific. A roadblock tailored to the information provided to the police may have been justified under that doctrine. However, a roadblock stop of any and all persons leaving the parking area regardless of whether they or their vehicles matched or even resembled the description provided by the caller went beyond what could be justified under the ancillary power doctrine. The police could not rely on the information provided by the 911 caller to establish the roadblock stop and then ignore the details of that information on the assumption that the caller have [sic] been mistaken in his identification of the individuals or vehicles involved. [Emphasis added.]

Accordingly, in his view, a properly “tailored” roadblock might have been justified, but not a roadblock that swept up all vehicles including the one in which the respondents were driving. I agree that the Charter requirement of proportionality means the common law roadblock must be properly “tailored” to the information which the police possess and regard as reliable.

118 A “Clayton and Farmer” stop is not the same thing as a Mann investigative detention although it may (or may not) lead in that direction. A “Clayton and Farmer” stop of all vehicles is established for screening purposes. A Mann inquiry may then be undertaken only if reasonable grounds for individualized suspicion emerge. I conclude that the common law at issue in this case satisfies the requirement of proportionality (in fact “tailored” is more or less a synonym for proportionality). In such circumstances, anything less than a full blockade would not serve the purpose which has already been found to be pressing and substantial. Moreover, for the reasons mentioned, the law’s salutary effects exceed its deleterious effects.

119 I therefore turn to the issue of “inadequate tailoring”.

J. In Light of the Common Law Power of the Police to Mount the Road Blockade in This Case, Was the Police Blockade in This Case Constitutional?

120 An arbitrary detention pursuant to a “saved” law is not unconstitutional unless the exercise of the common law authority is itself “unreasonable” in the totality of the circumstances.

121 If I were to put what Doherty J.A. said within the analytical framework used here, I understand his conclusion to be that the common law police power to erect a blockade exists and was in principle applicable on the facts of this case but the exercise of that power was not reasonable “in the totality of the circumstances” because of inadequate tailoring.

122 No doubt the “sporty Jaguar” did not conform to the 911 caller’s description of the vehicles in which the four handgun people had arrived, but I believe the degree of “tailoring” required by Doherty J.A. is, with respect, excessive. The handgun people, when seen by the 911 caller, were standing outside. It would not be prudent for the police simply to assume that the handgun people would necessarily be leaving the Million Dollar Saloon in the same vehicles in which they arrived. Moreover, the “tailoring” required by the Ontario Court of Appeal assumes a level of vehicle-make recognition on the part of 911 callers in general that, as the police noted, would be “problematic” (see trial judgment, at para. 10). As shown in Godoy, the police do not always have the advantage of the full story from a 911 caller. On the other hand, if the occupants of the stopped car had been female and Asiatic, a “tailored” roadblock would have let them pass, as the 911 caller must be presumed to be less error prone in dealing with a person’s appearance, which calls for less specialized knowledge and less sophisticated powers of observation. The blockade, complete as it was, involved no more than a brief imposition on the time of motorists departing from the parking lot. The more difficult issue is whether police conduct after the initial stop infringed the respondents’ Charter rights.

K. A Search That Is Conducted Incidental to a Lawful Detention to Further its Purpose Is Not an Unreasonable Search Within the Meaning of Section 8 of the Charter

123 Once the blockade is found to be lawful, the question is whether the police did thereafter obtain grounds of reasonable “individualized” suspicion of Clayton, thereby converting the initial stop into a Mann investigative detention. As noted by the trial judge, Clayton’s appearance corresponded to the 911 call; he was wearing gloves on a warm night (para. 13) which suggested a concern on his part about leaving fingerprints. The trial judge found that “when the officer asked [Clayton] to step out, objectively there existed articulable cause [i.e., individualized suspicion] to remove him from the car and to search him” (para. 78). The police then attempted to search Clayton, but once he was told police were responding to a gun call, he bolted. He was then apprehended and the ensuing search produced the handgun. Only after seizure of the handgun was Clayton arrested (para. 19). The gun was properly admitted into evidence.

124 Farmer presents a different issue. The trial judge concluded that “[w]hen [Constable] Dickson asked Farmer to get out, he did not have reasonable cause to suspect the driver was implicated in the offence under investigation” (para. 73). Moreover, “[w]hile I accept that Farmer was hesitant, I do not accept that it played a role in the decision to search” (para. 74). Further, the trial judge writes:

This was not a situation like *Ferris* [(1998), 126 C.C.C. (3d) 298], where the search was conducted because of concern for officer safety, where there were objectively discernible facts known to the constable giving reasonable cause to suspect Farmer was criminally implicated in the crime under investigation. Here, the decision was made before the reluctance to get out and was not dependent upon it. Even if it were, the situation lacked the objectively discernible facts from which one could conclude Farmer was, or had just committed, the crime under investigation. [Emphasis added; para. 75.]

The trial judge’s different treatment of Farmer would be understandable if Clayton and Farmer had been two unconnected pedestrians who happened to be leaving the Million Dollar Saloon parking lot at the same time, but independently. However that is not this case. Farmer, being black, fit the general description by the 911 caller. He was leaving the parking lot in the same car as Clayton soon after the 911 gun call. Once the trial judge concluded that sufficient grounds existed to require Clayton to get out of the car and submit to a search for reasons of police safety incidental to detention it follows, I think that it would have been foolhardy for the police, in the context of a gun call, to leave Farmer, possibly armed, in the car while they went about their business with Clayton. Nor could the police be expected to allow Farmer to drive away. If Farmer, left alone in the driver’s seat, had taken a shot at the police, there would have been legitimate questions raised about police training and police judgment and the unreality of a law that led to such an avoidable result. The respondents were travelling together and the concerns about officer safety raised by the glove-wearing, possibly gun-flourishing Clayton gave rise to a sufficient concern about the driver to warrant a pat-down search of Farmer for officer safety incidental (at that point) to Farmer’s continued detention. Nevertheless, this point is complicated in Farmer’s case because, before he was searched, he was arrested.

125 Farmer was out of the car and was putting his hands on the roof when Clayton tried to bolt (trial judgment, at paras. 23-24). The arresting officer initially testified that he did not arrest Farmer until after he received word that Clayton had a gun. However, the police tapes showed this not to be the case. The arresting officer had no such information. Accordingly, the trial judge concluded that “[a] reasonable person placed in [Constable] Mulholland’s position could not conclude there were reasonable and probable grounds for the arrest” (para. 82). The search of Farmer took place after his arrest. The trial judge therefore found:

The search was conducted in a reasonable manner and incident to an arrest. However, the arrest was unlawful and the search violated Mr. Farmer’s s. 8 rights. [para. 83]

The trial judge thus treated the intervening arrest as determinative of Farmer’s rights. It seems to me overly formalistic however to hold that, while the police were entitled to conduct a pat-down search of Farmer incidental to his continued detention, the entitlement vanished with the wrongful pronouncement of the words of arrest, even though the officer safety issue remained the same. To put it another way, I do not think the effect of the arrest can be said to have enlarged Farmer’s reasonable expectation of privacy. An arrest, of course, gives the police greater powers of search than a Mann detention, but the fact is that what happened to Farmer was a pat-down search well within the bounds of a Mann detention.

126 I would therefore hold that the pat-down search of Farmer that resulted in the seizure of the gun was not rendered unconstitutional by the words of arrest that intervened between getting Farmer out of the car and the police pat-down search to ensure officer safety. Had I concluded otherwise, I would, nevertheless, have agreed with the trial judge that the gun should be admitted under s. 24(2) .

L. In Any Event, Section 24(2) Was Properly Invoked in Farmer’s Case

127 In the Ontario Court of Appeal, Doherty J.A. stated that:

The trial judge’s s. 24(2) analysis proceeded on the basis that the initial stop was constitutional. I have concluded that it was unconstitutional. It follows that the usual deference owed to a trial judge’s s. 24(2) analysis has no application [para. 69]

As, on the contrary, I accept the trial judge’s conclusion that the initial stop was constitutional, I would have been prepared to defer to the trial judge’s s. 24(2) decision to admit the gun as evidence against Farmer.

128 All parties agree that s. 24(2) requires the application of the well-known three-part test articulated in *R. v. Collins*, [1987] 1 S.C.R. 265. The court looks first at the effect of the admission of the impugned evidence on the fairness of the trial, second at the seriousness of the Charter violation and third at the negative impact, if any, on the administration of justice that would be occasioned by the admission of the evidence. Both the trial judge and Doherty J.A. agreed, as do I, that admission of the gun would not affect trial fairness. Doherty J.A.’s view of the seriousness of the Charter breach was predicated on his conclusion that the original blockade detention was unconstitutional. He states:

Farmer and Clayton were entitled to proceed on their way. Instead, they found themselves in a potentially demeaning and frightening confrontation with the police. The roadblock stop led to a serious violation of their Charter rights.

The significance of the Charter breaches is not minimized because it turns out that Farmer and Clayton were in possession of loaded prohibited weapons. . . . Criminals do not have different constitutional rights than the rest of the community. [paras. 77-78]

On the s. 24(2) point, I accept the conclusion of the trial judge who held that, while the Charter violations were not “technical or trivial, they were not serious enough as to support exclusion” (para. 99). In support of his conclusion the trial judge observed that

the violations occurred in a fast-paced situation, where the officer had little time for reflection.

. . .

. . . the fact it was a gun call is an important consideration.

Constable Mulholland saw the Robson-Clayton struggle and Clayton’s flight. . . . As regards the search incident to arrest, the officer honestly but mistakenly believed he had the information that would give him reasonable and probable grounds. Again, there is no bad faith. [paras. 95 and 97-98]

129 As stated, Doherty J.A. made an important point about the potential contribution of inadequate training to excessive police conduct. A Charter violation caused by systemic failure would raise greater concerns for the administration of justice than an isolated act of a single misguided police officer. However, given my conclusion that the roadblock (i.e., detention) was valid, I do not think the adequacy of police training emerges as a s. 24(2) consideration in this case.

130 As to whether admission of the evidence would bring the administration of justice into disrepute, I agree with the trial judge that “[t]he evidence sought to be excluded is essential to the prosecution of serious charges. The officer had legitimate concerns for his safety. Given the fast-paced events over a brief period of time as noted above, the officers had to make quick decisions without time for reflection. I consider as well the nature of the search contemplated” (para. 100). The trial judge therefore held:

To exclude the evidence of a loaded gun in these circumstances, would bring the administration of justice into greater disrepute than would occur if it was admitted. [para. 101]

131 I agree. If it had been necessary to resort to s. 24(2), my view is that the gun found on Farmer was properly admitted in evidence.

M. Disposition

132 I would allow the appeal and reinstate the convictions entered by the trial judge.

Appeal allowed.

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Solicitors for the respondent Wendell Clayton: Wasser McArthur, Toronto.

Solicitor for the respondent Troy Farmer: Deepak Paradkar, Thornhill.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

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Solicitors for the intervener the Canadian Civil Liberties Association: McCarthy Tétrault, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

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