
CANADA / JUDGMENT

R. v. Dhillon

2012 BCCA 254

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 254 R. v. Dhillon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Dhillon,

2012 BCCA 254

Date: 20120613

Docket: CA038220

Between:

Regina

Respondent

And

Rajinder Singh Dhillon

Appellant

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Hinkson

On appeal from: Provincial Court of British Columbia, January 28, 2010

(R. v. Dhillon, Abbotsford Docket No. 65321-2C)

Counsel for the Appellant:

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R. Thirkell

Counsel for the Respondent:

M. Levitz, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

March 13, 2012

Place and Date of Judgment:

Vancouver, British Columbia

June 13, 2012

Written Reasons by:

The Honourable Madam Justice D. Smith

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[1] Rajinder Singh Dhillon appeals his convictions on four firearm offences. The alleged offences occurred on August 15, 2006, at Abbotsford, B.C. They include:

Count 1: did possess a firearm, AK-47 Rifle, while not being the holder of a licence under which he may possess the firearm and a registration certificate for the firearm, contrary to s. 91(1) of the Criminal Code.

Count 2: did carry a concealed weapon, AK-47 Rifle, contrary to s. 90(1) of the Criminal Code.

Count 3: was an occupant of a motor vehicle in which he knew there was a prohibited weapon, an AK-47 Rifle, for which he or any occupant of the motor vehicle was not the holder of an authorization or licence under which he or any other occupant may transport the prohibited weapon, contrary to s. 94(1)(b)(i) of the Criminal Code.

Count 4: did possess a prohibited device, cartridge magazine, while not being the holder of a licence under which he may possess it, contrary to s. 91(2) of the Criminal Code.

[2] The central issue at trial was the lawfulness of a search of the trunk of Mr. Dhillon's motor vehicle and the attendant seizure of the firearm discovered therein. The trial judge found that the search was conducted for officer safety reasons, incidental to an investigative detention, and did not violate Mr. Dhillon's s. 8 Charter right to be secure against

unreasonable search and seizure. In the alternative, if Mr. Dhillon was not lawfully detained for an investigative purpose, the trial judge held that the firearm was admissible as evidence in the trial pursuant to s. 24(2) of the Charter based on the test prevailing at the time from *R. v. Collins*, [1987] 1 S.C.R. 265.

- [3] On appeal, Mr. Dhillon submits the trial judge erred in finding that the search of his vehicle was for officer safety reasons incidental to an investigative detention and therefore reasonable. He says the only authority under which the investigating officer undertook the search was Mr. Dhillon's consent, which the investigating officer acknowledged at trial was not obtained in compliance with the preconditions for valid consent established in *R. v. Borden*, [1994] 3 S.C.R. 145. In the absence of valid consent, which the Crown now concedes was not properly obtained, Mr. Dhillon submits that the search of the trunk was unreasonable, the firearm seized was not admissible, and, in the absence of the firearm evidence, he should have been acquitted of all the charges against him.
- [4] In the alternative, Mr. Dhillon submits that if he was detained before the search of the vehicle (as found by the trial judge), his detention was arbitrary and therefore contrary to s. 9 of the Charter. He says there were no "reasonable grounds to suspect in all the circumstances that [Mr. Dhillon was] connected to a particular crime and that such a detention [was] necessary": *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at para. 45. In support of that submission, Mr. Dhillon relies on the investigating officer's acknowledgment at trial that he had no reasonable grounds to detain Mr. Dhillon.
- [5] In the further alternative, Mr. Dhillon submits that if he was lawfully detained pursuant to an investigative detention, he was not advised of the reason for his detention or of his right to counsel, contrary to ss. 10(a) and (b) of the Charter. Relying on *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, he contends that an individual subject to an investigation detention must be informed of his s. 10 Charter rights "without delay" (para. 2). He maintains, based on *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1147, that if he was lawfully detained, Cst. Doucette's failure to advise him of his s. 10 Charter rights triggered a violation of his s. 8 Charter right to be secure from an unreasonable search and seizure.
- [6] In the face of violations of his ss. 8, 9 and 10 Charter rights, Mr. Dhillon submits the trial judge erred in failing to exclude the evidence of the firearm pursuant to s. 24(2) of the Charter.
- [7] For the reasons that follow, I am of the view that the appeal must be allowed, the convictions quashed and an acquittal entered. As a result of my conclusions on the issue of whether Mr. Dhillon was detained, I find it unnecessary to address Mr. Dhillon's alternative claim of a s. 10 Charter breach.

Background circumstances

- [8] On August 15, 2006, Cst. Doucette was dispatched to the parking lot of a Subway restaurant in Abbotsford, B.C. in response to a complaint of fighting amongst a group of 12 South Asian males. Upon his arrival with his partner, he observed 7 to 9 South Asian males in front of the Subway restaurant. He also observed a BMW motor vehicle with its passenger door open and parked at an angle to the linear parking stalls. Two more officers arrived at approximately the same time as Cst. Doucette and his partner.
- [9] Cst. Doucette informed the group of males that he was investigating a complaint about a fight. In response, he was advised that there had been no fight. He saw no evidence of a fight and concluded that the complaint was unfounded. He did, however, recognize an individual in the group, Mr. Dhaliwal, from previous police dealings and from police intelligence, as someone who was involved in violent criminal activity and associated with firearms. Mr. Dhaliwal's presence at the scene raised Cst. Doucette's suspicions that weapons might be present.
- [10] Cst. Doucette was also concerned about the manner in which the BMW was parked, as it suggested to him that someone might have exited the vehicle in a hurry. Upon inquiring as to its ownership, Mr. Dhillon came forward. Cst. Doucette asked Mr. Dhillon if he had any identification and Mr. Dhillon produced his driver's licence from the middle console of the vehicle.
- [11] Cst. Doucette then looked inside the open passenger door and observed a pair of scissors and some rolling papers in the middle consol. In his experience those items were typically associated with the use of marijuana. He did not see or smell any burnt or fresh marijuana.
- [12] The possibility of drugs in the vehicle also made Cst. Doucette suspicious that there might be weapons in the vehicle. He said that in his experience the two were often connected. While he had not seen any drugs or weapons inside the main body of the vehicle, he was concerned about what might be inside the trunk. He asked Mr. Dhillon if there was anything inside his vehicle that he "needed to worry" about and "if he had any ... drugs or weapons in the car", to which Mr. Dhillon replied "no". He then asked Mr. Dhillon if he would consent to him searching the vehicle, to which Mr. Dhillon replied that "he didn't have any problem with it" as "there was nothing in the vehicle." When Cst. Doucette asked Mr. Dhillon how to open the trunk, Mr. Dhillon walked around to the driver's-side door and pushed a button below the steering wheel that opened the trunk.
- [13] Cst. Doucette asked Mr. Dhillon to step back before he opened the trunk. Inside the trunk he noted a long object covered in towels. Upon removing the towels he discovered a Norico assault rifle (an AK-47 knock-off), a prohibited firearm, with an attached 30-round magazine. He immediately arrested and handcuffed Mr. Dhillon, conducted a pat-down search of his person, and placed him in the back of a police vehicle. The interval between Mr. Dhillon identifying himself to Cst. Doucette as the owner of the vehicle and his arrest was about four to five minutes.

- [14] Shortly thereafter, two other males arrived at the scene. Cst. Doucette knew both individuals to be associated with a criminal gang, to carry handguns and to wear body armour. He was also aware that both men had previously been involved in shootings. He immediately called for more backup and directed the other police officers present to handcuff and search all 11 males now in the group.
- [15] Forty-five minutes later, Cst. Doucette advised Mr. Dhillon that he was under arrest for a firearms offence and that he had a right to counsel. About an hour later, at the detachment, Mr. Dhillon was provided access to a telephone for the purpose of contacting legal counsel.
- [16] At trial, Cst. Doucette testified that the legal authority on which he conducted the search of Mr. Dhillon's vehicle was Mr. Dhillon's consent. He acknowledged that at the time he had only "a suspicion that someone who used the vehicle may have been using drugs at some point". He also acknowledged that before he searched the vehicle he did not have reasonable grounds to arrest Mr. Dhillon or detain him for investigative purposes on any drug-related or weapons-related offence. He similarly acknowledged that he did not have reasonable grounds to obtain a search warrant.
- [17] In response to questions about what he believed his options to be at the time, Cst. Doucette responded:

Q You would agree with me though that you could have secured that trunk until backup arrived, could you not?

A Yes.

Q In fact, you could have prevented any of the people there access to that vehicle until backup arrived, could you not?

A Yes.

Q So there was no immediate officer safety concern?

A Well, once we see Mr. Dhaliwal, Mr. Karbonavic, Mr. Wust, I have no idea who's driving by. I have no idea. Peardonville leads right to the highway. Anybody could drive by and do anything.

Q What does that have to do with what's in the trunk of the vehicle?

A I have no idea who's associated. I see seven to nine people where they said there was 12. How do I know three people aren't driving around?

Q It wouldn't have changed the fact that you could secure the vehicle.

A I could secure the vehicle.

Q To you had no grounds for a search. You sort of characterized this as a search based on a suspicion?

A It was actually a consent search. I asked him for consent. He consented to the search.

Q And your reasons for doing it were that you might find evidence --

A We might find weapons or drugs.

Q Because at that point you had nothing on any of the people there?

A That's correct.

Q No grounds to charge them with anything, no reason to detain them any longer?

A They weren't detained.

Q You would agree though that you were exercising control over the movement of Mr. Dhillon at this point?

A I didn't exercise control of his movements. I asked him for his driver's licence. He went to get it. I asked him how the trunk opened. He went to open the trunk. Never once did I tell him to go open the trunk. I said how does the trunk open. He went and popped it open.

[18] In sum, Cst. Doucette acknowledged that: (i) he did not have reasonable grounds to arrest Mr. Dhillon; (ii) he did not have reasonable grounds to detain Mr. Dhillon for investigative purposes (for an assault, drug-related offence or weapon-related offence); (iii) he therefore did not have authority to conduct a search for officer safety reasons incidental to an investigative detention; (iv) he did not have reasonable grounds to obtain a search warrant for the vehicle; and (v) he was relying solely on Mr. Dhillon's consent as the legal basis for his search of the vehicle.

The trial judge's reasons

[19] The trial judge found that Cst. Doucette's actions did not breach Mr. Dhillon's Charter rights and that the firearm was admissible evidence at the trial. She concluded, based on the cumulative effect of all of the evidence, that the only rational explanation and inference was that the firearm was in the trunk of Mr. Dhillon's vehicle with his knowledge and consent.

[20] In particular, the trial judge held that Mr. Dhillon's s. 9 Charter right not to be arbitrarily detained had not been breached, as he was lawfully detained pursuant to an investigative detention. This ruling appears to have been based on several findings of fact, including that Cst. Doucette had probable (i.e., reasonable) grounds to believe there were drugs in the car:

[9] At this point because of the fact there were a large number of young males there, with only four officers, and with the reputation of Mr. Dhaliwal in his mind and the probable involvement of drugs given the paraphernalia, Cst. Doucette wanted to check the trunk for possible weapons.

...

[26] ... Cst. Doucette's evidence was that he looked inside the vehicle for safety reasons for both himself and his fellow officers. Once the constable saw the drug paraphernalia in the console, he became concerned as in his experience drugs are very frequently involved in conjunction with firearms. That, coupled with the manner in which the vehicle was parked, and the suspicious presence of the males, including a known violent offender, the officer had reason to be concerned about what would be in the vehicle, including the trunk of the vehicle.

[Emphasis added.]

[21] Based on the presence of drug paraphernalia in the vehicle, the manner in which the vehicle was parked, and the presence of a known violent offender in the group of males, the trial judge concluded that Cst. Doucette had both subjective and objective grounds to detain Mr. Dhillon for investigation in regard to the complaint of a fight:

[29] In the case at bar, given the fact that the police were responding to a call generated by a member of the public regarding a violent offence, the presence of Mr. Dhaliwal, the way the car was parked, the drug paraphernalia in the car, Mr. Dhillon's involvement with the group of young men, it was reasonable for [Cst.] Doucette to form the belief that Mr. Dhillon was involved in some manner with the fight that they were caused to investigate. It would be naive and unrealistic to expect that the police when investigating an assault would accept the word of a group of people there when they deny an assault ever took place, especially given the known violent person within the group. Up to the point where the accused is arrested, interference with his liberty was minimal, only to the extent required for the officers to do their duty in checking out a potential assault.

[30] I find that the officers had both objective and subjective grounds to detain the group of men which included Mr. Dhillon for investigation. I find that Mr. Dhillon was not arbitrarily detained in that period of four minutes such that his s. 9 Charter rights were violated.

[Emphasis added.]

[22] Having found that Mr. Dhillon was lawfully detained for investigative purposes, and relying on the authority of Mann, the trial judge held that the search of Mr. Dhillon's vehicle for officer and public safety reasons was reasonable as incidental to Mr. Dhillon's investigative detention:

[35] In any event, Cst. Doucett, having found drug paraphernalia, was concerned about the safety not only of the officers but also of the group of men present and members of the public because of weapons frequently being found along with drugs.

[23] The trial judge also found no breach of Mr. Dhillon's s. 10 Charter rights to be informed of the reason for his detention and to retain and instruct counsel without delay. In her view the 45 minute delay was not intentional but due to the volatility and potential danger of the situation.

[24] In the alternative, the trial judge stated that if she was wrong in finding that Mr. Dhillon had not established any Charter breaches, she would have admitted the firearm pursuant to s. 24(2). Applying the Collins framework, she found that the real evidence was non-conscriptive and reliable, the violation of Mr. Dhillon's privacy interest in the trunk of his vehicle was minimal, and Cst. Doucette was at all times acting in good faith. She concluded that the administration of justice would be brought into disrepute if the evidence of the firearm was excluded as evidence at the trial.

On appeal

(i) The appellant's position

[25] Mr. Dhillon submits the trial judge erred in analyzing the lawfulness of the search as incidental to an investigative detention when Cst. Doucette acknowledged that the only basis for his search of the vehicle was Mr. Dhillon's consent. He submits that Cst. Doucette did not obtain a valid and effective consent from Mr. Dhillon. Nor did he subjectively believe that he had reasonable grounds to detain Mr. Dhillon. In the absence of a valid consent and a lawful investigative detention, Mr. Dhillon contends that the search of his vehicle was an infringement of his s. 8 Charter right, that the evidence of the firearm obtained from the trunk should not have been admitted as evidence at the trial, and that he should have been acquitted on all charges.

(ii) The Crown's position

[26] Counsel for the Crown (who was not counsel at trial) concedes that Cst. Doucette failed to obtain a valid consent from Mr. Dhillon to search his vehicle. Counsel also agrees that the evidence at trial did not support a finding that Mr. Dhillon was subject to an investigative detention when the trunk of his vehicle was searched. This position differs from that taken by the Crown at trial, where the judge was urged to find that Mr. Dhillon was subject to an investigative detention. Counsel on appeal submits this change of position is justifiable, as the issue of whether an individual is detained is a question of law and therefore subject to review on a standard of correctness.

[27] Counsel maintains, however, that even in the absence of a lawful investigative detention, the search was not unreasonable as it was a justifiable use of a police power in the exercise of their duties to preserve the peace, prevent crime and protect life and property: see *Dedman v. The Queen*, [1985] 2 S.C.R. 29, and *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (Ct. Crim. App.). This common law test for the justification of police powers has become known as the Waterfield doctrine and was adopted by the Supreme Court of Canada in *Dedman*.

[28] In the alternative, the Crown submits that it remains open to this Court to find that the trial judge was correct in finding that the search was incidental to a lawful investigative detention, as this is a question of law subject to review on the standard of correctness.

Discussion

1. Was there a valid consent search of the vehicle?

[29] Both parties agree that Mr. Dhillon's consent for the search of the trunk of his vehicle was not obtained in a manner required by the long established jurisprudence. The Crown properly concedes this issue. Borden was decided 12 years ago and sets out the requirements for a voluntary consent: (i) the individual must be advised of his right to refuse or withdraw his consent at any time; (ii) the individual must be made aware of the consequences of his consent to the search; and (iii) the individual must be informed of his right to counsel in order to have explained to him the consequences of his consent to the search: Borden at 162. The requirements for an informed consent were not met in this case and accordingly Mr. Dhillon's consent was not valid or enforceable.

2. Was the search of the vehicle incidental to a lawful investigative detention?

Detention

[30] Detention for Charter purposes exists where there is "a suspension of the individual's liberty interest by a significant physical or psychological restraint": R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 44. Psychological detention occurs where an individual "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist": R. v. Therens, [1985] 1 S.C.R. 613 at 644, cited in Grant at para. 28. The determination of whether there has been detention is an objective test: Grant at para. 31. Where there has been no physical restraint and no legal obligation to comply with a demand by a police officer, the question is whether "a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply". The relevant considerations in those circumstances include (at para. 44):

- (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

Lawfulness of detention

[31] If a detention is found to have occurred, it is necessary to determine whether that detention was arbitrary contrary to s. 9 of the Charter. A detention is not arbitrary if it is authorized by law, either statutory or common law. In Mann, the Court posed the following questions: (i)

whether at common law there existed a police power to detain individuals for investigative purposes; and (ii) whether a concomitant common law power of search incidental to an investigative detention existed. The Court traced the existence of both powers back to *Waterfield*, where the Court recognized that duties imposed on police officers by statute or at common law may engage associated police powers such as the power to arrest, detain and/or search (*Mann* at paras. 24-26).

- [32] In answering the first question, the Court in *Mann* held that a lawful detention at common law is one that is based on reasonable grounds. Reasonable grounds to detain for investigative purposes exist if the detention is "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": *Mann* at para. 34. In *Mann*, the Court emphasised that "[t]he power to detain cannot be exercised on the basis of a hunch, nor can it become a de facto arrest." Subsequently, in *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, the Court described the reasonable suspicion standard for an investigative detention (at para. 75):

"Suspicion" is an expectation that the targeted individual is possibly engaged in some criminal activity. A "reasonable" suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. As observed by P. Sankoff and S. Perrault, "Suspicious Searches: What's so Reasonable About Them?" (1999), 24 C.R. (5th) 123:

...the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment. What distinguishes "reasonable suspicion" from the higher standard of "reasonable and probable grounds" is merely the degree of probability demonstrating that a person is engaged in criminal activity, not the existence of objectively ascertainable facts which, in both cases, must exist to support the search.

- [33] Objectively reasonable suspicion includes both a subjective and an objective element. The importance of establishing both elements was underscored by Mr. Justice Frankel, for the majority, in *R. v. Reddy*, 2010 BCCA 11:

- [67] As is the case with the power of arrest, an officer invoking the power of investigative detention must subjectively believe that the requisite standard has been met, and the officer's belief must be objectively reasonable: *Mann* at para. 27; *R. v. Greaves*, 2004 BCCA 484, 189 C.C.C. (3d) 305 at para. 33.

- [34] In addition to the requirement of reasonable grounds to suspect that an individual is involved in criminal activity, *Mann* requires that, to be lawful, an investigative detention must be reasonably necessary in order to justify the otherwise unreasonable interference with an individual's liberty:

- [34] ...The evolution of the *Waterfield* test ... calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that

there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test. [Emphasis added.]

Search incidental to investigative detention

- [35] Where there exist reasonable grounds to suspect that a detained individual is connected to a particular crime, officer or public safety concerns may justify a search incidental to that detention, which will typically involve a pat-down search of the detained individual (Mann):
- [40] 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. ... 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. [Emphasis added.]
- [36] Thus, a lawful search incidental to an investigative detention requires "reasonable grounds" (i.e., an objective basis) for concerns about officer and/or public safety, and that the search be "reasonably necessary" to ensure the preservation of the officer and/or public safety.

Was the search of Mr. Dhillon's vehicle incidental to an investigative detention?

- [37] In my view, the trial judge erred in principle and in fact in finding that Mr. Dhillon was subject to an investigative detention and therefore in finding that the search of Mr. Dhillon's vehicle was reasonably necessary as incidental to that investigative detention. In my view, the facts do not support a finding that Mr. Dhillon was detained; nor does the evidence support a finding that Cst. Doucette's subjective belief rose above a hunch or mere suspicion of criminal activity to the required level of reasonable grounds to suspect that Mr. Dhillon was involved in a recent or ongoing crime.
- [38] On this issue, the Crown acknowledges the paucity of evidence to support such a finding. Cst. Doucette testified that he did not exert any control over Mr. Dhillon. He did not physically restrain Mr. Dhillon or direct him to go anywhere or do anything other than to step back away from the vehicle when he was searching the trunk. He did not ask him to open the trunk. His only requests of Mr. Dhillon were to produce his driver's licence and "how to open the trunk". Furthermore, Cst. Doucette testified that he had not detained Mr. Dhillon.

- [39] Based on the test in *Grant*, these facts do not support a finding that Mr. Dhillon had been detained. The only evidence that might support a finding that Mr. Dhillon was psychologically detained was his compliance with the requests made by Cst. Doucette (to produce his driver's license and how to open the trunk). However, in my view these factors fall short of establishing an evidentiary basis for a finding that Mr. Dhillon believed he had "no choice but to comply": *Grant* at 44. In responding to Cst. Doucette's request to search the trunk, Mr. Dhillon statement that "he didn't have any problem with it" because "there was nothing in the vehicle" does not appear to demonstrate compulsion.
- [40] Nor did the trial judge explicitly find that Mr. Dhillon had been detained. While this finding may be implicit in her finding that there was a lawful investigative detention, her analysis focused solely on whether there were reasonable grounds to detain, not whether there was in fact detention. As this Court made clear in *R. v. Whitaker*, 2008 BCCA 174, it is not sufficient that the police may have had a legal basis to exercise certain powers if they did not in fact exercise those powers. It is not enough, for example, for the Crown to assert that the police had reasonable grounds to obtain a warrant if they did not in fact obtain a warrant. The question for the court is the lawfulness of the actual police conduct, not the potential basis for the exercise of police power. As Mr. Justice Frankel observed in *Whitaker*, albeit in the context of an unlawful arrest:
- [65] The Crown argued, in brief, that even if the police did not have reasonable grounds to arrest Mr. Whitaker, his detention was not arbitrary because he could have been detained under the common law power of investigative detention recognized in *R. v. Mann* [citation omitted]. The difficulty with this argument is that the police did not invoke the common law power of investigative detention; they invoked the statutory power of arrest, with its more extensive power of incidental search of the person. When the police have wrongfully arrested someone, their actions cannot be defended on the basis that they could have detained this person on some other basis. In deciding whether the police infringed Charter rights they are to be judged on what they did, not what they could have done: *R. v. Charley*, (1993), 22 C.R. (4th) 297 (Ont. C.A.) at para. 5. [Emphasis added.]
- [41] Further, in my view, the trial judge also erred in finding that Cst. Doucette had reasonable grounds to detain Mr. Dhillon. The duration of the encounter between Cst. Doucette and Mr. Dhillon, before Mr. Dhillon's arrest, was only four minutes. During that period Cst. Doucette did not form a subjective belief that Mr. Dhillon had been or was involved in a fight, and found nothing to support the complaint of a fight, which he concluded was unfounded.
- [42] The trial judge considered this aspect of Cst. Doucette's evidence when she stated:
- [24] It was Cst. Doucette who dealt with Mr. Dhillon and Cst. Doucette gave evidence that Mr. Dhillon was not in the officer's mind detained. This, of course, goes to the good faith of the officer.

- [43] However, the judge appears to have ignored this evidence when she found that Cst. Doucette subjectively believed that Mr. Dhillon was implicated in a fight and that his subjective belief was objectively reasonable:
- [29] In the case at bar, given the fact that the police were responding to a call generated by a member of the public regarding a violent offence, the presence of Mr. Dhaliwal, the way the car was parked, the drug paraphernalia in the car, Mr. Dhillon's involvement with the group of young men, it was reasonable for [Cst.] Doucette to form the belief that Mr. Dhillon was involved in some manner with the fight that they were caused to investigate. [Emphasis added.]
- [44] By implication, the trial judge appears to have rejected Cst. Doucette's subjective belief that the complaint of a fight was unfounded. In such circumstances, *R. v. Feeney*, [1997] 2 S.C.R. 13 requires that an explanation be provided:
- [31] ...The trial judge noted that Sgt. Madrigga testified that he did not think he had sufficient grounds to arrest until he observed the blood on the appellant, but did not advert to this evidence in concluding that reasonable and probable grounds to arrest existed prior to the entry into the trailer. In order to conclude that, objectively speaking, reasonable and probable grounds for arrest existed, one must conclude that the officer on the scene was unreasonable in reaching a different conclusion. The trial judge, however, did not explain his dismissal of the officer's evidence in this respect. In my view, such a failure to clarify the basis for his finding that the objective test was satisfied constituted an error of law. ...
- ...
- [34] In my view, as the lack of subjective belief on the part of the officer would suggest, the requirement that, objectively speaking, reasonable and probable grounds for an arrest exist prior to forcible entry is not met. The objective test as set out in *Storrey*, [[1990] 1 S.C.R. 241], is whether a reasonable person, standing in the shoes of the officer, would have believed that reasonable and probable grounds to make the arrest existed. Any finding that the subjective test is not met will generally imply that the objective test is not met, unless the officer is to be considered to have an unreasonably high standard.
- [Italic emphasis in original; underline emphasis added.]
- [45] The Crown submits the trial judge provided a form of explanation for her implied rejection of Cst. Doucette's evidence as to his subjective belief that he had not detained Mr. Dhillon, when she postulated (at para. 29):

It would be naïve and unrealistic to expect that the police when investigating an assault would accept the word of a group of people there when they deny an assault ever took place, especially given the known violent person within the group.

- [46] However, as noted above, Cst. Doucette testified that he formed the conclusion that the report of a fight was unfounded. While the facts noted by the trial judge may have been relevant to assessing the objective reasonableness of a subjective belief that a fight had occurred, no subjective belief existed in this case. Cst. Doucette stated that the only legal authority upon which he conducted the search was Mr. Dhillon's consent, even though he subsequently acknowledged that Mr. Dhillon's consent was not obtained in a manner that made it valid and enforceable. He did not purport to search the vehicle incidental to an investigative detention of Mr. Dhillon, as he acknowledged that his bare suspicion that he might find drugs and/or weapons in the trunk of the vehicle did not rise to the level of reasonable grounds to detain Mr. Dhillon.
- [47] As in Feeney, the trial judge's apparent rejection of Cst. Doucette's evidence on this issue, without explanation, is an error of law. The law requires both a subjective and an objective basis for an investigative detention. Even if the trial judge's finding that there was an objective basis for detention were accepted, the complete absence of a subjective basis in this case is fatal to the finding that there was a lawful investigative detention.
- [48] Cst. Doucette's concern that Mr. Dhillon might be in possession of drugs and/or weapons did not rise to the level of reasonable suspicion. Accordingly, his search of Mr. Dhillon's vehicle could not be justified as incidental to an investigative detention for officer and/or public safety reasons.
3. Was the search of the vehicle justifiable under the Waterfield doctrine?
- [49] The Crown submits that even without an investigative detention, the search was justified as reasonably necessary for officer and public safety reasons based on the Waterfield doctrine. Counsel maintains that because of the nature of the suspected crimes, Cst. Doucette was facing circumstances that had a potentially high risk of violence and he therefore had a duty to search the trunk of Mr. Dhillon's vehicle for the protection of the public and the officers who were present.
- [50] In my view, such an application of the Waterfield doctrine would extend it far beyond its proper scope. A review of the doctrine's historical roots and subsequent evolution in Canadian jurisprudence bears this out.
- [51] Waterfield was an English case involving a criminal prosecution for charges of dangerous driving and assaulting a police officer. On the charge of assaulting a police officer, one of the elements of the offence required that the police officers be "acting in the due execution of their duty" at the time of the assault. The assault had occurred when two police officers attempted to stop the accused from driving away in a vehicle that was under investigation in relation to a previous dangerous driving incident. The question arose as to whether the officers were entitled to prevent the removal of the car without charging or arresting the accused. In order to determine whether the officers were acting in the course of their duties (within the meaning of the statute imposing the offence), the court articulated what has come to be known as the Waterfield doctrine:

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. [Emphasis added.]

[52] In England, the Waterfield test was never applied beyond those cases where the requirement that an officer be acting "in the execution of his duty" was an element of the offence charged. Indeed, Waterfield was only cited in a handful of decisions and was never used to recognize entirely new investigative powers: see James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335 at para. 27.

[53] In Canada, Waterfield was initially applied in a similar manner. (See *R. v. Stenning*, [1979] S.C.R. 631, and *R. v. Knowlton*, [1974] S.C.R. 443.) Waterfield took on a new life with the decision of the Supreme Court of Canada in *R. v. Dedman*, [1985] 2 S.C.R. 2. Dedman involved a charge of failing or refusing to comply with a roadside demand (for a breath sample) arising out of a random roadside vehicle stop program. A question arose as to whether the police officer had the authority to require the accused to stop at the roadside check-point. The majority framed the issue as follows (at 28-29):

[T]he actions of police officers must find legal justification in statutory or common law authority. The ambit of their authority, as distinct from their liability, is not to be determined by the limits of criminal or civil responsibility. Police action may be unlawful for lack of statutory or common law authority although neither criminal nor tortious. The issue in the present case may be likened to one of vires. The contention is that the allegedly unauthorized and hence unlawful nature of the signal to stop affected the validity of the subsequent demand for a sample of breath.

[54] Applying the Waterfield doctrine, the majority held that the officer was acting within the "general scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic" (at 35). In finding that the use of the power associated with that duty was justifiable in the circumstances, the majority set out the following criteria for the second branch of the test (at 35):

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.

[55] Waterfield was later applied in *R. v. Simpson* (1993), 12 O.R. (3d) 182 (Ont. C.A.) to recognize what is now the most commonly-used branch of the ancillary powers doctrine: the power of investigative detention. Simpson found that police have the power to detain an individual to determine if he or she has been involved in criminal activity, provided they have some "articulable cause" for the detention. That standard for investigative detention became

widely applied across the country, although the Supreme Court did not endorse the power to search incidental to an investigative detention until *Mann*. In *Mann*, the majority applied the Waterfield doctrine to find there was a limited power to search (for protective reasons) incidental to an investigative detention where there exist "reasonable grounds to detain".

- [56] Prior to *Mann*, the Supreme Court had unanimously affirmed the use of the Waterfield doctrine in *R. v. Godoy*, [1999] 1 S.C.R. 311. In *Godoy*, the Court recognized a police power to forcibly enter a private home to investigate a 911 call and provide assistance to the caller. This application of the Waterfield doctrine reflected a subtle but significant difference in its use: from that of a defence to criminal charges (for failure to establish an element of an offence) to one that was now used to establish a positive police investigatory power. In this new application of the doctrine, it is the exercise of the police investigatory powers that produce the evidence for the charges laid (i.e., the fruits of the investigation) rather than the conduct of the accused during the exercise of what may be entirely unrelated police powers.
- [57] The Waterfield doctrine was again used to justify police actions in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, a decision that bears some similarities to the case at bar. In *Clayton*, police received a 911 call indicating that a number of black men were openly displaying handguns outside a strip club. The caller identified four vehicles associated with the men. Police arrived and blocked entrances to the parking lot and almost immediately stopped a vehicle containing two black men (not one of the vehicles identified by the caller). Police became suspicious and asked both men to get out of the vehicle. On searching the men, both were found to have loaded handguns.
- [58] In *Clayton*, the Court clarified the relationship between the common law, including the Waterfield doctrine, and the Charter. Madam Justice Abella, for the majority, characterized the relationship as follows:
- [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. [Emphasis added.]

- [59] The majority found that the police were justified in detaining the men (by stopping the vehicle) based on the existence of reasonable grounds to believe there were handguns in a public place, which posed a genuine risk to public safety. After the initial detention, the Court found that the police were further justified in continuing the detention and conducting a protective search based on reasonable grounds to suspect the accused were in possession of handguns, because of their behaviour and the fact that they matched the racial description in the 911 call.
- [60] In concurring reasons, Mr. Justice Binnie (for himself and two others), differed regarding the approach to be taken in recognizing new common law police powers. He would have adopted a procedure whereby the court would first conduct a Waterfield analysis to determine whether the alleged police power existed at common law, and then subject that common law power to an express s. 1 Charter inquiry (paras. 59-60, 78-79). Justice Binnie went on to agree with the majority, however, that the circumstances in Clayton supported a finding that the initial detention and subsequent search were authorized at common law and consistent with the Charter. In particular, he found that the decision to stop all vehicles leaving the parking lot (not merely those identified in the 911 call) was justified as being as "tailored" a reaction as the circumstances permitted.
- [61] The use of sniffer dogs at a bus terminal has also attracted consideration under the Waterfield doctrine. In Kang-Brown the issue was whether the police were justified in using a sniffer-dog to search the luggage of the accused at a bus terminal after his behavior raised their suspicions that he might be in possession of illegal drugs. It was undisputed that the police did not have reasonable grounds to believe an offence had been committed at the time of the sniffer-dog search. Five members of the Supreme Court accepted that where an investigative technique is minimally invasive (as with the use of a sniffer dog) the police may be justified in employing that technique on the basis of a lower "reasonable suspicion" standard.
- [62] Of those five, Justice Binnie (for himself and Chief Justice McLachlin) found that the reasonable suspicion standard had not been met on the facts of the case. While he agreed that "police are entitled to call in aid sniffer-dogs where they have reasonable grounds to suspect the presence of contraband", Justice Binnie found on the facts of the case that the police had acted on speculation only (paras. 25-26). The search was therefore a violation of s. 8 and the evidence was excluded under s. 24(2). He found that the "reasonable suspicion" standard was Charter-compliant because the nature of the search was minimally-invasive and highly accurate, and the objective of the search was narrowly targeted. He rejected the more extreme position taken by Mr. Justice Bastarache, who would have found police authority to conduct "generalized" (i.e., random) sniffer-dog searches in public places such as bus terminals, where there is a reduced expectation of privacy.
- [63] In concurring reasons, Mr. Justice LeBel (for himself and three others), rejected the lower "reasonable suspicion" standard and disagreed with Binnie J. that, in the absence of legislative action, it is the role of the courts to fill the gaps in the law of police investigative

powers. In LeBel J.'s opinion, "the approach adopted by my colleagues in this case will in practice jeopardize critical elements of the constitutional rights guaranteed by s. 8 and of that section's underlying values" (para. 10). He further expressed concern that "[t]he extension of common law police powers as proposed in this case would shortcut the justification process and leave the Court to frame the common law rule itself without the full benefit of the dialogue and discussion that would have taken place had Parliament acted and been required to justify its action" (para. 14).

- [64] Thus, while the Supreme Court has not been unanimous on the manner in which the common law ancillary powers doctrine interacts with the Charter, it has consistently held that the doctrine cannot be used to avoid Charter scrutiny of police action (per Clayton). In order to survive Charter scrutiny, police powers must be exercised in a manner that balances the rights (including privacy rights) of individuals. This has been achieved primarily by requiring police to have an objective basis for searching an individual or property. That objective basis had typically been met by establishing reasonable grounds to believe an offence has been committed.
- [65] With the decision in *Kang-Brown*, the Supreme Court has now recognized two situations in which that objective basis may be on a lower standard of "reasonable suspicion". The first permits a limited safety search in the context of an investigative detention. The second arises where the nature of the search is of a targeted and minimally-invasive nature, and authorizes a search even in the absence of an investigative detention. However, even under this lower standard, the objective basis for suspicion must be linked to a particular offence rather than a mere generalized suspicion of criminal activity.
- [66] To date, no court has recognized a police power to search based on a standard lower than that of objectively reasonable suspicion. The use of that lower standard to conduct a warrantless search, absent an investigative detention, was only justified in *Kang-Brown* because of the minimally-invasive nature of the search (both in terms of the search itself and the narrow category of information the "sniff" could reveal). In the case of a vehicle search, the nature of the privacy interest affected is much higher, both because the search is more invasive and because the scope of information that could be obtained through the search is much broader.
- [67] This Court has had occasion to consider *Waterfield* in a number of recent decisions. In *R. v. Chuhaniuk*, 2010 BCCA 403, the Court, applying *Waterfield*, found that police have the authority to conduct "security checks" of premises on the same property as a place on which they are lawfully executing a search warrant. It is notable that the Court limited that power to circumstances where there are "reasonable grounds to be concerned that there is a possibility that someone who poses an immediate risk to their safety or the safety of others is in such other place or premises" (para. 65). On the facts of that case there was no objective basis to support any safety concerns which would have required a search of the outbuildings. Thus, again, the possible expansion of police powers was linked to the existence of reasonable grounds to believe the action was necessary to protect officer or

public safety. While I am not persuaded that a free-standing power to search for officer safety reasons should be recognized, if such a power were to be recognized, in my view it would, at a minimum, require this level of objectively reasonable grounds.

- [68] In Reddy, this Court found that a detention and subsequent search by police officers violated Mr. Reddy's Charter rights because the police did not have a reasonable suspicion that any offence had been committed. The circumstances involved a 911 call in which the caller expressed concern about two men who had been sitting in a parked vehicle for several hours. When police arrived, the driver (Mr. Reddy) did not provide identification but gave his name, which allowed the officer to discover that he was subject to a cell-phone prohibition and had been connected with a previous weapons offence. Mr. Reddy was asked to exit the vehicle so it could be searched for cell-phones and while the search was being conducted he ran from the scene. Handguns were then found in the vehicle. After finding there were no reasonable grounds for an investigative detention, Frankel J.A. said this about the lawfulness of the search:
- [72] The trial judge opined that police officers are "justified" in searching a vehicle even though no specific offence is suspected, because "the courts rely on the police to monitor compliance with probation orders and the public relies on the police to maintain order". He went on to find that, in this particular case, the fact that Mr. Reddy took flight gave Constable Todd "good cause to search the vehicle". I am unable to accept either of these conclusions.
- [73] To begin, there is no support for the proposition that, when the police have a bare suspicion that a person in a vehicle is in breach of a condition of a probation order, they have authority to search that vehicle for evidence of that breach. Further, even when police officers lawfully detain someone reasonably suspected of being in breach of a probation order, they do not have a general power to search incidental to that detention for evidence of the suspected breach. It is clear from Mann that police officers may only conduct relatively non-intrusive protective searches incidental to a lawful investigative detention, and that such searches can be undertaken only when the officers have a reasonable basis for believing that their safety, or the safety of others, is at risk: para. 45. More specifically, as Iacobucci J. stated in Mann, "[the decision to search] 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.
- [Emphasis added.]
- [69] These comments are apposite to the circumstances in this case. While on the facts of Reddy there was a detention (though not a lawful one), the objective basis for the detention and the search was lacking. The circumstances of this case do not provide any stronger objective grounds to support a reasonable suspicion that a crime has occurred or reasonable grounds to believe the search was necessary for officer or public safety. Indeed Cst. Doucette admitted to having nothing more than a bare suspicion (based on the identity of one of the members of the group), to support his concerns for officer and public safety. He further

admitted that the vehicle could have been secured until more officers arrived, which runs directly counter to the argument that the search was necessary for public safety reasons. In those circumstances, it cannot be said that the search was either objectively reasonable or necessary, and thus the search fails on the second branch of Waterfield.

[70] In short, while the Waterfield doctrine has developed a robust history in Canada, it has been limited by constitutional constraints and, in particular, by a requirement that police show an objectively reasonable basis for the exercise of any powers. This criterion is reflected in the second branch of the Waterfield doctrine, which requires that police conduct not involve an "unjustifiable use of police powers". Canadian courts, to date, have held the exercise of a common law police power is only justified where its use is objectively reasonable and necessary. Thus, even if the Waterfield doctrine could be found to support the use of police powers based on concerns about safety rather than concerns about the commission of specific criminal offences, in my view at the very least those safety concerns would have to be objectively reasonable before they could serve as a free-standing justification for the use of police search powers.

[71] In my view the circumstances of this case do not support an application of the Waterfield doctrine to justify police conduct that was otherwise in breach of the Charter.

4. Was the evidence of the firearm admissible pursuant to s. 24(2) of the Charter?

[72] The trial judge found, in the alternative, that if there was Charter-infringing conduct by the state, she would nevertheless admit the firearm into evidence pursuant to s. 24(2). In support of that determination she found that the evidence was real and non-convictive; the breach of Mr. Dhillon's Charter right(s) was not serious, as the officer had acted in good faith out of concern for officer and public safety and in what he considered to be a volatile situation; and, finally, the consequence of not admitting the evidence would be the collapse of the trial on very serious charges for which there was a strong public interest in a trial of the merits.

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

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[74] While, generally speaking, a trial judge's determination of the admissibility of evidence in the face of Charter-infringing conduct is entitled to deference, that standard of review does not apply where the judge's findings in support of that determination have been overturned. In those circumstances, this Court must engage in its own analysis.

- [75] Of additional import, is the change in the analytical framework for considering the admissibility of impugned evidence under s. 24(2) since the trial of these charges. In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, the Supreme Court set out a new approach for determining if the admission of impugned evidence would bring the administration of justice into disrepute. That approach involves the consideration and balancing of the following factors:
1. The seriousness of the Charter-infringing state conduct;
 2. The impact of the breach on the Charter-protected interests of the accused; and
 3. Society's interest in an adjudication of the case on its merits.
- [76] In my view, the Charter-infringing conduct in this case was serious. Proceeding with a search in the admitted absence of reasonable grounds and without a valid consent (the requirements of which had been well established for at least 12 years) does not demonstrate good faith. Absent exceptional circumstances, deliberate, negligent or willfully blind state conduct does not equate with good faith (*Grant* at para. 75) and the impugned conduct cannot be justified.
- [77] The effect of the state's non-compliance on Mr. Dhillon's Charter-protected interests was also, in my view, significant. Even a search of a motor vehicle, where there is a reduced expectation of privacy, cannot be justified where there are no reasonable grounds or valid consent for the use of that police power. As was noted in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, one of three companion decisions to *Grant*:
- [31] being stopped and subjected to a search by the police without justification impacts on the motorist's rightful expectation of liberty and privacy in a way that is much more than trivial. As Iacobucci J. observed in *Mann*, the relatively non-intrusive nature of detention and search "must be weighed against the absence of any reasonable basis for justification" (para. 56). [Emphasis in original.]
- [78] Finally, in balancing society's interest in a trial on the merits (particularly one involving very serious charges) with the interest in ensuring state compliance with Charter-protected rights, a court must focus on the long-term effect that non-compliance would have on the "overall reputation of the justice system", rather than the "immediate reaction" to the circumstances of an individual case (even if they are egregious) (*Grant* at 68).
- [79] In all of the circumstances, I am of the view that the admission of the firearm into evidence would bring the administration of justice into disrepute. Accordingly, the evidence shall be excluded. The effect of that determination is that Mr. Dhillon must be acquitted on all four charges.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Hinkson"

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