
CANADA / JUDGMENT

R. v. Fortune

2012 BCSC 2031

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 2031 R. v. Fortune

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Fortune,

2012 BCSC 2031

Date: 20120522

Docket: 58825-2

Registry: Chilliwack

Regina

v.

Matthew David James Fortune

Before: The Honourable Mr. Justice N. Brown

Oral Ruling on Voir Dire

Counsel for the Crown:

F. Lépine

Counsel for the Accused:

D.F.O. Henderson

Place and Date of Hearing:

Chilliwack, B.C.

May 7 and 8, 2012

Place and Date of Judgment:

Chilliwack, B.C.

May 22, 2012

I. Overview of Issues

A. Charter breaches alleged

- [1] Mr. Fortune, the accused, asserts that on August 4, 2011, two police officers unlawfully arrested and detained him and conducted incidental searches pursuant to this alleged unlawful arrest. He says the officer who arrested and detained him did so because of a policy set by the officer's RCMP superiors directing him to do so. Mr. Fortune says the officer's actions and this policy are inconsistent with the Charter of Rights and Freedoms [Charter].
- [2] Cst. M1 and Cst. M2, the two officers involved in Mr. Fortune's arrest, detention, and incidental searches, explained that this official arrest policy directed officers to arrest anyone they found driving while prohibited, and to search their vehicle; regardless of whether the officer was arresting the driver under the Criminal Code, R.S.C. 1985, c. C-46 [Code] or under s. 79 of the Motor Vehicle Act R.S.B.C. 1996, c. 318 [MVA] and regardless of the particular circumstances at the time of arrest, the officers were directed to apply the policy.
- [3] Mr. Fortune says the arresting officer, Cst. M1, complied with the policy instead of the arrest guidelines set out in s. 495(2)(d) of the Code. Mr. Fortune argues that Cst. M1 failed to exercise the discretion required of him under that section before arresting and further detaining him; and that the officer's failure to exercise the discretion made the following illegal: his arrest for driving a motor vehicle while prohibited; his following detention and later arrest for possession of a controlled substance for the purpose of trafficking; and the incidental searches of him and of the car he was driving when arrested. He submits the actions of the two officers together constituted breaches of his rights under ss. 8, 9, 10(a) and 10(b) of the Charter.
- [4] Mr. Fortune says his detention after arrest was illegal, not only because Cst. M1's arrest of him was in itself illegal, but also because Cst. M1 questioned him at the police station for over two hours with the intention of turning him into an informer on drug trafficking activities in the Mission, B.C. area, which is an improper investigative purpose.

- [5] Further, Mr. Fortune asserts neither of the two officers promptly informed him of the reasons for his arrest and of his right to speak to, instruct, and retain counsel without delay with regard to the drug charges, as guaranteed by s. 10(a) and (b) of the Charter. It is an accepted fact that the officers did not advise Mr. Fortune of his s. 10(a) and (b) Charter rights until they had finished questioning him, which was 15 minutes before his arrest for the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA] offences.
- [6] Based on the cumulative effect of the alleged Charter violations, Mr. Fortune asks the court to exclude evidence obtained from the search of the car and of his person from the trial, pursuant to s. 24(2) of the Charter. Furthermore, he submits the Charter violations in this case are sufficiently flagrant and clear to warrant ordering a stay of proceedings under s. 24(1) of the Charter.

B. Overview of Crown's response

- [7] The Crown submits that because Mr. Fortune had no reasonable expectation of privacy in the items searched or seized, including the drugs found in the vehicle, he has no standing to bring an application under s. 8 of the Charter. I will dispose of this issue later, when I come to consideration of s. 24(2) of the Charter.
- [8] The Crown argues the officers had reasonable grounds for Mr. Fortune's initial detention and that the detention was therefore not arbitrary. Counsel further submits the officers had reasonable grounds for their continuing to detain Mr. Fortune as part of their investigation of the driving prohibition offence.
- [9] The Crown further submits the investigative search of the car incidental to Mr. Fortune's arrest was justified and, in the circumstances, reasonable. He submits the fact the arresting officer complied with the official arrest and search policy does not mean the outcome would not have remained the same, had the arresting officer exercised his discretion under s. 495(2) (d).
- [10] The Crown also submits either of s. 495(1)(a) of the Code or s. 79(a) of the MVA allowed Cst. M1 to arrest Mr. Fortune for driving while prohibited.
- [11] Although the Crown counsel argues Mr. Fortune's arrest was lawful, he concedes the officers violated Mr. Fortune's rights under s. 10(a) and (b) of the Charter. Nonetheless, he submits I should admit into evidence the items seized from Mr. Fortune's person and the car under s. 24(2) of the Charter.
- [12] As for Mr. Fortune's application for a stay of proceedings under s. 24(1) of the Charter, Crown counsel complained it had no notice of Mr. Fortune's intent to apply for relief under s. 24(1). Therefore, he asked me to consider refusing to hear an application to grant a stay under s. 24(1).

II. facts

- [13] On July 30, 2011, five days before Mr. Fortune's August 4, 2011 arrest for the offences in this case, the officers noticed Tyler Labelle driving a vehicle registered in Mr. Labelle's name with Mr. Fortune as a passenger. The officers pulled them over.
- [14] Cst. M1 found cocaine on Mr. Labelle's person. Cst. M1 learned Mr. Fortune was under a driving prohibition at the time. Neither Mr. Fortune nor Mr. Labelle were charged with an offence then.
- [15] On August 4, 2011, at about 1400 hours, Cst. M2 and Cst. M1 saw Mr. Fortune, alone this time, driving a car that Cst. M1 recognized from five days earlier as one belonging to Tyler Labelle.
- [16] Cst. M1 confirmed through dispatch that Mr. Fortune had been prohibited from driving a motor vehicle. The officers pulled him over to confirm his identity and to arrest him for driving while prohibited.
- [17] During the voir dire, both officers confirmed that RCMP officers in the Mission detachment worked under a policy directing officers to arrest all persons suspected of driving while prohibited. If the driving prohibition was confirmed, the policy further directed the officers to conduct a search incidental to arrest of both the vehicle and the person. This applied irrespective of whether they had arrested the person under the Code or under the MVA, and irrespective of the particular circumstances surrounding the arrest.
- [18] When Cst. M2 and Cst. M1 conducted such investigations, they did so according to a pre-arranged pattern; Cst. M1 would act as the arresting officer and search the suspect's person while Cst. M2 would search the vehicle.
- [19] Neither officer knew whether the accused had been prohibited from driving under the Code or under the MVA. Neither did Cst. M1, who was the arresting officer, know whether the arrest would be pursuant to s. 495 of the Code, or pursuant to ss. 73 and 79 of the MVA.
- [20] Cst. M1 acknowledged his awareness of both the arrest provisions under s. 495(2) and the discretionary aspects of the arrest provisions under s. 73 of the MVA. He explained during cross-examination that he preferred to follow the arrest policy for driving prohibition offences set by his superiors, which directed officers that upon an arrest of a suspect they were to conduct a search.
- [21] As Mr. Fortune exited the car, both officers noticed he had a broken cell phone in his hand. Cst. M1 said this was not a factor in his arrest of Mr. Fortune because he was focussed on the driving while prohibited charge. On that charge, he advised Mr. Fortune of his Charter rights and gave him the official police warning. Mr. Fortune, who was cooperative, told Cst. M1 he did not wish to speak to a lawyer.

- [22] Before Cst. M1's search of Mr. Fortune's person, considered incidental to his powers of arrest by Cst. M1, he was not concerned about officer or public safety. This was because Mr. Fortune was cooperative and, from the earlier July 30 encounter, he knew Mr. Fortune's identity, and had found no weapons on that prior occasion.
- [23] Cst. M2 seized the cell phone and searched the vehicle, contemporaneously with Cst. M1's post-arrest search of Mr. Fortune's person. Cst. M1 testified he was looking for weapons and to confirm Mr. Fortune's identity. Pursuant to these aims, he reached into Mr. Fortune's right pocket and found \$225.00 cash. Cst. M1 then handcuffed Mr. Fortune and kept him in custody.
- [24] Cst. M2 searched the vehicle incidental to Mr. Fortune's arrest. When he searched the car at 1412 hours, Cst. M2 had not realized that the vehicle was the same one Mr. Fortune had been in on July 30.
- [25] A central issue in this case is the legal significance of the officers' adherence to the dictates of the arrest and search policy for driving prohibition offences given to them by their detachment's superior officers. In line with the policy and related training, Cst. M1 confirmed he arrests every person he finds driving while prohibited, whether their prohibition lies under the Code or the MVA. Cst. M1 confirmed he also searches the driver incidental to their arrest. Usually, his partner, Cst. M2, searches the vehicle for vehicle identification documents, registration papers, and possible contraband. Cst. M2 said he limits his vehicle searches to places in and about the location of the driver.
- [26] On direct examination, Cst. M2 testified he suspected his search would reveal the presence of drugs in the car for two reasons: first, the accused had a broken cell phone in his hand and, in his experience, drug dealers often break their cell phones as a way to destroy phone numbers and other potentially incriminating evidence; second, he had in mind that four days earlier, Tyler Labelle had drugs in his possession. Cst. M2 testified, however, that his search focussed on finding documents that would show vehicle ownership.
- [27] Cst. M2 confined his search to the area around the driver's seat. In the console area underneath some papers, he found a plastic bag containing drugs. Their exact location in relation to the console was not made clear, i.e. whether the plastic bag was under papers that were located on top of the console, or inside the console under papers. I will assume for the purposes of the voir dire that Cst. M2 had to open the console to find the drugs.
- [28] I do not know whether he did find ownership papers or other documents from his search. There is no evidence on that point.
- [29] Cst. M1 testified that before Cst. M2 had discovered drugs in the car, he anticipated he would likely release Mr. Fortune on a promise to appear (PTA). But because Cst. M1 was in plain clothes at the time, he did not have the necessary paperwork to issue a PTA on his person, nor did he think it necessary to issue one. In any case, it was after Cst. M2's discovering drugs in the car that the officers decided to detain Mr. Fortune for questioning.

- [30] Cst. M1 did not arrest and charge Mr. Fortune at the scene for any drug related offence. The officers transported him to the jail for questioning with the hope he might produce useable intelligence regarding drug trafficking activities in the Mission area. This questioning, conducted mostly by Cst. M1, lasted well over two hours. During questioning, Mr. Fortune was not advised of Cst. M2's earlier discovery of drugs in the car. According to the officers' testimony, the detention plan stipulated that if Mr. Fortune were to cooperate and provide useful information, he would be released with no arrest or laying of charges for the drug trafficking offence. If, however, Mr. Fortune failed to cooperate, he would be arrested pursuant to the CDSA. Questioning bore no fruit at all. Fifteen minutes after it ended, Mr. Fortune was arrested on drug related offences and released on an undertaking to appear and Mr. Fortune was advised of his Charter rights.
- [31] Crown counsel advised the Court that the Crown was not aware until trial of the officers' investigation plan.

III. POWERS OF ARREST

A. Search incidental to arrest

- [32] For a lawful arrest, s. 495 of the Code requires police to have reasonable and probable grounds for arrest, and to adhere to the arrest provisions of the statutes that govern a particular offence or possess an arrest warrant. The right of police to search incidental to an arrest arises inherently from the arrest itself. If, therefore, the arrest itself is unlawful or arbitrary, a court cannot uphold any search incidental to it, no matter how reasonable; *R. v. Caslake*, [1998] 1 S.C.R. 51 [Caslake] at para. 13. Mr. Fortune submits that since his arrest was both unlawful and arbitrary, the search incidental to it was also unlawful. He further submits his detention for questioning following the arrest was arbitrary.
- [33] Discussing a search incidental to an arrest, Justice Chiasson, writing at para. 19 of *R. v. Majedi*, 2009 BCCA 276 [Majedi], distilled, from *Caslake*, the principles that limit the powers of police officers to search incidental to a lawful arrest.
1. Officers undertaking a search incidental to arrest do not require reasonable and probable grounds; a lawful arrest provides that foundation and the right to search derives from it (paras. 13 and 17);
 2. The right to search does not arise out of a reduced expectation of privacy of the arrested person, but flows out of the need for the authorities to gain control of the situation and the need to obtain information (para. 17);
 3. A legally unauthorized search to make an inventory is not a valid search incidental to arrest (para. 30);
 4. The three main purposes of a search incidental to arrest are: one, to ensure the safety of the police and the public; two, to protect evidence; three, to discover evidence (para. 19);

5. The categories of legitimate purposes are not closed: while the police have considerable leeway, a valid purpose is required that must be "truly incidental" to the arrest (paras. 10, 20 and 25);
 6. If the justification for the search is to find evidence, there must be a reasonable prospect the evidence will relate to the offence for which the person has been arrested (para. 22);
 7. The police undertaking a search incidental to arrest subjectively must have a valid purpose in mind, the reasonableness of which must be considered objectively.
1. Officer's discretion and lawfulness of arrest and detention on driving prohibition charge
- [34] Defence counsel submits that a search could be unlawful and a breach of s. 9 for either one of two alternative reasons: the search was unlawful because the arrest that led to it was unlawful because it did not comply with the provisions that govern arrest under s. 495(2) of the Code; or the search could also be unlawful because it was arbitrary. These grounds, he submits, are not conjunctive; either ground suffices; Caslake at para. 13.
- [35] Section 495 provides:
495. (1) A peace officer may arrest without warrant
- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
 - (b) a person whom he finds committing a criminal offence; or
 - (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.
- (2) A peace officer shall not arrest a person without warrant for
- (a) an indictable offence mentioned in section 553,
 - (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
 - (c) an offence punishable on summary conviction,
- in any case where
- (d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
- (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

- (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

a) Crown caution on "arbitrary arrest" as a concept

- [36] Crown counsel stressed it is important not to conflate detention with arrest, which he submitted defence counsel had done in his submissions. He points out s. 9 of the Charter protects people from arbitrary detention, not from arbitrary arrest. Because an officer's belief fell short of reasonable and probable grounds, for example, an arrest might be unlawful, but that does not necessarily render it arbitrary. Crown counsel further points out that virtually every arrest involves a period of detention. Of course, if a detention is arbitrary, any arrest based on the same reasons should also be deemed arbitrary.
- [37] Further, in some circumstances, a lawful arrest and detention can become an arbitrary detention. For example, unless the circumstances of the detained person fit within one or more enumerated exceptions in s. 497 and s. 498 of the Code, arresting officers and officers in charge are obliged to release suspects as soon as practicable, as set out in the subsections.
- [38] In this case, Mr. Fortune maintains that the officers' failure to properly exercise their discretion by considering the arrest provisions of s. 495(2) renders his arrest unlawful. Likewise, referring now to the reasons for his continued detention, he argues his continued detention was not only unlawful, but also arbitrary.
- [39] A search incidental to a lawful arrest, nonetheless, can itself be deemed unlawful if the search itself is not carried out for a valid purpose that is "truly incidental" to the arrest; Majedi, paras. 10, 20 and 25.
- [40] In sum, there is a general distinction between an unlawful detention and an arbitrary one. An unlawful detention may not be arbitrary, as discussed in *R. v. Duguay* (1985), 18 C.C.C. (3d) 289; (aff'd on other grounds [1989] 1 S.C.R. 93), at para. 25:
- [25] It cannot be that every unlawful arrest necessarily falls within the words "arbitrarily detained". The grounds upon which an arrest was made may fall just short of constituting reasonable and probable cause. The person making the arrest may honestly though mistakenly believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not said to be capricious or arbitrary.
- [41] In any case, I acknowledge the Crown's point that, viewed in isolation, strictly speaking, arbitrary arrest is not an accurate legal concept. However, this observation has no bearing on the substance of defence counsel's submission.

[42] Turning now to the specifics in this case, defence counsel argues the initial arrest and detention of Mr. Fortune and search incidental to arrest were arbitrary for three main reasons:

1. The officers knew who Mr. Fortune was and the searches of the vehicle and of him incidental to detention were therefore not necessary.
2. Regarding Mr. Fortune's arrest, instead of exercising their discretion by considering factors mandated by s. 495(2)(d) of the Code or s. 95 of the MVA, the officers had in mind only the arrest policy set by their superiors. In so doing, they failed to exercise their own discretion, as was their bounden duty; rendering his arrest unlawful.
3. Furthermore, given all the known circumstances at the time of Mr. Fortune arrest and during his continued detention, viewed objectively, the arrest was not justified.

[43] With regard to the searches of Mr. Fortune's person and of the vehicle incidental to arrest, defence counsel submits that, because his arrest was unlawful, so also were the searches. Moreover, because the officers failed to put their minds to the question of whether they could meet their objectives without a search, both searches were also unreasonable.

2. Officer's discretion regarding arrest, s. 495(2) of the Code

a) Position of Defence

[44] Defence counsel submits that the detachment's arrest policy has prevented officers from exercising their duty to "assess the circumstances of each case." It dictates that officers, in all instances, pay no regard to the particular circumstances; they are to arrest every person suspected of driving while prohibited and always to conduct searches incidental to that arrest. Such failure to exercise their discretion effectively makes both the arrest, and the search incidental to it, unlawful; and thus, also seizures de facto unreasonable under s. 8 of the Charter.

[45] The discretionary aspect of a search incidental to arrest is addressed in *Caslake*. After pointing out that the power to search incidental to arrest does not impose a duty to search, but is at the discretion of the police, Chief Justice Lamer quoted *L'Heureux-Dubé J.* in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at para. 60 [Cloutier].

[60] 1. ... The police have some discretion in conducting a search. Where they are satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to assess the circumstances of each search so as to determine whether a search meets the underlying objectives.

[Emphasis added.]

- [46] In this regard, defence counsel noted Cst. M2's evidence that he intended to search the car, irrespective of whether Mr. Fortune had a cell phone in his hand or of whether he knew the vehicle identification; Cst. M2 explained that he invariably conducted the search in connection with the 'driving while prohibited' offence.
- [47] Defence counsel cited *R. v. Strilec*, 2010 BCCA 198 [Strilec], a case where the arresting officer had different options from which to choose.
- [48] The officer had pulled over Mr. Strilec on a highway, riding a dirt bike that had no tail lights and, as it turned out, no insurance either. The Court found that after the constable had learned Mr. Strilec had no insurance, he had the choice either of arresting him under s. 79 of the MVA, and detaining him until he could be brought before a justice of the peace, or of completing his investigation in accordance with s. 73 of the MVA and issuing him a ticket. The Court noted that in the former case, the officer would have had to advise him of his s. 10(a) and (b) Charter rights, but not so if he were to proceed under s. 73 of the MVA. Ultimately, however, the Court found the officer's actions were so intrusive that, although the officer had testified the officer did not intend to arrest Mr. Strilec, his actions effectively had placed him under de facto arrest. The officer therefore, was obliged to advise him of his right to counsel (paras. 32 to 33).
- [49] Defence counsel referred to *R. v. Schwartz*, (1998) 51 C.R.R. (2d) 277 (B.C.P.C.) [Schwartz] as an example of the negative effects an official policy preventing an officer's proper exercise of discretion can have on a person's Charter rights. In *Schwartz*, Judge de Villiers found the Attorney General of British Columbia's directive to the police, which effectively instructed officers to make arrests of the male party in all spousal assault cases, was contrary to the Code's arresting provisions.
- [50] Mr. Schwartz and his wife had argued. The wife struck the husband. The husband grabbed the wife's throat and threw her against the wall. Judge de Villiers found the arresting officer who had arrested Mr. Schwartz and detained him for 14 hours had acted on a directive issued by the Attorney General. The judge found the officer had not put his mind to the public interest circumstances set out in the Code, specifically s. 495(2). He found, in the circumstances, no reason why the officer should not have released Mr. Schwartz immediately, or see him brought before a justice as soon as possible. He also found that the directive interfered with the discretion of the officer to decide whether to arrest Mr. Schwartz. The judge accordingly deemed Mr. Schwartz's arrest arbitrary and contrary to due process.
- [51] Referring to ss. 495(1), (2), 496, 497 and 503 of the Code, the judge stated at para. 32:
- [32] The thrust of all these sections of the Criminal Code is to ensure that nobody is arrested or, if arrested, is kept in custody unless the arrest or continued detention is necessary to prevent the commission of further offences or the escape of the accused, or to bring the accused's prosecution to an orderly completion.

- [52] Confirming the officer's duty to consider all the circumstances known to them when making an arrest, Judge de Villiers further stated:
- [34] Each case being investigated by a peace officer must be considered on the basis of the perceived individual circumstances applicable to it, and not on the basis of some preconceived bias against the class of alleged offender. The peace officer must consider all the circumstances known to him when he makes the arrest, not just those that favour the prosecution: *R. v. Chartier* (1979), 9 C.R. (3d) 97, S.C.C. Moreover, in determining whether an arrest has been lawful it is not sufficient to prove that the peace officer personally believed that he or she had reasonable and probable grounds to make the arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, with knowledge of the law, standing in the shoes of the peace officer, would have believed that reasonable and probable grounds existed to make the arrest: *R. v. Storrey*, [1990] S.C.R. 241.
- [53] Judge de Villiers noted at para. 43 that "[o]beying a general directive to arrest does not mean that an arrest in conformity with the directive is unlawful or arbitrary if that directive merely requires the actual provisions of the law to be applied: *R. v. Scott*, (1990) M.V.R. (2d) 204, B.C.C.A." The judge found the constable had allowed the directive to solely govern his exercise of discretion; and, when he decided to arrest Mr. Schwartz, he had failed to put his mind to any of the public interest circumstances set out in s. 495(2), (para. 44). His arrest was not necessary for any of the reasons set out in ss. 495(2)(a), (d) and (e). Therefore, within the context of s. 495(2), the arrest was unlawful.
- [54] The issue of policy directives and police discretion was also considered in *R. v. Venzi*, (1997) 37 W.C.B. (2d) 130 (B.C.S.C.), by Justice Lamperson, sitting on an appeal from a Provincial Court decision. He did not have a copy of the directive in question before him, but stated that he agreed "an arrest based solely on policy rather than the criteria contained in s. 495(2) is unlawful and arbitrary" (para. 15).
- [55] Likewise, Judge de Villiers found in *Schwartz* that another component of the Attorney General's directive, addressed to the Chief Judge and justices of the peace was improper:
- [56] The directive undermines the rule of law. It requires police officers to act unlawfully, and interferes with their lawful discretion in carrying out their duties. It also interferes with the independence of the judiciary.
- [56] Judge de Villiers noted, as well, that the directive effectively purported to instruct officers to disregard s. 495 of the Code.
- [69] ... [T]he directive instructs the police to act unlawfully in those situations where the Criminal Code forbids them to arrest and it interferes with the discretion to arrest or not to arrest given them by s. 495(1).

- [57] A decision of the High Court of Australia in *Enever v. R.*, (1906) 3 C.L.R. 969 gives further insight into the nature of an officer's delegated authorities. A passage from *Enever* is quoted in Schwartz:
- [73] Now the powers of a constable, qua police officer, whether conferred by common or statute law, are exercised by him by virtue of his office and cannot be exercised on the responsibility of any person but himself ... A constable, when acting as a police officer, is not exercising a delegated authority, but an original authority, and the law of agency has no application.
- [58] See also: *R. v. Labine* (1987), 29 C.R.R. 296 (B.C.S.C.); the dissenting decision of Harradence J.A. in *R. v. Sieben* (1989), 70 Alta. L.R. (2d) 337 (Alta. C.A.); and *R. v. Pithart* (1987), 34 C.C.C. (3d) 150, (B.C. Co. Ct.) [Pithart].
- [59] In *Pithart*, Leggatt J. states at p. 160:
- ... A decision to arrest and detain an individual should be based on reasons relating specifically to that individual. Section 9 of the Charter is intended to guarantee an individual, not a collective, right. This should be borne in mind when searching for an appropriate meaning to attach to "arbitrarily detained", for, as the Supreme Court of Canada has said on numerous occasions, a purposive approach should be taken to the interpretation of the Charter. Accordingly, I conclude detention based on a blanket policy rather than on reasons pertaining to the individual detainee violates the right not to be arbitrarily detained, guaranteed by s. 9 of the Charter.
- [60] Finally, Judge de Villiers had before him a number of such like cases dealing with impaired driving offences, which he summarized at para. 104 of his reasons. Addressing the question of the appropriate constitutional remedy, he observed:
- [104] ... [In] the case before me the policy to violate the rights of men accused of spousal assaults was made, not by the Royal Canadian Mounted Police, but by no less an authority than the Attorney General. That circumstance makes it all the more necessary for the Courts, as guardians of the Constitution, to protect even the humblest of our citizens against such abuse by the state, and to do so in a manner that can be seen as effective.
- [61] In that case, Judge de Villiers entered a stay under s. 24(1) of the Charter.
- b) Position of Crown
- [62] The Crown makes two main responses to defence counsel's argument. Both responses assume the dispatcher did not advise the officers whether Mr. Fortune's driving prohibition fell under the MVA or the Code.

- [63] Assuming Mr. Fortune's offence did fall under the Code, the offence is deemed an indictable offence, until the Crown elects to proceed by summary conviction. Therefore, Crown argues, the arrest provisions of s. 495(2) of the Code do not apply and the impugned policy thus becomes irrelevant. Further, if Mr. Fortune's offence fell under the MVA, the broad powers of arrest available to an officer making an arrest under s. 79 again make the policy irrelevant.
- [64] In the case at bar, Crown counsel submits the officers had compelling reasons to detain Mr. Fortune: he was driving while prohibited; he was holding, significantly, a broken cell phone in his hand as he exited the car; the officers were aware of the events that occurred five days earlier, notably, the presence of drugs found on Mr. Labelle's person. To these circumstances, one might add the public interest in preventing the continuation of the driving prohibition offence, the need to dispose of the vehicle safely and the need to preserve evidence. I note as well that the public interest considerations set out under s. 495(2)(d) are not exclusive.
- [65] If, from the outset, the officers had arrested and detained Mr. Fortune under the CDSA for possession for the purposes of trafficking, then from that serious charge, more public interest considerations could have arisen. These could include the need to further search and impound the vehicle, to attempt to activate the cell phone and preserve that evidence, to question the owner of the vehicle; and generally, the need to preserve evidence. However, as it was, up to the time of Mr. Fortune's arrest on the CDSA charges over two hours later, the officers had arrested and detained Mr. Fortune only for a driving prohibition offence of then unknown derivation.
- [66] Although a copy of the arrest policy is not in evidence, its content can be inferred well enough for our purposes from the evidence of Cst. M1 and Cst. M2.
- [67] Before discussing events further, I will distil the essence of the Crown's submissions on the statutory obligations of the officers, either under the Code or under the MVA. I will then discuss the defence submissions.
- [68] Crown counsel submits that before considering Mr. Fortune's policy argument, I have to first decide whether s. 495(2) of the Code applies to the circumstances of this case. This will depend, counsel says, on the nature of the offence charged. Depending on the circumstances, Mr. Fortune could have been prohibited from driving either under the Code or under s. 79 of the MVA. A breach of s.79 of the MVA is deemed a summary conviction offence by s. 2 of the Offence Act, R.S.B.C. 1996, c. 338.
- [69] Section 259(4) of the Code provides that:
- (4) Every offender who operates a motor vehicle ... while disqualified [with some exceptions] ...
 - (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

[70] Disqualification encompasses a full range of driving prohibitions under the MVA and under the Code. Section 259(5) of the Code states:

(5) For the purposes of this section, "disqualification" means

(a) a prohibition from operating a motor vehicle, vessel or aircraft or any railway equipment ordered pursuant to any of subsections (1), (2) and (3.1) to (3.4); or

(b) a disqualification or any other form of legal restriction of the right or privilege to operate a motor vehicle, vessel or aircraft imposed

(i) in the case of a motor vehicle, under the law of a province, or

(ii) in the case of a vessel or an aircraft, under an Act of Parliament,

in respect of a conviction or discharge under section 730 of any offence referred to in any of subsections (1), (2) and (3.1) to (3.4).

[71] Therefore, an offender prohibited from driving under the MVA is also prohibited under the Code from driving while disqualified. Further, because s. 2 of the Code defines an offender as "a person who has been determined by a court to be guilty of an offence, whether on acceptance of a plea of guilty or on a finding of guilt", a driver prohibited by the court from driving under the Code or disqualified from driving under the MVA, in both cases is also a prohibited or disqualified driver under the Code.

[72] A person that only the Superintendent of Motor Vehicles has prohibited from driving under s. 93 of the MVA because of their unsatisfactory driving record, however, is not considered an offender. As mentioned earlier, the police dispatcher had advised Cst. M1 that Mr. Fortune was a prohibited driver, but did not specify under which legislation.

[73] Further, Crown points out that prohibited driving is not an electable offence under s. 553 of the Code. Therefore, Crown counsel submits, s. 495(2)(a), which deals with hybrid offences, does not apply.

[74] As for how hybrid offences should be treated, Crown counsel points out that s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. I-21, provides that if the enactment provides that the offender may be prosecuted for the offence by indictment, the offence is deemed an indictable offence; see also *R. v. Huff* (1979), 17 A.R. 499 (C.A.) which holds that until such time as the prosecution elects to proceed summarily for the purposes of s. 495 of the Code, hybrid offences are deemed indictable.

[75] Crown counsel submits that the aggregate effect of the legislation I have just discussed is that s. 495(2) of the Code does not apply. Accordingly, he submits Cst. M1 did not have to consider whether he believed on reasonable grounds that the public interest may be satisfied without arresting the person, having regard to all the circumstances including the need to:

1. establish Mr. Fortune's identity;
2. secure or preserve evidence of or relating to the evidence; or
3. to prevent a continuation or repetition of the offence that they be satisfied without having to arrest him pursuant to s. 495(2)(d) of the Code.

[76] Finally, in circumstances where s. 495(2) does not apply, Crown submits s. 495(1) governs. Section 495(1) states:

495. (1) A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence.

[77] Counsel submits the discretion conferred on officers by the word "may" in s. 495(1) refers to a "limited discretion"; one designed to protect an officer in situations where they might find they have reasonable grounds to arrest, but for good reasons decide not to do so. Without the protection of s. 495(1), counsel submits officers could be found derelict in the execution of their duty for failing to arrest an offender.

[78] Turning now to Crown's submissions on s. 79 of the MVA, counsel submits the section gives an officer what is, in effect, an unfettered discretion. The section provides:

79. An officer or constable of the Royal Canadian Mounted Police or of the police department of a municipality may arrest without warrant

- (a) a person who the officer or constable finds driving a motor vehicle, and who the officer or constable has reasonable and probable grounds to believe was driving in contravention of section 95 or 102 and may detain the person arrested until he or she can be brought before a justice to be dealt with according to law.

[79] Crown counsel points out that s. 79 is silent regarding arrest limitations. It allows an officer to arrest a person for these offences, and allows them to detain an accused person until they can be brought before a justice to be dealt with by law.

[80] Crown counsel submits this legislative silence indicates an intention to make it easier for police officers to arrest persons for contravening s. 95(1), the MVA 'driving while prohibited' offence.

[81] In summary, Crown counsel's answer to Mr. Fortune's complaint that Cst. M1 failed to put his mind to the conditions for his arrest set out in s. 495(2) is that this section does not apply. As for s. 79 of the MVA, it contains none of the limitations set out in s. 495(2) of the Code and it was not necessary, therefore, for Cst. M1 to put his mind to s. 495(2)(d).

c) Defence counsel's response to Crown's interpretation of s. 495

[82] Counsel for Mr. Fortune characterized Crown counsel's interpretation as novel and wrong. In brief, he submits s. 495(1) is not divisible from s. 495(2). The latter simply qualifies the arrest powers set out in s. 495(1). Counsel points out s. 495(1)(b) deals, for example, with any person committing an offence; which would include summary conviction offences. Subsection (c) deals with those situations where the officer has reasonable grounds to believe a person is subject to an outstanding warrant of arrest or committal.

[83] He submits s. 495(2) is a limiting section for the broader empowerment set out in s. 495(1) of the Code:

495(1)(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[84] Returning to Strilec, defence counsel points out that an officer has discretion under s. 79. He can detain the driver or take them before a justice of the peace. As Ryan J.A. explains at para. 71, the officer, after having determined Mr. Strilec was driving without insurance could arrest him in accordance with s. 79 of the MVA and advise him of his s. 10(b) rights or carry out his investigation in accordance with s. 73 of the MVA and so not have to advise him of his s. 10(b) rights.

[85] Defence counsel submitted that s. 495(2) applies to both s. 79 of the MVA and Code offences, given the way s. 259(5) of the Code embraces provincial driving prohibitions; (excepting s. 93 of the MVA disqualifications imposed by the Superintendent of Motor Vehicles). In my view, defence counsel's submission is sound. In the case at bar, it appears the officers did not have s. 73 in mind. Cst. M1 simply arrested Mr. Fortune for driving while prohibited and advised him of his Charter rights with respect to that offence.

d) Conclusions

[86] I admire the logical artisanship of Crown counsel's submissions on whether s. 495(2) of the Code applies in the case at bar; but I fundamentally disagree with it. I see no support for it in authority. Further, the interpretation stands foursquare against the underlying premises and principles with which s. 495(2) of the Code is imbued by both the common law and the Charter: the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7); the presumption of innocence and the right that everyone has to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal (s. 11(d)); and the right not to be arbitrarily detained or imprisoned (s. 9).

- [87] I agree with defence counsel's submission that Parliament intended s. 495(1) and (2) of the Code to be read as a whole. Section 495(1) empowers officers; s. 495(2) limits an officer's powers of arrest and provides the principal basis upon which an officer is to exercise their discretion before arresting and searching a suspect.
- [88] Crimes such as murder, terrorism, hijacking, and treason offences have their own specific provisions and they are not encompassed by s. 495(2) of the Code. Those aside, as I read s. 495(2)(d), it applies equally to both summary conviction and indictable offences.
- [89] Crown counsel obviously had not yet had opportunity to decide whether to proceed summarily or by indictment; but Crown's unknowable future contingent decision does not determine how an officer at the scene of the offence should exercise their discretion. Moreover, I cannot see, either, why the officers' ignorance of the origins of the driving prohibition, whether it arose from the dispatcher's neglect to state the origins of the prohibition, or their failure to find that detail out, should determine how Cst. M1 ought to have exercised his discretion. Naturally, I do not say that the officers had to find out the origins of the prohibition, simply that the officer's knowledge, or lack of it, should not be the factor in this case that tells them whether to put their mind to s. 495(2)(d) of the Code.
3. Findings on discretion and police policy
- [90] I find, accordingly, that before Cst. M1 arrested and further detained Mr. Fortune for driving while prohibited, he failed to perform the duty s. 495(2) then required of him: to determine whether the public interest warranted Mr. Fortune's arrest and continued detention. Both officers - and I have referred mostly to Cst. M1 because he was the arresting officer - admittedly adhered to the policy their superiors had stipulated, which thereby inhibited the exercising of their own discretion to have regard to all limiting considerations stated in s. 495(2). Similarly, Cst. M2 did not put his mind to considering whether a search of the car was reasonably necessary. But that search was incidental to the arrest of Mr. Fortune, so even if the arrest itself were found objectively reasonable, its lawfulness depends originally on the lawfulness of the arrest.
- [91] Crown counsel submitted that the existence of an official policy that directs officers to arrest all persons suspected on reasonable and probable grounds of driving while prohibited is not logically irreconcilable with the co-existent presence of objectively reasonable grounds for the arrest and continued detention of the offender. Nor is it irreconcilable, he submits, with finding that the officers would have exercised their discretion to arrest the suspect anyway. But the officers' own evidence in this case does not support such a finding. The officers confirmed they would have arrested Mr. Fortune pursuant to the policy, irrespective of the circumstances.
- [92] Further, viewing the circumstances on an objective basis, Cst. M1 agreed he was not concerned about the need to establish Mr. Fortune's identity. He was a local person with no criminal record. He was not concerned about the need to secure or preserve evidence relating to the offence of driving while prohibited. He was not concerned about the need to

prevent the continuation or repetition of the offence of driving while prohibited. Finally, he had no concerns about the need to ensure Mr. Fortune's attendance at court. Accordingly, considering the guidelines set out in s. 495(2)(d), neither Cst. M1's subjective belief nor the circumstances, both as articulated by the officers and viewed objectively, justified Mr. Fortune's arrest for driving while prohibited and his continued detention.

[93] Accordingly, I find Mr. Fortune's arrest was unlawful, as was the search of the vehicle incidental to the arrest.

4. Findings on initial detention, arrest and search

[94] The initial pullover and detention of Mr. Fortune was lawful. The officers had reasonable grounds for doing so. Regarding Cst. M2's search of the vehicle incidental to his arrest and considering the principles already discussed, Cst. M2's search of the area around the driver's seat, considered in isolation from the arrest, fell within a reasonable range.

[95] I accept that Cst. M2, unlike Cst. M1, was not aware of the identity of the registered owner of the vehicle. Although Cst. M2 did not put his mind to whether a search for documents in the car was reasonably necessary, had he done so in the circumstances, I find Cst. M2 would have been justified in searching for evidence to confirm the identity and contact information for the registered owner and lawful use of the car; and that there was a reasonable prospect of finding such evidence. I find Cst. M2 had a valid purpose in mind and there was a reasonable prospect of finding evidence related to the driving prohibition charge. His search for papers on or in the console was objectively reasonable in the circumstances.

[96] Considering Mr. Fortune's minimal privacy interests in the vehicle and there being no claim advanced of ownership of any vehicle contents advanced, the intrusion was objectively reasonable, considering all the circumstances.

[97] The fact Cst. M2 foresaw the possibility he could find drugs during a search for documents would not in itself delegitimize the search. I emphasize I am considering the search in isolation from the other matters I have addressed.

[98] Cst. M1's pat-down of Mr. Fortune for his safety, again considered in isolation, was somewhat justifiable. However, reaching into the pockets of his sport shorts and removing the cash was unrelated to safety concerns, and it was not objectively reasonable in the circumstances. Particularly, to that point, Mr. Fortune had been arrested and detained only in relation to the driving prohibition charge, and there was no need to search his pockets for money.

- [99] Following discovery of drugs in the vehicle, Cst. M1 did not advise Mr. Fortune that because drugs had been discovered, he was being detained on suspicion of either possession of a controlled substance, or for possession for the purposes of trafficking. Cst. M1 did not immediately accord Mr. Fortune his rights under s. 10(a) and (b) of the Charter for the drug related offence; *R. v. Suberu*, 2009 SCC 33. No exigent circumstances existed at the scene to justify delay, thus distinguishing *R. v. Purchase*, 2011 BCSC 154.
- [100] In the case at bar, the officers did not conduct their investigation in accordance with the Charter and the Code. During their investigation, they effectively ignored s. 495(2) of the Code and Mr. Fortune's Charter rights. They elected to say nothing about the discovery of drugs and chose, instead, to turn Mr. Fortune into an informer about the local drug scene. Nothing was wrong with that investigative objective, so long as the Charter was fully complied with.
- [101] Crown counsel agrees that if officers have to choose between advising someone of their jeopardy as soon as it arises and refraining from doing so in the hope that it would prevent someone from becoming informants, they should choose advising the person of their jeopardy. Even so, Crown counsel submits, given the tenor of the questioning, Mr. Fortune likely knew he was being questioned in relation to a drug offence and that he was in jeopardy. Supporting this assertion is Cst. M1's testimony that he obtained no information from his questioning of Mr. Fortune.
- [102] While that may be a logical supposition, and relevant, perhaps, to support an absence of a link between the seizure of the drugs and the s. 10(a) and (b) Charter breaches that occurred during Mr. Fortune's extended detention, there is no evidence to show what Mr. Fortune was thinking at the time. If the officers were serious regarding seeing drug trafficking charges as prosecuted, they could not ignore the Charter. They had to factor the Charter into their investigations. As it was, Mr. Fortune was not advised of the reasons for his continued detention, and he was not accorded his rights at all under s. 10(a) and (b). His continued detention was unlawful and considering the reasons for his continued detention, also arbitrary.
- [103] As stated earlier, Mr. Fortune's arrest on the driving prohibition charge was unlawful and, therefore, the search of the vehicle incidental to the arrest was also unlawful.

IV. Section 24 Analyses

A. Notice question

- [104] Crown counsel took initial objection to Mr. Fortune's s. 24(1) motion for a stay, which Mr. Fortune was making this application based on the delay in advising him of s. 10(a) and (b) rights with respect to the CDSA offences.

- [105] The Crown submitted that a s. 24(1) application requires notice to the Crown and to the British Columbia and Canada Attorney Generals pursuant s. 8 of the Constitutional Question Act, R.S.B.C. 1996, c. 68 [CQA].
- [106] Crown counsel advised he could not find any notice in his file, and further, Mr. Fortune's s. 24(1) application surprised him. He was only prepared for a s. 24(2) application.
- [107] Defence counsel, however, referred to *R. v. Mitchell*, (1998) 104 B.C.A.C. 263. In that case, both counsel and the trial judge believed that s. 8 of the CQA applied to criminal proceedings, thus requiring notice of a s. 24(1) application. However, that case was not questioning a prosecution under a provincial legislation, a challenge to the validity of statutes, or subordinate legislation. Therefore, Southin J.A. confirmed no notice under the legislation is required.
- [108] That is not to say procedural notice is not required. Crown should have advance notice of the application, together with any supporting materials, before the hearing. If questions of systemic abuse, for example, arise or are at issue, the Crown may wish to call witnesses regarding that. Defence counsel said he had sent emails to Crown counsel, with case law; but that he did not wish to see counsel wrong-footed, which I accept.
- [109] In any case, Crown counsel still questioned the propriety of proceeding in the absence of formal motion to the Crown. He made submissions on the point, and he was at liberty to file further written submissions. As it is, just before giving these oral reasons today, Crown counsel did make further submissions, and explained why he was not giving detailed submissions on the points he had raised earlier. However, I find the materials before me, coupled with the submissions made by both counsel, sparse as they were at the time, sufficient to allow me to make a just decision on the issue.

B. Section 24(1) Analysis

- [110] Submissions on the questions of when s. 24(1) becomes a fit remedy and what factual circumstances I should consider to justify ordering a stay were a little thin on the ground, as just mentioned.
- [111] As I understand his position, Mr. Fortune's s. 24(1) claim relies on the lengthy detention that followed his arrest without s. 10(a) and (b) Charter warnings, especially given the legal jeopardy he faced from the drugs found in the car and seized. The officers detained him for 2 hours and 40 minutes in total. This figure lessens after allowing time for the time necessary for Mr. Fortune's arrest for driving while prohibited; his transportation to the jail; and so on. He was questioned without the warnings prescribed by ss. 10(a) and 10(b) of the Charter, all while in legal jeopardy for a CDSA charge, for over two hours. As mentioned, Crown counsel agrees this constituted a breach of Mr. Fortune's Charter rights.

- [112] Crown counsel suggested, however, that Mr. Fortune looks to s. 24(1) for relief only because there was no link between the discovery and seizure of drugs and s. 10(a) and (b) violations of the Charter, a link which must be found to warrant exclusion of evidence under s. 24(2), as discussed later.
- [113] In essence, Crown's position is that the nature and extent of Mr. Fortune's post-arrest detention is an insufficient basis for the drastic remedy of a stay of proceedings.
- [114] A court may grant a stay of proceedings for an abuse of process only in the clearest of cases; *R. v. Regan*, 2002 SCC 12.
- [115] In the recent Ontario Court of Appeal case of *R. v. Zarinchang*, 2010 ONCA 286, and *United States of America v. Ranga*, 2012 BCCA 81 both Courts considered s. 24(1) stay applications. In *Zarinchang*, the Ontario Court of Appeal dealt with a case stemming from assault and mischief charges that resulted in Mr. Zarinchang's detention in custody for 24 days before the start of a show cause hearing. There was no evidence to show the abuse of delay would affect his right to a fair trial. The Charter sections considered were ss. 7, 9, and 11.
- [116] I understand these are the main principles a judge should consider before granting a stay under s. 24(1).
- [117] The case must fall into one of two categories. The first category implicates state misconduct that may prejudice the fairness of the trial; the second category relates to state misconduct that flouts fundamental principles of justice, and which undermine the integrity of the judicial process. Whichever of the two categories the analysis falls under, the judge must see that the following three further criteria are present:
1. The prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated to the conduct of the trial or by its outcome. The prejudice must be prospective. The remedy may not be used to redress past prejudice.
 2. No other remedy is available or reasonably capable of removing that prejudice.
 3. Where a case falls in either of these categories, but the judge remains uncertain whether the prejudice is serious enough to justify a stay of proceedings, the court may engage a third criterion; the balancing of those interests favouring a stay against society's interest in a trial on the merits.
- [118] Some examples of cases in which a court has granted a stay include: *Schwartz*; *R. v. Donald*, 2010 SKPC 123; and *R. v. Knight*, 2010 ONCJ 561. Another example of a successful application occurred in *R. v. Bonds*, 2010 ONCJ 561, which involved appalling abusive behaviour and Charter breaches.
- [119] In *R. v. De Lima*, 2010 ONCJ 230, Mr. De Lima had already been acquitted of the charges; but the judge considered a stay of proceedings anyway. Mr. De Lima had been kept in cells overnight, notwithstanding the absence of a reasonable basis for a belief that he might continue or repeat the offences with which he was charged; and despite any credible

prospect of the commission of another offence; and despite any risk factors which, the Court found, would have constituted a violation of s. 9 of the Charter. Given the acquittal, the matter was moot, but Gage J. opined the case ran "perilously close to the clearest of cases" (para. 39).

- [120] Although concerns of a systemic problem in policing were present, it is noteworthy from the De Lima case that the judge found insufficient evidentiary foundation to make a finding that there was a systemic problem in the jurisdiction (para. 34). He noted, however, the police were now on notice that perfunctory assessment processes will trigger "a stronger and different remedy" having regard to the "long term interests of the administration of justice and the Charter of Rights".
- [121] In *R. v. Muthuthamby*, 2010 ONCJ 435 [Muthuthamby], O'Donnell J. dealt with what was characterized as a totally unreasonable strip search of Mr. Muthuthamby, who was impaired at the time. Toronto Police had a policy regarding strip searches. Beginning at para. 25, O'Donnell J. considered a number of cases dealing with strip searches. At para. 34, he questioned whether some of the cases reviewed had "passed constitutional muster"; and whether stays had been granted more liberally than "the clearest of cases" test might allow. This is especially so, O'Donnell J. noted, when the cases have moved from the more general principle a judge is supposed to consider when hearing s. 24(1) applications, as set out in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, 232 D.L.R. (4th) 577, to the more specific tests they are supposed to consider when the accused seeks a stay of proceedings. Moreover, in the so-called 'residual category cases', O'Donnell J. noted that, in some cases, there is no indication the judges had engaged in a balancing analysis, or had considered other remedies, instead of a stay, which forms part of the balancing analysis.
- [122] In *R. v. White*, (1999) 174 D.L.R. (4th) 111 [White], the Supreme Court of Canada distanced itself, though not entirely, from its earlier decision of *R. v. Therens*, [1985] 1 S.C.R. 613 [Therens], where the Court indicated that only under s. 24(2) could evidence be excluded as a remedy. In *White*, the Court acknowledged the possibility of that remedy under s. 24(1); at least where admission of evidence could violate s. 7 of the Charter. In that instance, a judge could exclude evidence under s. 24(1). The Court concluded in *White* that s. 24(1) "may be appropriately employed as a discrete source of a court's power to exclude evidence whose very admission would render a trial unfair" (para. 88).
- [123] In *White*, the trial judge had employed s. 24(1) to exclude from evidence a statement Mrs. White made under statutory compulsion, (the obligation to report an accident); thus the statement was subject to criminal immunity. The Supreme Court found the trial judge could exclude the statement under s. 24(1).
- [124] The implications of *White's*, giving trial judges discretion to exclude evidence when deciding whether to grant a stay under s. 24(1), are not yet clear. It is noteworthy, however, that the Supreme Court appears to have excluded the accused's statement, not because of state misconduct, but because its admission would violate the evidentiary rule against self-

incrimination. For the present case, I can go so far only to say that White allows a trial judge to at least consider excluding evidence where it's very admission would render a trial unfair under s. 24(1); White at para. 88.

- [125] In *R. v. Tugnum*, 2002 BCSC 1572 [Tugnum], Macaulay J. carefully analyzed a number of authorities dealing with s. 24(1): *R. v. Pena*, (1997) 35 W.C.B. (2d) 111 (B.C.S.C.) [Pena]; *R. v. Erickson*, (1984) 56 B.C.L.R. 247 (B.C.C.A.) [Erickson]; and *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 [Tobiass]. He also sounded some cautionary notes, similar in concern and tone to those voiced in *Muthuthamby*.
- [126] In *Pena*, Justice Josephson rejected Mr. Pena's contention that the grievous nature of the Charter breach standing alone, justified a stay of proceedings. He adopted the conclusion in *Erickson*, that a relationship must be present between the Charter breach and the fairness of the trial process (paras. 64, 66 and 67).
- [127] At para. 37 of *Tugnum*, Justice Macaulay notes that the B.C. Court of Appeal had overturned the decision of the trial judge in *Erickson* granting a stay under s. 24(1) based on a finding Mr. Erickson had been arbitrarily detained. At p. 253 of *Erickson*, Esson J.A. criticized on the judge's conclusion that the only appropriate remedy in such circumstances was to quash the Indictment:

Assuming everything else in favour of the accused, the question is whether the trial judge erred in law on the facts found by him in granting such a remedy. In my view, he clearly did. He granted the most sweeping and drastic remedy in the arsenal of remedies without any factual basis that could possibly permit the conclusion that it would be either just or appropriate to do so. He concluded as a fact that there was no malice or negligence by either the Crown or the police. In the light of that conclusion, the point as to whether the remedy could be granted is really not arguable. The need to impress upon all parties the requirement that the law be obeyed is not enough to justify granting a remedy which is not otherwise just and appropriate. I say that with full recognition of the fundamental nature of the right created by s. 454 and the importance of it being complied with by those who are obligated to do so; but a breach does not in itself justify turning the system on its head.

- [128] In *Tobiass*, a unanimous Supreme Court discussed the criteria for granting a stay where the way the state prosecuted the case appears to have affected the fairness of the proceedings or the integrity of the judicial system.
- [90] If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
 - (2) no other remedy is reasonably capable of removing that prejudice.

(O'Connor, *supra*, at para. 75.)

[91] The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See O'Connor, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See O'Connor, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.

[129] Justice Macaulay in *Tugnum* also noted that cases involving post-investigative arbitrary detention pose analytical challenges for judges deciding s. 24(1) cases. He notes at para. 34 that:

[34] ... [T]here is little, if any, connection between the breach, itself a past event, and the conduct of the prosecution or the fairness of the trial. The majority of the appellant's authorities, even those that refer to O'Connor, fail to grapple with this issue. Instead, they merely conclude that, because of the seriousness of the breach, the circumstances amount to the "clearest of cases". In my view, those decisions fail to address the reasoning in *Tobias* that a stay of proceedings is a prospective remedy and is not to be used to remedy past wrongs.

1. Alternative remedies

[130] As for alternative remedies, Justice Macaulay points out in *Tugnum* at para. 44 that if the accused establishes that the officer should have ended the detention because the public interest could be satisfied without continuing the detention, ss. 495(3) and 497(3) and 498(3) would not protect an officer from liability in civil proceedings.

[131] In cases where an accused is convicted, a reduction in sentence may be an appropriate remedy, as discussed in *Muthuthamby* at para. 118.

2. Conclusion on s. 24(1)

[132] I find a stay of proceedings pursuant to s. 24(1) is not warranted in this case for the following reasons.

- [133] The facts do not fall within the realm of "clearest of cases". Mr. Fortune's detention and the over two hours of questioning he underwent without being accorded his rights under s. 10(a) and (b) of the Charter falls well short of the extended periods and, in some instances, abusive conduct seen in other cases. Further, the questioning he underwent during his unlawful detention did not conscript any evidence that would have any future effect on the fairness of the trial. Neither would its inclusion prejudice him in the conduct of the defence.
- [134] As for other remedies, the likelihood that a financially worthwhile civil damage award is unlikely is not equivalent to saying no civil remedy is available. The damages awarded presumably measure the nature and extent of the harm.
- [135] Finally, if a remedy under s. 24(2) is fitting in this case, that could avert the need for a stay of proceedings.
- [136] While the arrest and search policy regarding persons suspected on reasonable and probable grounds of driving while prohibited is a serious matter, one that could well affect other members of the community, if allowed to continue, given the limited evidence available in the present case this becomes too speculative. The evidence on the impact of the policy here is sufficient to see its impact on Mr. Fortune's Charter rights; but no details of its nature, extent, or application were discussed sufficiently to provide an analysis of the systemic implications of the policy.
- [137] Generally speaking, however, regarding concerns of a 'form of systemic abuse' continuing in the community, unsettling and depriving other community members of their fundamental rights, I agree such a set arrest policy would impede the exercise of the discretion the law requires peace officers to exercise, as amply discussed in these reasons.

C. Section 24(2) Analysis

- [138] Before deciding whether to exclude evidence under s. 24(2), Mr. Fortune must satisfy the Court (1) he has sufficient standing to seek this remedy and (2) the evidence to be excluded was obtained in a manner that denied him his constitutional rights. I must also consider whether there is a sufficient relationship between evidence Mr. Fortune seeks to exclude and the breaches of his Charter rights.
1. Does the accused have standing under s. 24(2)?
 - a) Crown submissions on standing
- [139] The Crown submits Mr. Fortune does not have standing to allege a s. 8 breach of the Charter because the evidence shows he did not have a reasonable expectation of privacy in the car that was searched, or related to the objects seized from within it.

[140] Crown counsel acknowledges that while some evidence indicates the presence of a privacy interest, it carries insufficient weight to give Mr. Fortune standing to allege a Charter breach under s. 8.

[141] In *R. v. Edwards*, [1996] 1 S.C.R. 128 [Edwards], the Court listed seven factors for a trial judge to consider when assessing circumstances that could establish a privacy interest (para. 45). I will now list the factors and apply them to the case at bar:

1. Presence of accused at the time of the search: Mr. Fortune was present at the time of the search.
2. Possession or control of the property or place seized: Mr. Fortune was in possession of the car at the time of the search.
3. Ownership of the property or place: Mr. Fortune had a degree of possession or control of the property or place searched. He was not, however, the registered owner. He was driving unlawfully.
4. Historical use of the property or item: Mr. Fortune was present in the vehicle five days earlier.
5. The ability to regulate access including the right to admit or to exclude others from the place: When Mr. Fortune was in the vehicle, he could admit or exclude others, excepting the vehicle's owner.
6. The existence of a subjective expectation of privacy: There is no evidence regarding Mr. Fortune's subjective expectation of privacy.
7. The objective reasonableness of the expectation of privacy: Crown counsel submits that had there been a subjective expectation of privacy, it could not have been a reasonable for one of two reasons:
 - (a) Mr. Fortune was driving while prohibited and he was subject to lawful arrest for that offence if observed driving a vehicle; and
 - (b) the vehicle could be subject to search for documents, at least those establishing ownership, insurance, and any right of possession.

[142] In *R. v. Crocker*, 2009 BCCA 388 [Crocker], Smith J.A. overturned a finding that the accused had a reasonable expectation of privacy in relation to a stolen truck parked in a parking stall belonging to Mr. Crocker. The trial judge had based the finding of a privacy interest on the fact that "the truck was parked in one of Mr. Crocker's assigned stalls associated to the penthouse, inside the locked underground garage, the access to both of which he controlled" (para. 35).

[143] Smith J.A. also relied on the fact Mr. Crocker was present when the truck was searched, that he was in possession of it, and had some degree of control over it. However, she clarifies that "... those factors alone do not create a privacy interest" (para. 85). The Court also pointed out the lack of evidence showing Mr. Crocker's had a subjective expectation of privacy and, even had he possessed it, the lack of any objective criteria supporting one (para. 85).

[144] The Court ultimately found the trial judge erred in finding Mr. Crocker had met the burden of establishing an expectation of privacy in the truck.

[86] When the totality of the circumstances is considered, I am of the view the trial judge erred in finding that Mr. Crocker had met the burden required of him for establishing an expectation of privacy in the truck. While the police search of the truck may have been unlawful, any remedy associated with that conduct could be asserted only by an individual who had a lawful proprietary, possessory or privacy interest in the vehicle: *R. v. Spinelli* (1995), 101 C.C.C. (3d) 385 (B.C.C.A.) at para. 45. Mr. Crocker was not such a person and therefore had no standing to allege a s. 8 Charter breach in the police search of the stolen truck.

[145] Crown submits the facts in *Crocker* are analogous and Mr. Fortune likewise does not have standing under s. 8 of the Charter.

b) Defence Position on standing and discussion

[146] Defence counsel submits the circumstances show Mr. Fortune did have a prima facie right of privacy. He refers to the remarks of Justice LaForest, dissenting in *R. v. Belnavis*, [1997] 3 S.C.R. 341 [Belvanis], at para. 61, which the headnote accurately distils.

[HN] There is less expectation of privacy in an automobile not because a person is less entitled to privacy, but because for the purposes of regulating and controlling traffic safety and cars, it is reasonable for the state to seek entry into a car more freely than to the home, and once there the police may incidentally observe what is illegal. But beyond this, the individual as such and the privacy he or she has in property brought with him or her is deserving of as much privacy as if the individual were at home.

[147] But the main issue in *Belnavis* is not whether the driver had standing under the Charter, but whether the passenger did. Because she was a passenger in the vehicle and her own evidence had negated any possible claim of ownership over things inside the vehicle - which were, in fact, stolen objects - the Court found she had no standing to challenge their seizure. The Court noted that a passenger who could demonstrate a relationship (e.g. a spousal relationship) between her and the driver or the owner, could establish a privacy interest and thus standing.

[148] At para. 14 of *Belnavis*, Justice Cory, writing for the Court, noted, without comment, that in the Court of Appeal decision *R. v. Belnavis* (1996) 29 O.R. (3d) 321 (Ont. C.A.) [*Belnavis* (Ont. C.A.)], Doherty J.A. had stated that when a judge is assessing whether a person has a

reasonable expectation of privacy, lawful presence in the vehicle is only one factor to be considered. Lawful presence did not per se create a privacy expectation with respect to the vehicle or its contents. On the other hand, neither Justice Cory nor Doherty J.A., categorically say whether lawful presence is an essential element for the assertion of a privacy interest.

- [149] In that regard, however, it is noteworthy that at para. 37 of *Belnavis* (Ont. C.A.), Doherty J.A. noticed that, while the weight of authority in U.S. privacy cases supported the privacy claim of a driver having possession with the consent of the owner, without such consent, the driver had no privacy claim.
- [150] For example, as Doherty J.A., referring to *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994) at 256, noted, where the driver had only claimed they had the permission of an unidentified third party, the Court had found such did not constitute the owner's permission to drive the motor vehicle. Thus, there was no privacy interest. I take from this that, at least according to the U.S. case of *Gomez*, the accused must prove he had the owner's permission to establish their privacy interest.
- [151] A reasonable expectation of privacy may relate either to the place searched or the thing seized, or to both; *Belnavis*. However, a reduced expectation of privacy attaches to a motor vehicle; *R. v. Grant*, [1993] 3 S.C.R. 223 [*Grant*].
- [152] Doherty J.A. also noted in *Belnavis* (Ont. C.A.), that it is reasonable for a person who is driving a motor vehicle with the owner's consent to expect that agents of the state cannot invade the vehicle absent a demonstrable state interest that is sufficiently compelling to override the driver's entitlement to maintain the privacy of the vehicle.
- [153] Defence counsel argued that the fact Mr. Fortune had been a passenger in the same vehicle five days earlier was sufficient to show he had the owner's permission to drive the vehicle on the day of his arrest. That is not necessarily so. An owner can grant permission to a person to drive while they are with them, or grant permission for one specific occasion, but not for another. Significant insurance questions may present themselves in such circumstances. The question of whether, at a given time, the owner's consent is present, is not always a straightforward one; not one, at least, that lends itself to easy answers. In the present case, I have no evidence showing whether Mr. Fortune and the owner were members of the same family, for example, which might warrant a strong inference the driver had permission to drive at the material time. As the matter stands, the historical record in this case consists of one undoubted occasion five days previous, which saw Mr. Fortune as a passenger in the same vehicle with the owner undoubtedly present.
- [154] In *Edwards*, Mr. Edwards had a key to his girlfriend's apartment. He had been a visitor over the three-year period they had been dating. He also kept some clothes in the apartment. The Court found that this was an insufficient basis to establish an expectation of privacy at the time the police searched the girlfriend's apartment for drugs. However, the fact that Edwards had no authority to regulate access to the apartment was a significant factor in the

decision. The authority to admit and repel others appears to send a strong signal a privacy interest is present.

- [155] Defence counsel conceded that because Mr. Fortune did not own the car, he had a lesser privacy interest. He points out, however, that there is no evidence the car had been stolen, or that it was running with stolen plates, as in Crocker. In addition, defence counsel strongly argues that the fact that Mr. Fortune could control access to the vehicle establishes a reasonable expectation of privacy. He submits it is the right to control access to the vehicle that most strongly marks a reasonable expectation of privacy in a vehicle, not whether a person is licensed to drive it. He points out, alluding to Crocker, that if a person owns a car and they have no licence to drive, that fact would not detract from the fact it remained their car; and that, against all other outside claimants, they could maintain a privacy right to the vehicle and its contents. Defence counsel submits the fact that Mr. Fortune drove while prohibited from doing so, had nothing to do with his ability to possess and control the vehicle at the material time.
- [156] Counsel points out as well, that even in Crocker, the Court of Appeal had not specifically excluded the possibility that someone wrongfully possessing a vehicle could still lay claim to a privacy interest. In any case, defence counsel submits, what negated any colour of right argument Mr. Crocker could have had to his claim of a proprietary right against others was the fact the truck the police searched was stolen. This had nothing to do, he submits, with whether he was licensed to drive it, thus distinguishing Crocker from the case at bar. I note, however, that while the Court did note Mr. Crocker was in possession of the truck and had some degree of control over it, as mentioned above, the Court also stated "those factors alone do not create a privacy interest" (para. 85).
- [157] As I understand Crocker, the Court made it clear that trial judges must consider the totality of the circumstances, especially those that touch on a lawful proprietary, possessory, or privacy interest. It does appear from what the Court has said that someone in unlawful possession of a vehicle would likely find it difficult to establish a privacy interest.

c) Findings on standing

- [158] In the case at bar, Mr. Fortune had no proprietary interest in the vehicle he was driving on August 4, 2011. As for a privacy claim based on lawful possession on July 30, 2011, five days earlier, Cst. M1 acknowledged Mr. Fortune was a passenger in the same car, with the registered owner present in it, which is indirect evidence of lawful possession on August 4. As mentioned, I have no direct evidence of consent on August 4, such as the owner's confirmation he had given consent; nor evidence of any relationship the owner might have had to Mr. Fortune; based on affinity, contract, or otherwise, from which it might be possible to confirm any possessory right on the day in question.

- [159] Further, insofar as a reasonable expectation of privacy while driving in public is concerned, Mr. Fortune's position at all material times in the driver's seat, and his unlawful driving activities, would be obvious to any police officer who already knew his identity.
- [160] Defence counsel suggests that, in effect, Mr. Fortune possessed a kind of peaceable possession against the strangers of the world, so to speak. One under which he could exclude entry to all those he did not want to enter the vehicle and to invite into it those he did. Even so, that factor, standing alone, does not automatically give him standing under ss. 8 and 24(2) of the Charter. Again, the totality of the circumstances must be measured and weighed to see whether there is enough to establish a privacy interest.
- [161] As for a privacy interest in relation to things in the vehicle over which Mr. Fortune conceivably could maintain a privacy interest, he has not asserted a proprietary, possessory, or privacy interest regarding any object seized from inside the car. As noted, I have no evidence of a subjective expectation of privacy.
- [162] Considering the totality of the circumstances and the balance of probabilities, I find that Mr. Fortune did have an operable claim to privacy at the time of his arrest that was at least sufficient to give him standing on a s. 24(2) application. While the evidence of a possessory right on the day of his arrest and his relationship to the owner is somewhat lacking, for the reasons I mentioned, such evidence as there is, is not contradicted. There is no evidence the car was stolen, as in Crocker.
- [163] Mr. Fortune's possessory right, combined with his ability to admit and refuse entry to others establishes a privacy interest, albeit one at the lower end of the scale; but sufficient, still, to establish standing under s. 24(2).
- [164] If I am wrong in this finding, I should note this: in my view, a contrary finding would not necessarily have excluded all possibility of Mr. Fortune having standing to apply to exclude evidence. If evidence was obtained because of violations of his own individual rights that do not stem solely from his mere lawful presence and possessory rights within the vehicle, he could still establish standing for a s. 24(2) application in some circumstances, *R. v. Do*, 2012 BCSC 411 at para. 12; *R. v. Lauriente*, 2010 BCCA 72 [Lauriente], at para. 24.
- [165] I will take a brief adjournment.
- [166] Editorial note: [On returning to court, counsel kindly pointed out a misstatement regarding Mr. Fortune's location in the vehicle on August 4. I mistakenly referred to him on occasion as driver, instead of passenger. These reasons correct the misstatement.]
2. Is there a temporal or causal relationship between the search and seizure of the drugs and the denial of Mr. Fortune's constitutional rights?
- [167] The Crown submitted that even if Mr. Fortune's arrest and detention was unlawful, his subsequent detention arbitrary, and his s. 10(a) and (b) rights violated, submitted, nothing linked Cst. M2's obtaining of the drugs from the car to any of the Charter breaches.

- [168] This threshold question must be addressed before proceeding further with a s. 24(2) analysis. The defining question is whether any or all of the breaches of Mr. Fortune's Charter rights connect sufficiently to the evidence Mr. Fortune seeks to exclude. If so, I can proceed to the next step of the s. 24(2) analysis; *R. v. Lauriente*, at para. 36.
- [169] Using the 'but for test' to look for a causal link between a breach and the obtaining of the evidence may be a useful tool, but in *Lauriente*, *Therens*, and *R. v. Strachan*, [1988] 2 S.C.R. 980 [Strachan], the Supreme Court of Canada deemed this approach too restrictive for s. 24(2) purposes.
- [170] The headnote in *Strachan* states:
- [HN] Section 24(2) does not require a causal link between the Charter infringement and the discovery of the evidence. All evidence gathered following a violation of a Charter right should be considered as within the scope of s. 24(2). The first inquiry under s. 24(2) is to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence, while not determinative, figures prominently in this assessment.
- [cited in *Lauriente* at para. 43]
- [171] Chief Justice Dickson, speaking for the majority in *Strachan* stated:
- [46] ... Situations will arise where evidence, though obtained following the breach of a Charter right, will be too remote from the violation to be "obtained in a manner" that infringed the Charter. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote.
- [172] A connection that is merely "remote" or "tenuous" will not suffice; *R. v. Plaha* (2004), 189 O.A.C. 376 (Ont. C.A.) at para. 45; *R. v. Goldhard*, [1996] 2 S.C.R. 463.
- [173] In *R. v. Wittwer*, [2008] 2 S.C.R. 235, the Supreme Court considered a possible causal link between the accused's earlier statement, which was a product of a breach; and a later one that was not a product of the breach, but one that had been tainted by the earlier statement.
- [174] Writing the unanimous decision in *Wittwer*, Justice Fish noted "the courts have adopted a purposive and generous approach"; and that it is not necessary to establish "a strict causal relationship between the breach and the subsequent statement" (para. 21). He stated:
- [21] ... The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: *Strachan*, at p. 1005. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three": *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45. A connection that is merely "remote" or "tenuous" will not suffice: *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40; *Plaha*, at para. 45.

a) Findings on casual links in the case at bar

[175] Turning now to the present case, I find a causal and temporal connection between Mr. Fortune's unlawful arrest and the evidence obtained from the car and his person. I also find a temporal and contextual connection between the evidence obtained during the arbitrary detention and the s. 10(a) and (b) violations that followed his arrest. I find these required the same transactions and a course of conduct that began with his unlawful arrest and seizure. As extensively discussed in these reasons, Cst. M1 did not exercise any of the discretion that s. 495(2)(d) required of him before he arrested and continued to detain Mr. Fortune.

[176] I find links partly causal and temporal, and also contextual, between what was essentially part of one course of conduct and the evidence obtained:

§ between official arrest policy for driving while prohibited offences the officers followed and Mr. Fortune's unlawful arrest;

§ between the arrest policy and the unlawful search and discovery drugs;

§ between the discovery of the drugs and the officer's decision not to advise Mr. Fortune of the reasons for his continued detention;

§ between the decision not to advise Mr. Fortune of the reasons for his detention pursuant to 10(a) of the Charter and, in hopes he might become an informer, the decision to question Mr. Fortune for over two hours on the very subject, drug trafficking, on which he stood in legal jeopardy;

§ between the violation of Mr. Fortune's rights under s. 10(b) of the Charter to retain and instruct counsel in relation to the CDSA charges, when throughout the officer's questioning, he stood in legal jeopardy.

[177] I find Mr. Fortune has established a link sufficiently strong to allow me to turn to the next step.

3. General legal Principles s. 24(2)

[178] In *R. v. Reddy*, 2010 BCCA 11, Justice Frankel distilled the principles from *Grant* to guide judges deciding applications under s. 24(2) of the Charter:

[91] ... [In] deciding whether to admit or exclude evidence, a court must now assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
- (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little); and

- (3) society's interest in the adjudication of the case on its merits.

See also: R. v. Harrison [2009] SCC 34 at para. 2

[92] With respect to the first factor--seriousness of the breach--the greater the level of state misconduct, the greater will be the need of the courts to disassociate themselves from that conduct. Wilful or reckless disregard for Charter rights will, therefore, tend to support exclusion: paras. 71-74. Further, as the Chief Justice and Charron J. noted (at para. 75):

"Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: [citations omitted].

[93] As for the second factor--impact of the breach on the accused--it was observed that "[t]he impact of a Charter breach may range from fleeting and technical to profoundly intrusive". The more serious the impact is on the rights of the accused, the more likely it will be that exclusion is warranted: paras. 76, 77.

[94] The last factor--society's interest in a decision on the merits--involves the question of "whether the truth seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": para. 79. The reliability of the evidence is an important consideration, as is the importance of the evidence to the truth-seeking function of the trial. Although "seriousness of the offence" remains a consideration, it has far less importance than under the Collins/Stillman framework, because s. 24(2) focuses on the long-term implication for the repute of the administration of justice, and not the public's short-term desire for a conviction: para. 84.

4. Analysis and findings

a) Seriousness of Charter-breaching conduct

[179] Crown counsel submitted the presence of the policy could overlay the circumstances that would still provide residual grounds to arrest and further detain Mr. Fortune. As discussed earlier, he submits the presence of an arrest policy is not irreconcilable with the presence of objective grounds for arrest. The existence of an arrest policy will not always lead to an unjust or unfair result. If Cst. M1, properly exercising his discretion, could have arrested Mr. Fortune, this lessens the seriousness of the breach. Crown counsel further points out that Mr. Fortune was driving while prohibited. As he exited the car, the broken cell phone was in plain view. The officers were aware of the events that had occurred five days earlier. To these considerations, they could also have perhaps added the others discussed earlier; but the officers did not put their minds to Mr. Fortune's rights and the public interest. On the evidence and irrespective of the officers' awareness of all these circumstances, plus any others that one might reasonably conceive, the fact is they followed the policy and would not have put their minds to what the law required of them. Thus, they did not.

- [180] In my view, the Charter breaches in this case, viewed individually and cumulatively, fall towards the serious end.
- [181] The Charter breaches that started the chain of events occurred because the officers adhered to official policy. The officers were obeying their superiors and were not deliberately acting in bad faith. Even so, they were aware of the provisions of s. 495(2) of the Code and its requirements. Mr. Fortune's arrest, therefore, formed part of what appears to be a systemic pattern of Charter violations. As stated, I would not go so far as to say the officers acted in bad faith when Cst. M1 arrested Mr. Fortune; but considering the circumstances, neither could I say they were acting in good faith.
- [182] As for the officers' arbitrary detention and subsequent questioning of Mr. Fortune without having advised him of his Charter rights, this formed an integral part of an investigative plan that both officers knew, or should have known, constituted a breach of ss. 7, 8, and 9 of the Charter. Although these subsequent violations were animated by and linked to the first breach, standing on their own, the detention and questioning constituted serious Charter violations. Since these violations stem from deliberate planning and execution, and the officers had knowledge of Mr. Fortune's Charter rights, and their violation, I cannot find the officers acted in good faith. They were not new recruits and, as mentioned, they were also conscious of the Charter implications of their actions; and in that sense, they acted in bad faith.
- [183] I should point out that the officers gave their evidence in a straightforward way. They did not in any way attempt to mislead the Court and they were open about their intentions and their investigative strategy. They were not abusive or disrespectful of Mr. Fortune. These findings are not intended in any way to reflect negatively on their professional honesty or character.
- b) Impact of the breach on Charter protected interests of the accused
- [184] If evidence obtained in connection with a Charter would have been inevitably obtained through a continuing lawful investigation, this lessens the degree of the impact on the accused's Charter protected interests.
- [185] This is not the same question as asking whether the evidence would have been obtained had the officers acted in accordance with s. 495(2)(d) and had not violated the accused's Charter protected interests.
- [186] In this case, I heard no evidence regarding vehicle inventories, communication with the registered owner, or any other further investigative steps that would have led inevitably to the discovery of the drugs. I find answering the discoverability questions requires engaging in too much speculation to come to a sound conclusion; Grant at para. 122.

[187] Insofar as the impact of the breach to Mr. Fortune's liberty is concerned, I find his detention falls into about the middle of the range of serious impact. It was not nearly as long as seen in some cases, but neither was it only a momentary interference.

[188] From a broader perspective, however, violations relating to the detention and arrest of a person lie close to the heart of the individual liberties and dignity that the Charter seeks to preserve for everyone. The provisions of s. 495(2) are a direct reflection of those values. Likewise, other provisions of the Code such as ss. 496, 497 and 498 reflect similar Charter values.

[189] In my view, overlooking the Charter violations in this case could send the message that these Charter values are not important. This supports exclusion of the evidence.

c) Society's interest in adjudication on the merits

[190] I turn finally now to society's interest in adjudication on the merits of the charges in this case. Factors favouring inclusion of evidence include: the serious nature of the offence; the reliability of the evidence; and the fact that the exclusion of the drugs discovered and analyzed would see nothing of the Crown's case left to prosecute on the CDSA charges. (I note however that because the Crown still has to prove possession and conviction; even with the evidence admitted, conviction would not be a foregone conclusion).

[191] Numerous decisions of this Court and our Court of Appeal have commented on the insidious nature and destructive effects of dial-a-dope operations in the suburbs of Vancouver and small cities throughout the Province such as Mission and even other rural areas. Dial-a-dope operations make highly destructive drugs readily available in areas of the Province where access to them would otherwise be very difficult. Dial-a-dope operations are difficult to police and their investigation and prosecution consumes considerable community resources. The public has a strong interest in seeing such crimes tried on their merits; particularly given the tremendous harms their activities cause vulnerable young people and addicted persons.

[192] At the same time, Canadians expect the Court to uphold and protect Charter values. I find that overlooking a pattern of Charter violations that are serious, both individually and collectively would undermine the reputation of the justice system in the longer term, even if it means seeing a potential dial-a-dope trafficker walk away. This is especially so once it is recognized that the Charter placed no obstacles whatsoever in the way of a productive investigation in this case. It was state misconduct, not the upholding of Charter provisions, that stands in the way of investigation and prosecution on the merits of this case.

d) Conclusion on s. 24(2)

[193] Considering all these factors and weighing all in the balance, I find they strongly favour exclusion of the evidence obtained from the search of the car and Mr. Fortune's person, and I so order.

"N. Brown J."

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