

CANADA / JUDGMENT

R. v. Makortoff

2025 BCCA 462

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 462 R. v. Makortoff

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Makortoff,

2025 BCCA 462

Date: 20251230

Docket: CA50198

Between:

Rex

Respondent

And

Jessie Adam Makortoff

Appellant

Before:

The Honourable Justice Griffin

The Honourable Justice Winteringham

The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated

December 8, 2023 (conviction) (R. v. Makortoff, 2023 BCSC 2565,

Rossland Docket 22870-2).

Counsel for the Appellant:

D.J. White

Counsel for the Respondent:

J.R. Lawn

A.L. Russell

Place and Date of Hearing:

Vancouver, British Columbia

October 29, 2025

Place and Date of Judgment:

Vancouver, British Columbia

December 30, 2025

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Justice Griffin

The Honourable Justice Gomery

Summary:

The appellant challenges his conviction for possession for the purpose of trafficking. During a motor vehicle stop, the police suspected the appellant was drug trafficking. The investigator detained the appellant for one hour and 47 minutes to wait for a narcotics dog to conduct a search. In his application to exclude the cocaine found during the search, the appellant alleged the detention was unlawful and constituted a breach of s. 9 of the Charter. In the voir dire ruling, the trial judge found the detention to be lawful and, even if not lawful, would not have excluded the evidence. Held: Appeal dismissed. In the s. 9 Charter analysis, the judge properly considered the factors engaged. She did not misconstrue the evidence about the seriousness of the investigation. Although long, the duration of the detention was reasonable, given the location of the arrest, the diligence of both the arresting officer and narcotics dog officer, and the lack of less intrusive investigative measures.

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

- [1] Can the police lawfully detain a motorist, based only on a suspicion of drug trafficking, for one hour and 47 minutes until a drug detection dog arrives?
- [2] The appellant challenged the lawfulness of his detention, alleging a breach of s. 9 of the Charter, and sought to exclude the evidence seized during the subsequent search of his vehicle. The appellant alleges the judge misapprehended the seriousness of the investigation. He alleges the judge should have found the length of the detention rendered it arbitrary. He submits these errors impacted the judge's s. 9 analysis. Following a voir dire, the trial judge dismissed the Charter application, concluding the police had not violated s. 9 of the Charter. She found that even if she was wrong about the s. 9 breach, she would not have excluded the evidence: *R. v. Makortoff*, 2023 BCSC 2524 at paras. 161, 188 [Voiur Dire Reasons]. On December 8, 2023, in reasons indexed as *R. v. Makortoff*, 2023 BCSC 2565, she convicted the appellant of possession of a controlled substance for the purpose of trafficking and on June 21, 2024, sentenced him to 22 months incarceration along with ancillary orders.
- [3] For the reasons set out below, I would dismiss the appeal. I agree with the appellant that the length of the detention warranted an inquiry. However, the judge made factual findings--not displaced on appeal--supporting the judge's s. 9 Charter analysis. The judge accepted the evidence of the police officer about the nature of the investigation, the basis for the detention (including its duration), and the validity of the investigative steps undertaken. The appellant has not demonstrated error with respect to the judge's case-specific analysis of the detention.

Background

- [4] On October 8, 2020, Cst. Tabert, a general duty member of the RCMP, was traveling on Highway 3 near Grand Forks when he saw the appellant's vehicle driving in the opposite direction. Cst. Tabert watched the vehicle swerve and brake heavily. As a result of his observations, Cst. Tabert turned around his police cruiser to pull over the vehicle. He did so because he wanted to assess the driver's sobriety but also because he knew the appellant was connected to the vehicle and he was rumoured to be trafficking drugs. During the traffic stop, Cst. Tabert formed the suspicion that the appellant was transporting illicit drugs, and he detained him for a drug investigation. He informed the appellant that he was being detained for suspicion of possession for the purpose of trafficking, told him of his right to speak to a lawyer, fastened handcuffs, and placed him into the back of the police cruiser.
- [5] At 5:32 p.m., immediately after detaining the appellant and within four minutes of beginning the traffic stop, Cst. Tabert called the closest dog handler available, Cst. Innes. While waiting for the dog handler, the appellant sat in the back of the police cruiser. The judge accepted the appellant's evidence that the lights and noise of the police car gave him a headache, and that being in the back of the police car was uncomfortable. However, the judge concluded the appellant's pain was not pronounced, given that he was able to fall

asleep while waiting for the dog handler to arrive: Voir Dire Reasons at para. 120.

- [6] Meanwhile, Cst. Innes responded immediately to the request to attend with his dog, drove 142 kilometres to the scene and arrived at 7:07 p.m. At 7:12 p.m., the dog signalled there were drugs in the vehicle. One minute later, Cst. Tabert arrested the appellant for possession for the purpose of trafficking. In total, the appellant was detained for one hour and 47 minutes from the time of the initial traffic stop (5:26 p.m.) to the time of his arrest (7:13 p.m.). Following the arrest, the police searched the vehicle and found two packages hidden inside a hockey skate. One package contained 137.5 grams of cocaine, which is the subject of this appeal. The second package contained 1,006 pills purported to be MDA. In an oral ruling, not the subject of this appeal, the judge quashed the MDA count in the Indictment: *R. v. Makortoff*, 2023 BCSC 2564.

Voir Dire Reasons

- [7] During the voir dire, the appellant alleged breaches of ss. 9 and 10 of the Charter. He does not advance the same challenges on appeal, nor does he challenge the balance of the judge's factual findings. Rather, he asserts errors with respect to the judge's assessment of the s. 9 breach, focusing on her characterization of the seriousness of this drug investigation and the duration of the detention. I will thus summarize only the portions of the judge's reasons relevant to the grounds raised on appeal.
- [8] The appellant, Cst. Tabert, and Cst. Innes testified at the voir dire. Importantly, the judge preferred the testimony of Cst. Tabert where it was different from the appellant's. Her reason for doing so is best captured at para. 48 of the Voir Dire Reasons:
- [48] Accordingly, on Mr. Makortoff's evidence, in the 18 hours leading up to the encounter with Constable Tabert, he stayed up all night, ingested some quantity of drugs, slept for a few hours, smoked marihuana, and then drove for four to four-and-a-half hours. I conclude his ability to remember the details of what happened that day to be of questionable reliability given his lack of sleep, ingestion of substances over the previous 18 hours, the long drive, and given his evidence on timing that he insisted was correct when it clearly was not.
- [9] The judge accepted Cst. Tabert's testimony about the basis for the initial stop, noting that "the movements of the [appellant's] vehicle were consistent with a person who is impaired and who does not want to be pulled over by the police [and he] acknowledged that he also knew [the appellant] was rumoured to be trafficking drugs": Voir Dire Reasons at para. 68. The judge accepted that there was a dual purpose for stopping the appellant but concluded it was not a ruse for a criminal investigation: Voir Dire Reasons at para. 68.
- [10] The judge noted that within a few minutes of Cst. Tabert interacting with the appellant, the officer suspected the appellant was engaged in drug trafficking: Voir Dire Reasons at paras. 71-73. Cst. Tabert noted: the smell of burnt cannabis, a chemical smell he believed to be air freshener, and a hammer sitting in the driver's foot well. He thought the appellant appeared nervous, which was inconsistent with his demeanour in their previous interactions: Voir

Dire Reasons at para. 71. Cst. Tabert combined these observations with the appellant's statement that he was travelling from Grand Forks to Vancouver, and other information the officer had learned prior to the interaction. Namely, that the appellant's vehicle had been queried by the Vancouver Police Department the night before, illicit drugs sold in Grand Forks usually come from Vancouver, and information from a confidential informer that the appellant was involved in drug trafficking: Voir Dire Reasons at para. 73. In the fall of 2020, Cst. Tabert received information from a confidential informer that the appellant sold drugs and transported drugs in his vehicle--the same vehicle now pulled over: Voir Dire Reasons at para. 2. Cst. Tabert testified that based on the totality of this information, he suspected the appellant possessed drugs for the purpose of trafficking.

- [11] To determine the s. 9 breach, both Crown and defence counsel invited the judge to apply the analysis set out by the Ontario Court of Appeal in *R. v. Barclay*, 2018 ONCA 114. Although not an exhaustive list, the Ontario Court of Appeal listed some of the factors relevant to assessing a s. 9 Charter breach: the intrusiveness of the detention; the nature of the suspected criminal offence; the complexity of the investigation; any immediate public or individual safety concerns; the ability of the police to effectively carry out the investigation without continuing the detention of the suspect; the lack of police diligence; and the lack of immediate availability of the required investigative tools: *Barclay* at para. 31. The judge agreed with this analysis and considered the factors enunciated in *Barclay*, noting that the "permitted duration of an investigative detention is case-specific": *Barclay* at para. 31.
- [12] The judge then turned to consider each of the factors identified in *Barclay*. First, she agreed the appellant's detention in a police vehicle while handcuffed was significant and intrusive: Voir Dire Reasons at para. 121, citing *R. v. McGuffie*, 2016 ONCA 365. The judge accepted the appellant's testimony that he was physically uncomfortable and that the flashing lights and noise caused him to have a headache: Voir Dire Reasons at para. 119. The judge acknowledged the appellant's belief that his reputation would suffer since people passing by on the highway could see his mother's vehicle that he often drove: Voir Dire Reasons at para. 117.
- [13] Second, she considered the seriousness of the investigation stating the appellant was suspected of trafficking drugs: Voir Dire Reasons at para. 122. The judge noted the degree of seriousness of this type of offence:
- [123] Since 2016, British Columbia has had a public health emergency due to addictive and toxic street drugs causing overdose deaths. The severity of the problem has steadily increased. The Court of Appeal for British Columbia has recognized the danger that street drugs pose to the drug-using members of society, including drugs that do not include fentanyl: *R. v. Smith*, 2017 BCCA 112; and *R. v. Mann*, 2018 BCCA 265.

The judge accepted that the investigation was not as "emergently serious" as cases involving those detained in shooting investigations: Voir Dire Reasons at para. 124. However, she found that drugs "intended to be trafficked pose a threat to the drug-using population" (Voir Dire Reasons at

para. 125) and "some of those drugs [were] highly addictive and potentially toxic, putting the health and safety of [individuals who use drugs] at real risk" (Voir Dire Reasons at para. 151). The judge concluded that "the crime [the appellant] was suspected to be in the course of committing, namely, the trafficking of drugs, [was] extremely serious" and "[t]he public interest in intercepting drugs before they get trafficked is compelling": Voir Dire Reasons at para. 126.

- [14] Third, the judge considered alternatives to the appellant's detention. She found the "logistics of getting the dog to the scene in a reasonable time" were complex because the only nearby narcotics dog was 142 kilometres away. Otherwise, the deployment of a narcotics dog was not complicated: Voir Dire Reasons at paras. 127-128. However, regarding other available investigative steps and due diligence, the judge concluded the police acted at all times with appropriate diligence. The judge determined that the other potential investigative steps proposed by defence (such as conducting surveillance, obtaining consent to search, or questioning the appellant) were not feasible and the minimally intrusive option was waiting for the narcotics dog: Voir Dire Reasons at paras. 134-135.
- [15] The judge agreed with the Crown that the police could not be expected to have a narcotics dog available in every city and town. In this case, the least intrusive step that could be taken was a narcotics dog. This was the appropriate tool to deploy, particularly since the detention was not and was never intended to be indefinite: Voir Dire Reasons at paras. 138-143.
- [16] Finally, the nature of the crime under investigation and the "reasonable suspicion that there were drugs for the purpose of trafficking in the vehicle" gave rise to "an immediate safety concern to the drug-using members of the public in the Grand Forks area": Voir Dire Reasons at para. 129.
- [17] Considering the totality of the circumstances, the judge concluded the appellant's s. 9 rights were not breached by the duration of this detention. She reached this conclusion after considering the relevant s. 9 jurisprudence including *R. v. Mann*, 2004 SCC 52 [Mann SCC], and *Barclay*. She found:
- [154] Taking all of the circumstances into account, especially the seriousness of the crime being investigated, considered against the significantly intrusive detention of being handcuffed in a police vehicle for an hour and 45 minutes, and considering that a narcotics dog is a minimally intrusive investigative method, I conclude that Mr. Makortoff's s. 9 rights were not violated by this detention.
- [18] Despite her conclusion that the appellant had not proven a breach of the Charter, the judge went on to conduct an analysis under *R. v. Grant*, 2009 SCC 32 to determine whether the evidence should be excluded pursuant to s. 24(2) of the Charter: Voir Dire Reasons at para. 161. The judge assessed the three lines of inquiry as mandated by *Grant* and concluded that, in all the circumstances, the admission of the seized cocaine would not bring the administration of justice into disrepute, and it would therefore not be excluded under s. 24(2) of the Charter: Voir Dire Reasons at paras. 187-188.

On appeal

- [19] On appeal, the appellant does not dispute the lawfulness of the initial traffic stop. Further, the appellant does not dispute the judge's finding that Cst. Tabert had sufficient grounds to detain him for a drug investigation. Rather, he contends the judge erred in finding: (1) the investigation to be serious, and (2) the duration of the detention to be reasonable.
- [20] In relation to the seriousness of the offence, the appellant argues that the evidence only supported a finding that Cst. Tabert was investigating a marihuana related offence, not an offence for hard drugs.
- [21] In relation to the length of the detention, the appellant submits the judge erred in failing to find a s. 9 Charter breach despite the duration of the detention. The appellant submits his Charter rights were breached because of the length of the detention, particularly when coupled with the nature of the investigation that was actually underway.

Did the judge err by finding the appellant's s. 9 Charter rights were not infringed?

Standard of Review

- [22] In *R. v. Le*, 2019 SCC 34, the Supreme Court of Canada identified the standard of review applicable in a case such as this:
- [23] Before engaging in any analysis in this appeal, it is necessary to identify the applicable standard of review. Questions of law on an appeal attract a standard of correctness (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 18). Questions of fact attract a palpable and overriding error standard (para. 18). The application of the law to a given factual matrix, that is, whether a legal standard is met, amounts to a question of law and attracts a correctness standard (*Shepherd*, at para. 20; *Grant*, at para. 43).
- [29] There is no dispute, whether among the courts below or the parties to this appeal, that Mr. Le was detained at some point in the backyard. What we must decide is when this occurred and whether it was arbitrary. This is because the analysis of whether s. 9 of the Charter has been infringed proceeds in two stages. The first stage inquires into whether the claimant was detained at all. If that leads to the conclusion that the claimant was detained, the second stage of analysis inquires into whether the detention was arbitrary. Both stages attract a correctness standard of review.
- [23] As set out in *Le*, a s. 9 Charter inquiry proceeds in two stages: determining whether there was a detention; and, if so whether it was arbitrary. There is no dispute that the appellant was detained from the time he was pulled over until the time of his arrest. The second stage of the s. 9 analysis inquires into whether the detention was arbitrary. On this appeal, two standards of review are at work.

- [24] First, the underlying findings of fact made by the trial judge are reviewable on the standard of palpable and overriding error: *R. v. Côté*, 2011 SCC 46 at para. 44. That is, whether the judge erred in her finding about the seriousness of the offence is to be assessed on a standard of palpable and overriding error.
- [25] Second, questions of law—including whether the duration of the detention rendered it arbitrary—are subject to appellate review on the standard of correctness: *R. v. Shepherd*, 2009 SCC 35 at para. 20. In other words, the latter determination attracts a correctness standard of review: *Le* at para. 29.

Section 9 of the Charter

- [26] Section 9 of the Charter provides that everyone has the right not to be arbitrarily detained. Section 9 is meant to protect individual liberty against unjustified state interference: *Le* at para. 25. In *Mann* SCC, the Supreme Court of Canada recognized that the police have a common law power to briefly detain individuals for investigative purposes. Justice Iacobucci wrote:

45 To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case.

[Emphasis added.]

- [27] At the trial, the appellant asked the judge to apply the *Barclay* framework to assess the s. 9 Charter violation. The Crown agreed with this approach. Having considered the judge's analysis and the submissions before her, I agree that a consideration of the factors identified in *Barclay* is useful to the assessment of whether there was an infringement of the appellant's s. 9 Charter rights.
- [28] As stated, the appellant alleges two errors in the judge's analysis of the *Barclay* factors. First, the appellant submits the judge misapprehended the evidence which led her to improperly characterize the seriousness of the offence being investigated. Second, he submits the judge erred because she failed to fully consider the intrusiveness (including its duration) of the detention on the appellant. The appellant asserts that if the judge had not made either of these errors, she would have reached a different conclusion about whether the detention was arbitrary. That is, she would have found a breach of the Charter and was then compelled to conduct a s. 24(2) Charter analysis to decide whether the items seized should have been excluded.

Did the judge misapprehend the evidence about the seriousness of the offence under investigation?

- [29] On this point, the appellant contends the judge overstated the seriousness of the investigation and this overstatement skewed her assessment. He asserts there was no basis on the evidence for the judge to elevate the seriousness of the investigation to one of hard-drug trafficking. Rather, the appellant asserts, the investigation should have been characterized in accordance with Cst. Tabert's testimony that he smelled marihuana when he first approached the appellant in his vehicle. As such, this was nothing more than an investigation into marihuana.
- [30] The appellant points to para. 123, cited above, of the Voir Dire Reasons as demonstrating the error. In that paragraph, the judge specifically referred to two case authorities to reach her conclusion about the seriousness of the offence: Voir Dire Reasons at para. 123, citing *R. v. Smith*, 2017 BCCA 112; *R. v. Mann*, 2018 BCCA 265. Relying on those cases, the judge stated the court "has recognized the danger street drugs pose to the drug-using members of society, including drugs that do not include fentanyl": Voir Dire Reasons at para. 123. The appellant submits neither party raised these cases and the appellant was not given an opportunity to address them. The appellant asserts the judge's reliance on these cases caused her to misapprehend the seriousness of the offence actually under investigation.
- [31] The appellant submits that no witness testified about the type of drug being investigated and the judge drew an inference that was not available to her on the evidence presented. However, the Voir Dire Reasons and the transcript of proceedings reveal otherwise. For example, during submissions before her, the judge questioned defence counsel on this very point:

In this case the -- the evidence that Constable Tabert gave was that in Grand Forks his understanding is that the drug trade is supplied through Vancouver or Kelowna, that he knew [Mr. Makortoff] had been in Vancouver the previous evening, because the car had been queried by the Vancouver Police, and the other things he testified about seeing the hammer and the car and the smell of the -- Glade spray and so just the context of Constable Tabert's evidence, he didn't say he was investigating for marihuana. He said he smelled it, but that's not what -- when he detained Mr. Makortoff, I didn't understand from his evidence, to see if Mr. Makortoff was transporting marihuana in the vehicle, it was to see if he was transporting illegal drugs in the vehicle.

[Emphasis added.]

- [32] The appellant agrees with the judge's finding that Cst. Tabert testified he was investigating illegal drugs in the vehicle. However, the appellant asserts illegal drugs could encompass less lethal substances as those identified by the judge, such as psilocybin. As a result, he argues, the judge's finding about the seriousness of the offence was flawed.

- [33] To establish a palpable and overriding error of fact warranting appellate intervention, the appellant must show that the finding was clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must be plainly identified, and it must be shown to have affected the result: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 23-25. Mere differences in interpretation on factual matters are not misapprehensions but simply disagreements with the judge's different view of the evidence: *R. v. Christensen*, 2021 BCCA 392 at para. 56, citing *R. v. Swales*, 2014 BCCA 350 at para. 49.
- [34] The finding that Cst. Tabert was investigating the transport of illicit substances was well-rooted in the evidence. The judge made clear she was considering illicit substances including those other than fentanyl: *Voir Dire Reasons* at para. 123. The appellant has not pointed to any authority requiring a police officer to specify with precision the type of drug being investigated. In this case, there was ample evidence to support the judge's finding that Cst. Tabert suspected the appellant was trafficking illicit or illegal drugs (and this was not a marihuana investigation). The judge referred to the fact that Cst. Innes' dog was not trained to detect marihuana. It was entirely appropriate for the judge to infer illicit drugs are dangerous to the community. Again, the judge specifically noted she was not just talking about fentanyl. Rather, she was referring to illicit or illegal drugs, generally.
- [35] The finding that Cst. Tabert was investigating the transport of illicit substances was not clearly wrong, unsupported by the evidence, or unreasonable. As summarized by the Crown, there was a body of evidence establishing the basis for Cst. Tabert's suspicion that the appellant was involved in illicit drug trafficking:
- a) An informer provided information that the appellant sells drugs and transports drugs in his vehicle.
 - b) The illicit drugs sold in Grand Forks usually came from Vancouver or Kelowna.
 - c) Cannabis was legal to possess at the time of the offences.
 - d) Cocaine has a strong smell that he could recognize.
 - e) An air freshener had been recently sprayed in the vehicle; he knew that some illicit drugs had strong smells, and he believed the air freshener was used to mask him from smelling drugs in the vehicle.
 - f) He detained the appellant for a drug investigation.
 - g) He employed the use of a drug dog (trained specifically to detect drugs other than marihuana) to determine if there were in fact illicit drugs in the vehicle.
- [36] On points of law squarely before the court (as this issue was), the fact the judge referred to a case not cited by either counsel is not, by itself, an error of law: *IMS Incorporated v. Toronto Regional Real Estate Board*, 2023 FCA 70 at para. 55, citing *Heron Bay Investments Ltd. v. Canada*, 2010 FCA 203 at para. 22. The judge was not confused about the nature of the investigation--she did not characterize it incorrectly. Rather, she rejected the appellant's

submission that this was a marihuana (or a substance such as psilocybin) investigation. On the totality of the evidence, she found this to be an illicit drug trafficking investigation. The judge's finding that Cst. Tabert was engaged in an investigation into the transport of illicit drugs into Grand Forks--and that the offence of trafficking illicit drugs is serious--is owed deference on appeal and I would not disturb it.

Did the judge give insufficient weight to the intrusiveness of the detention?

- [37] The appellant submits the judge failed to fully consider the reputational harm that the roadside detention had on the appellant when she considered the intrusiveness and duration of the detention. With respect to intrusiveness, the judge reasoned in favour of the appellant, finding the roadside detention was intrusive. She held, "detention in a police cruiser while handcuffed is a form of detention that is significant and somewhere towards the intrusive end": Voir Dire Reasons at para. 121. She later referred back to this same finding:
- [154] Taking all of the circumstances into account, especially the seriousness of the crime being investigated, considered against the significantly intrusive detention of being handcuffed in a police vehicle for an hour and 45 minutes, and considering that a narcotics dog is a minimally intrusive investigative method, I conclude that Mr. Makortoff's s. 9 rights were not violated by this detention.
- [38] There is something to be said, however, about the duration of the detention. I agree with the appellant that, at first blush, the duration of his detention warranted an inquiry. And anything said in this decision should not be taken as an endorsement that a one hour and 47-minute detention is, generally speaking, Charter compliant. In this case, the trial judge conducted the fact specific s. 9 Charter inquiry in accordance with case authority. The appellant may disagree with her assessment of the evidence, but the judge's findings were available to her on the evidentiary record presented.
- [39] The appellant submitted that the judge failed to consider alternative investigative measures. In my view, the record reveals the judge addressed each alternative investigative tool proposed by the appellant. For example, the appellant specifically suggested the police could have shortened the duration of the detention by seeking the appellant's consent to search his car. However, as the judge held, this suggestion would run contrary to the principle in Mann SCC at para. 45 that the detainee should not be required to respond to questions during an investigative detention: Voir Dire Reasons at para. 134. In my view, the judge carefully considered each of the investigative measures proposed by the appellant. She rejected each of these suggestions after consideration: Voir Dire Reasons at paras. 130-135.
- [40] Here, Cst. Tabert had a reasonable suspicion that the appellant was trafficking illicit drugs (a finding not challenged on appeal) and that the drug detecting dog was the minimally invasive investigative step available in the circumstances. Cst. Tabert informed the appellant about the steps he was taking. He explained to the appellant the basis for his initial detention, and he advised the appellant of his right to counsel. Additionally, when Cst.

Tabert learned how long it would take for Cst. Innes to arrive at the location, he again asked the appellant if he wished to contact counsel. Cst. Tabert refrained from trying to elicit any other information while they awaited the narcotics dog. And, unlike the circumstances in Barclay at paras. 33-34--where the officers' reasonable suspicion was eroded because their initial investigation yielded no results before the narcotics dog arrived--Cst. Tabert's "reasonable suspicion" did not change.

[41] In sum, I find no error in the judge's assessment of the detention. In accordance with the Barclay framework, she conducted a fact-specific inquiry, did not overstate the seriousness of the investigation, found the narcotics dog was the least intrusive method of proceeding in the circumstances, and--despite the intrusion into the appellant's liberty--concluded the police did not violate the appellant's s. 9 rights. In my view, she was correct in her analysis. I would not accede to this ground of appeal.

Should this Court consider the exclusion of evidence?

[42] The judge found no breach of s. 9 but proceeded to conduct a s. 24(2) analysis in accordance Grant, should her s. 9 analysis be incorrect: Voir Dire Reasons at para. 161. The appellant's factum and notice of appeal are silent on the application of s. 24(2) of the Charter. For the reasons stated, it is my view the judge committed no error in concluding the appellant had not established a breach of s. 9 of the Charter. None of the judge's factual findings have been displaced and the appellant has not advanced a ground of appeal regarding s. 24(2). In these circumstances, I see no need to embark on a s. 24(2) Charter analysis.

Disposition

[43] For the reasons stated, I would dismiss the appeal.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Gomery"

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