
CANADA / JUDGMENT

R. v. Phengchanh

2011 BCSC 484

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 484 R. v. Phengchanh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Phengchanh,

2011 BCSC 484

Date: 20110415

Docket: X071127

Registry: New Westminster

Regina

v.

Kay Phengchanh

Before: The Honourable Mr. Justice S.R. Romilly

Ruling on a Voir Dire

Counsel for the Crown:

Rusty J. Antonuk

Counsel for the Accused:

J.F. Chester Bridal

Place and Date of Trial:

New Westminster, B.C.

April 6 and 7, 2011

Place and Date of Judgment:

New Westminster, B.C.

April 15, 2011

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A. NATURE OF THE APPLICATION

[1] This is an application by the defence for the exclusion of evidence obtained as a result of a search of the accused's vehicle. The defence submits that the search contravened s. 8 of the Charter and that the evidence should be excluded under s. 24(2) of the Charter.

[2] For the reasons stated below, the application is granted.

B. THE OFFENCES

[3] The accused was charged with five counts. At the outset of the trial, the Crown entered a stay of proceeding to Count 1 in the indictment. The remaining counts are:

Count 2

Kay Phengchanh, on or about the 16th day of June, 2007, at or near New Westminster, in the Province of British Columbia, did possess an unloaded prohibited or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of an authorization or a licence under which he may possess the prohibited or restricted firearm in that place and a registration certificate for the firearm, contrary to Section 95(1) of the Criminal Code.

Count 3

Kay Phengchanh, on or about the 16th day of June, 2007, at or near New Westminster, in the Province of British Columbia, did unlawfully occupy a vehicle knowing there was a firearm, a prohibited weapon, a restricted weapon, a prohibited device, or prohibited ammunition, in that vehicle, contrary to Section 94(1) of the Criminal Code.

Count 4

Kay Phengchanh, on or about the 16th day of June, 2007, at or near New Westminster, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: cocaine, contrary to Section 4(1) of the Controlled Drugs and Substances Act.

Count 5

Kay Phengchanh, on or about the 16th day of June, 2007, at or near New Westminster, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: heroin, contrary to Section 4(1) of the Controlled Drugs and Substances Act.

[4] The accused entered pleas of not guilty to all of these counts.

C. FINDINGS OF FACT ON THE VOIR DIRE

- [5] The accused, who at the material time was the driver, sole occupant and registered owner of a motor vehicle, was stopped by Constable Henly for a simple motor vehicle infraction. The side mirror of his vehicle was damaged and therefore not in a functioning mode contrary to s. 7.04 of the Motor Vehicle Act Regulations, B.C. Reg. 26/58. I am satisfied and I find as a fact that, upon noticing this infraction, Constable Henly intended to pull over the accused's vehicle and give him a notice and order requesting him to repair the defect within a few days. I also find as a fact that Constable Henly did not intend to give the driver of the vehicle any monetary penalty.
- [6] Before stopping the accused's vehicle, Constable Henly broadcasted her location and advised the other police officers of the location at which she was going to make a motor vehicle stop. Constable Henly also ran the licence plate of the accused's vehicle through her computer. The Canadian Police Information Check revealed that the accused's vehicle was not stolen and it was insured. Constable Henly also checked the PRIME database, which revealed that the accused's vehicle was involved in a "kidnapping and forcible confinement" in Abbotsford in 2005 or 2006, and that during that same time period the accused's vehicle had been the subject of a street check.
- [7] I find as a fact that Constable Henly pulled over the accused's vehicle after being advised that Sergeant Hyland (now Staff Sergeant) was coming to her location as "cover".
- [8] The accused's vehicle stopped without incident. Constable Henly went to the driver's door of the accused's vehicle. She noticed that the accused was the driver and sole occupant of the vehicle. She told the accused why she had stopped him and asked for his driver's licence and registration. I am satisfied that the accused turned these items over to Constable Henly. I am also satisfied that the accused was very, very nervous and did not make eye contact with Constable Henly while doing this.
- [9] Constable Henly took the accused's driver's licence and registration back to her vehicle where she checked the accused's name on the PRIME database. That check revealed that the accused, a person of Asian descent, was involved with drugs and an Asian Gang.

- [10] When Sergeant Hyland arrived, Constable Henly advised him that, for officer safety, she wanted to conduct a pat down search of the accused before giving him the notice and order. As a result, Sergeant Hyland asked the accused to get out of his vehicle. The accused complied. Sergeant Hyland conducted a pat down search of the accused. No weapons were found on the accused's person.
- [11] After the pat down search of the accused was found to be fruitless, Constable Henly testified that, for officer safety, she decided to search the driver's seat area of the vehicle. Her search of that area revealed no weapons, but she found a box-like area below the driver's seat, which was something she had never seen before in any car. She could not get into this box-like area, so she decided to open the back door of the car to examine this box-like area from the back. Upon doing this, Constable Henly discovered a flap of heroin in the foot well of the back seat where a passenger would usually sit. Subsequently, Sergeant Hyland arrested the accused for possession of heroin and asked for another officer to attend the scene with a police dog to do a thorough search of the accused's vehicle.
- [12] Upon his arrest for possession of heroin, the accused was Charterd and warned. I find as a fact that the accused understood his right to counsel. He told Constable Henly that he wished to speak to a lawyer. The accused spoke to a legal aid lawyer when he was returned to the police station for "booking in".
- [13] Constable Boyer arrived at the scene with her police dog. The search of the accused's vehicle with the help of the police dog revealed two more flaps of a narcotic. The search also revealed that one of the air bags had been removed from the front passenger dashboard. In that area they found a holster, which held an unloaded .38 calibre Beretta pistol and two magazines of rounds capable of being fired from the .38 calibre Beretta.
- [14] It is noteworthy that, during the relevant time, both Constable Henly and Sergeant Hyland were dressed in full police uniform and driving marked police vehicles.

D. POSITION OF THE DEFENCE

- [15] Defence counsel concedes that the initial stopping of the motor vehicle being driven by the accused was lawful and, thus, in compliance with s. 9 of the Charter. However, he submits that the police did not have a lawful basis to do a pat down search of the accused and search the passenger seat area of the vehicle for officer safety. He further submits that the search of the driver's seat area of the vehicle and the search conducted incidental to that arrest violated s. 8 of the Charter.
- [16] Defence counsel recognizes the reliability of the evidence he seeks to have excluded pursuant to s. 24(2) of the Charter. However, he argues that the right to be free from improper and unreasonable searches requires the court to exclude the evidence obtained by the police so as to protect those rights from routine infringement.

- [17] Defence counsel further submits that the real purpose for the traffic stop of the accused by Constable Henly was to see if the accused was in possession of drugs.

E. POSITION OF THE CROWN

- [18] The Crown argues that the initial stopping of the motor vehicle being driven by the accused was validly conducted pursuant to s. 7.04 of the Motor Vehicle Act Regulations and thus in compliance with s. 9 of the Charter.
- [19] Counsel for the Crown submits that Constable Henly had the legal right and duty to stop the accused's vehicle because of the motor vehicle infraction; that the sole purpose of the traffic stop was to give the accused a notice and order for the repair of his side view mirror; that the pat down search and search of the vehicle were part of the investigation of the accused; that after Constable Henly found the first flap of heroin and the accused was arrested, the remaining search of the vehicle was a search incident to arrest; and, lastly, if a violation of s. 8 of the Charter occurred, this is not a proper case in which to exclude the discovered evidence.

F. NATURE OF THE ACCUSED'S INTERESTS THAT ARE PROTECTED BY SECTIONS 8 AND 9 OF THE CHARTER

- [20] Sections 8 and 9 of the Charter state as follows:

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

- [21] In *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851 at para. 21, the Supreme Court of Canada indicated that a "warrantless search is presumptively unreasonable and contrary to s. 8 of the Charter..." and in "the absence of a warrant, the Crown must establish on a balance of probabilities that the search was authorized by law, that the law itself is reasonable, and that the manner in which the search was carried out was reasonable." A search may be authorized either by legislation or at common law: *R. v. Caslake*, [1998] 1 S.C.R. 51 at paras. 10-12.
- [22] In *R. v. Calderon* (2004), 188 C.C.C. (3d) 481, 23 C.R. (6th) 1 (Ont. C.A.) at para. 78, Laskin J.A., for the majority, addressed the issue of a warrantless search of a motor vehicle as follows:
- [78] A warrantless search may be justified in the common law in two ways: (1) by characterizing the search as a search incidental to an investigative detention and (2) by characterizing the search as a search incidental to arrest. [*R. v.*] Mann, [2004 SCC 52, [2004] 3 S.C.R. 59] at para. 40 confirms that the police do not have an unrestricted power to search incidental to an investigative detention. A search incidental to an investigative detention is justified for "protective" purposes: officers must believe, on reasonable and probable grounds, that their safety or the safety of others is at risk. See also *R. v. Ferris* (1998), 126 C.C.C. (3d) 298

(B.C.C.A.). Neither [Officer] Osborne nor [Officer] Rome claimed that he searched the appellants' car because his safety or the safety of others was at risk.

ii. Section 9 of the Charter

- [23] Random traffic check stops *prima facie* violate a person's right to be free from arbitrary detention pursuant to s. 9 of the Charter. However, traffic check stops have long been declared justifiable pursuant to s. 1 of the Charter. See: *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; and *R. v. Harris* (2007), 49 C.R. (6th) 220, 87 O.R. (3d) 214 (C.A.).
- [24] Police officers do not require objective justification to conduct a traffic stop. A genuine traffic stop that is authorized by law to check matters such as sobriety or licensing, which includes curfew, conditions of license, ownership, insurance and mechanical fitness of the vehicle, though it may be arbitrary, is justified under s. 1 of the Charter. However, a detention loses its justification if the police conduct surpasses these "traffic stop" objectives to become a pretext for criminal investigation. See: *Hufsky* at 636-37; *Ladouceur* at 1287-9; *Mellenthin* at 622, 624; *R. v. MacLennan* (1995), 97 C.C.C. (3d) 69 (N.S.C.A.) at para. 46; and *R. v. Byfield* (2005), 193 C.C.C. (3d) 139, 74 O.R. (3d) 206 (C.A.) at paras. 15-19. As noted by Cory J. in *Mellenthin*, "A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over.": at 629.

G. ARE THE ITEMS SEIZED FROM THE ACCUSED'S VEHICLE ADMISSIBLE EVIDENCE IN THIS TRIAL?

- [25] To determine whether the items seized from the accused's vehicle are admissible evidence in this trial requires a consideration of the power of police to stop a motor vehicle, the limits of a search incident to detention, an analysis of Constable Henly's subjective belief of the need for officer safety, and an analysis of the principles of search incidental to arrest and ss. 8, 9 and 24(2) of the Charter. It is important to understand both the broad scope and limitations involved in the ability of the police to search a motor vehicle incidental to an arrest. As pointed out by the Supreme Court of Canada in *Nolet* at para. 3: "random checks of vehicles for highway purposes must be limited to their intended purpose and cannot be turned into 'an unfounded general inquisition or an unreasonable search': *R. v. Mellenthin*, [1992] 3 S.C.R. 615, at p. 624." In assessing searches conducted after highway enforcement stops, the Court held, at para. 4:
- [4] ... It is necessary for a court to proceed step by step through the interactions of the police and the appellants from the initial stop onwards to determine whether, as the situation developed, the police stayed within their authority, having regard to the information lawfully obtained at each stage of their inquiry.
- [26] I begin my step by step assessment by dealing with the power of the police to stop and search a vehicle.

i. Power to stop and search a vehicle and the applicable legal principles

[27] In *R. v. Martin*, [2010] N.J. No. 227 (Nfld. Prov. Ct.), Gorman P.C.J. summarizes the law regarding the power of the police to stop and search a vehicle. At para. 41, he states:

[41] The police have the lawful authority to stop a motor vehicle if they have reasonable grounds to believe that a breach of the Highway Traffic Act has occurred (or to alert a driver to a potential safety issue such as a dull brake light and for many other reasons, see for instance, *R. v. Thiede*, [2010 ABPC 121]). If after doing so, the police have reasonable grounds to believe that an offence against another piece of legislation has been committed, they have the lawful authority to arrest and to search the vehicle incidental to that arrest. A search warrant is not required to conduct such a search nor must exigent grounds be established (see *R. v. Tontarelli*, [2009 NBCA 52]), at paragraphs 35 to 44). However, the police cannot stop a motor vehicle as a "pretext or ruse to cover for some other general criminal investigation" (see *R. v. Johnson*, [2009 ONCA 668], at paragraph 27) and "if an arrest is made as a result of such a stop, the arrested person must be advised of his right to counsel" (see *R. v. Strilec*, [2010 BCCA 198] at paragraph 35). Therefore, in assessing the constitutionality of police conduct in the context of Highway Traffic Act enforcement the court "must be alert to the danger of allowing these traffic stops to be turned into a means of conducting an unfounded general inquisition or an unreasonable search" (see *R. v. Schrenk*, [2010 MBCA 38] at paragraph 35). Having said this, it is also important to note that "where a police officer has a lawful and reasonable basis to stop a vehicle, the fact there are other reasons to effect a stop does not necessarily transform the stop into an arbitrary detention" (see *R. v. Grunwald*, [2010 BCCA 288, leave to appeal ref'd [2010] S.C.C.A. No. 299] at paragraph 22). Finally, to comply with section 8 of the Charter any search conducted incidental to an arrest must be "genuinely incidental to a lawful arrest" (see *R. v. Hillgardener*, [2010 ABCA 80] at paragraph 29).

See also: *R v. Kaddoura*, 2009 BCCA 113.

[28] Gorman P.C.J., in *Martin*, also summarized the legal principles involved in stopping and searching of motor vehicles by the police. He wrote, at para. 49:

[49] The legal principles involved in the stopping and searching of motor vehicles (incidental to an arrest) can be summarized as follows:

- (1) the police have the lawful authority to stop a motor vehicle if they have reasonable grounds to believe that a breach of the Highway Traffic Act has occurred (or to alert a driver to a potential safety issue such as a dull brake light) or for any other offence (see [*R. v.*] *Majedi*, [2009 BCCA 276] and *Schrenk*);

- (2) the stopping a motor vehicle for a potential breach of the Highway Traffic Act does not constitute a violation of section 9 of the Charter simply because the police have other suspicions or anticipate that once the vehicle is stopped they will be able to gather evidence of that other offence (see *R. v. Caprara* (2006), 211 O.A.C. 211, at paragraph 8; *R. v. Annett* (1984), 17 C.C.C. (3d) 332 (Ont. C.A.); and *Schrenk*, at paragraph 44). Rather, the issue involves a consideration of "connection or relatedness" (see *Nolet*, at paragraph 52);
- (3) a brief investigative detention based on "reasonable suspicion" is lawful, but a detention in the absence of at least reasonable suspicion is unlawful; arbitrary; and a violation of section 9 of the Charter (see *Mann*);
- (4) the use of the Highway Traffic Act as a "pretext or ruse to cover for some other general criminal investigation" will result in an arbitrary detention (see *Johnson*, at paragraph 27);
- (5) after a motor vehicle is stopped by the police they can affect an arrest if they have the requisite grounds (see *R. v. Feeney*, [1997] 2 S.C.R. 13 and *R. v. Warford* (2001), 161 C.C.C. (3d) 309 (N.L.C.A.)). If the arrest relates to an indictable offence the arresting officer need only have "reasonable and probable grounds" to believe that the suspect has committed or is about to commit the offence. If it is for a summary conviction offence the officer must find the suspect committing the offence (see sections 495(1)(a) and (b) of the Criminal Code; *R. v. Noel*, [2010 NBCA 28]; and *R. v. S.T.P.*, [2009 NSCA 86] at paragraphs 15 to 22);
- (6) for a search to comply with section 8 of the Charter it must be a search authorized either by legislation or at common law. If by legislation, the law itself must be reasonable and the manner in which the search is carried out must be reasonable (see *Mann*). If by the common law, then the search must be carried out in a reasonable manner (see *R. v. Kang-Brown*, [2008] 1 S.C.R. 456);
- (7) the common law provides the authority for the police to search incidental to an arrest. To "be authorized under the common law doctrine of search incidental to arrest, the search must be truly incidental in that the police must be able to explain, within the purposes recognized in the jurisprudence (protecting the police, protecting the evidence, or discovering evidence) or by reference to some other valid purpose, why they conducted the search" (see *R. v. McCabe*, [2008 NLCA 62] at paragraph 21). In *Nolet*, at paragraph 52, the Court indicated that a "search for evidence of the crime to which the arrest related" falls within the common law power of search incidental to an arrest;
- (8) there is no requirement for the police to obtain a search warrant when searching a motor vehicle incidental to an arrest (see *Nolet* and *R. v. Munro*, [2005 BCCA 610] at paragraph 12);
- (9) exigent grounds do not have to be established for a lawful search to be conducted incidental to an arrest (see *Tontarelli*, at paragraphs 35 to 44 and *Nolet*, at paragraph 52);

- (10) a police officer conducting a search incidental to arrest must subjectively have a valid purpose in mind, the reasonableness of which must be considered objectively (see Majedi, at paragraph 19);
- (11) the authority of the police to conduct a search incidental to an arrest allows them to search a motor vehicle, including its trunk (see [R. v.] Polashek [(1999), 134 C.C.C. (3d) 187 (Ont. C.A.)]; [R. v.] Alkins [(2007), 218 C.C.C. (3d) 97 (Ont. C.A.)]; and R. v. Tosczak, [2010 SKCA 10] at paragraph 10);
- (12) an officer conducting a search incidental to an arrest does not have to have reasonable and probable grounds to conduct the search. (see R. v. Le, [2001 BCCA 658] at paragraph 8). A lawful arrest provides the legal foundation for the search and the right to search derives from it. However, if the justification for the search is to find evidence, there must be a reasonable prospect that evidence will relate to the offence for which the person has been arrested (see Majedi, at paragraph 19); and
- (13) despite the broad power of search incidental to an arrest provided to the police by the common law, there is no automatic right to search a vehicle incident to an arrest. The validity of such a search will depend on whether there is a valid purpose for such a search (see R. v. Bulmer (2005), 198 C.C.C. (3d) 363 (Sask. C.A.)). Thus, the Court must determine if the search was "genuinely" incidental to a lawful arrest (see Hillgardener, at paragraph 29) or whether it constituted a "fishing expedition" (see R. v. Pontari (2007), 161 C.R.R. (2d) 233 (N.L.P.C.), per Porter, P.C.J.).

ii. Search incident to detention

(a) General principles

- [29] There is no general power of investigative detention. There is, at common law, a limited police power of investigative detention. The principles enunciated in R. v. Mann, 2004 SCC 52, [2004] 3 S.C.R. 59, describe those limitations.
- [30] In Mann, the Supreme Court of Canada confirmed the common law power to detain persons encountered on the street in circumstances falling short of reasonable grounds for arrest. Iacobucci J., writing for the majority, at para. 34, rejected the use of the description "articulable cause", but confirmed the legal validity of a limited power to detain for investigation where "there is a clear nexus between the individual to be detained and a recent or on-going criminal offence." He prefaced his comments by stating, at para. 15, that "[a]bsent a law to the contrary, individuals are free to do as they please. By contrast, the police... may act only to the extent that they are empowered to do so by law." However, "[g]iven their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing.": at para. 16.

- [31] From that perspective, and recognizing the court's limited role in matters better left to legislators, Iacobucci J. outlined the analytical parameters at paras. 17-18:
- [17] ... It is for that very reason that I do not believe it appropriate for this Court to recognize a general power of detention for investigative purposes... Here, our duty is to lay down the common law governing police powers of investigative detention in the particular context of this case.
- [18] ... The recognition of a limited police power of investigative detention marks another step in that measured development.
- [32] The detention's status is usually litigated in the context of s. 9 of the Charter. At para. 20, Iacobucci J. noted that a lawful detention at common law is not arbitrary under s. 9. At para. 24, he referred to the two-pronged test established in *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.), which is the basis of the common law limited police power of investigative detention:
- [24] ... In those situations, courts must first consider whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or at common law. If this threshold is met, the analysis continues to consider secondly whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

After considering the case law that has reviewed the Waterfield test, Iacobucci J. concluded at paras. 34-35, 40 and 45:

- [34] The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the Waterfield test, along with the [*R. v.*] *Simpson* [(1993), 12 O.R. (3d) 182 (C.A.)] articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.

[35] Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.

...

[40] The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances: see S. Coughlan, "Search Based on Articulate Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.

...

[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. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, 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.

[33] In *R. v. Reddy*, 2010 BCCA 11 at para. 67, Frankel J.A., for the majority, wrote:

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

(b) Assessing the issue of officer safety

- [34] In *R. v. Crocker*, 2009 BCCA 388, leave to appeal ref'd [2009] S.C.C.A. No. 466, D. Smith J.A., for the court, cautioned trial judges about second guessing a police officer about the need to search for the purpose of ensuring officer safety. She wrote at paras. 62-72:
- [62] In assessing an officer's expressed subjective belief it is important not to conflate the subjective and objective grounds for establishing the standard of reasonable suspicions. An officer's subjective belief in the level of risk for a protective safety search is established if he or she can articulate a basis for his or her suspicions. It is only when the objective standard is applied to the officer's articulated subjective belief for being suspicious that the reasonableness of his or her suspicions is determined.
- [63] Mann recognized the need for police to ensure their short-term safety by non-intrusive means. As the Court noted at para. 43, "[t]he importance of ensuring officer safety has been recognized in obiter by this Court in *R. v. Mellenthin*, [1992] 3 S.C.R. 615. Police officers face any number of risks everyday in the carrying out of their policing function, and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible." Moreover, the potentially dangerous or even lethal risk to police officers in approaching a stationary, occupied vehicle, even when that risk is not readily observable, is well established: *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401 (B.C.C.A.); *R. v. Romeo* (1989), 47 C.C.C. (3d) 113 (N.B.C.A.).
- [64] Similarly, in *R. v. Willis*, 2003 MBCA 54, 174 C.C.C. (3d) 406, the court acknowledged the high risk that police officers face when they enter into an unknown situation:
- [36] ... Police officers are at high risk everyday. They never know when a routine, mundane situation will explode into violence. Therefore, as has been said, it is undesirable to measure with extreme nicety whether their safety or that of the public in any particular search requires more or less than a quick pat-down.
- [65] More recently, Madam Justice Rowles, writing for the Court in *R. v. Duong*, 2006 BCCA 325, 228 B.C.A.C. 183, described the standard for an officer's subjective belief in the need for a protective safety search as follows:
- [54] There is no dispute that police officers are entitled to take reasonable steps to minimize the risks they face in the performance of their duties: [*R. v. Ferris*] [(1998), 126 C.C.C. (3d) 298 (B.C.C.A.)], at para. 54. Where a police officer has reason to believe that his or her safety is at risk in the course of an investigative detention, the officer is authorized to conduct a protective pat-down search: Mann, at para. 43. A "frisk search" for weapons is a relatively brief and non-intrusive procedure: Mann, at para. 42. Moreover, the reasonableness of a police officer's decision to conduct a search for officer safety cannot be judged by a standard that would second-guess the officer's actions with perfect hindsight: Ferris, at paras. 58, 71; *R. v. Willis* (2003), 174 C.C.C. (3d) 406, at para. 36 (Man. C.A.). The "police perception of reasonable necessity depends very much on the particular circumstances in which the police officer finds himself": Ferris, at para. 71. [emphasis added]

- [66] With respect, I am of the view that the trial judge erred in law by requiring a higher standard of specificity for Cst. Johnson's subjective belief in the necessity for a protective safety search than that required by Mann. Cst. Johnson's knowledge of the Cavalier's earlier involvement in the Costco incident, his observations of the occupants of the Cavalier, and his experience as a police officer in similar situations, all of which informed his subjective belief, were considerations that were clear and focused. They were not vague, or based on a hunch or mere intuition. The additional specificity the trial judge appeared to require by his finding that this evidence was too "vague" to establish the basis for Cst. Johnson's subjective belief amounted, in my view, to no more than an attempt to "measure with extreme nicety" or "second-guess ... with perfect hindsight" a dynamic and evolving street encounter that Cst. Johnson and Cp. Tupper were facing.
- [67] The second reason given by the trial judge for rejecting Cst. Johnson's subjective belief in officer safety concerns was his finding that Cst. Johnson's evidence on other unrelated matters was unreliable. However, while that finding may have been relevant to the trial judge's assessment of the reliability of the officer's evidence on other issues, it could not have informed his assessment of Cst. Johnson's evidence of his subjective belief because the basis of that belief was known facts and circumstances that were not in dispute. The Cavalier had reportedly been involved in an earlier criminal incident, Mr. Crocker had placed an envelope under the driver's seat and appeared to be hiding something in his fist, and he had refused to roll down his window until asked for a third time. While the trial judge may have questioned the validity of those concerns, that part of his analysis should have been left for his assessment of the objective grounds to support Cst. Johnson's subjective belief. In my view, it cannot be said that Cst. Johnson's officer safety concerns were outside the scope of what reasonable inferences could be drawn from the undisputed circumstances of the February 6, 2007 investigative stop.
- [68] In my view, the trial judge also erred in law in finding a lack of objective grounds to support Cst. Johnson's subjective belief in officer safety concerns, by failing to consider the totality of the circumstances. Many of those circumstances were the same as those articulated by Cst. Johnson as forming the basis for his subjective belief and were not disputed. The trial judge also did not appear to factor into his assessment the objective factors that he noted at para. 25 of his reasons, including: (i) that Mr. Crocker was talking to a known drug user, (ii) the vehicle in which Mr. Crocker and his passenger were seated had been reportedly involved in a previous unsolved criminal offence, (iii) Mr. Crocker had placed a folder under his seat with his right hand and was clenching something in his left hand that he was attempting to conceal, and (iv) Mr. Crocker did not respond to Cst. Johnson's request that he roll down his window until asked for the third time.
- [69] Thirdly, the trial judge considered as relevant to his assessment of the reasonableness of Cst. Johnson's subjective belief, the lack of evidence that the officer believed Mr. Crocker was potentially violent, in possession of a weapon, or that the earlier incident in which he suspected him to have been involved, involved violence. However, Mann does not import a

requirement that there be an overt indication of violence before a protective safety search may be undertaken. Other appellate decisions have also upheld a search incidental to an investigative detention for which there was no overt evidence of violence: *Duong*; *R. v. Thibodeau*, 2007 BCCA 489, 247 B.C.A.C. 103; *Willis*; and *R. v. Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.).

- [70] The test in *Mann* requires an assessment of all of the known facts and circumstances of a situation, including any reasonable inferences that might be drawn from those known facts or circumstances, in determining if the Crown has established reasonable grounds, both subjectively and objectively, to support an officer's decision to conduct a protective safety search. In my view, the trial judge failed to consider the totality of the circumstances, and the reasonable inferences that could be drawn from them, in determining if reasonable grounds existed for the search.
- [71] In summary, police have a duty to investigate crime. Courts should be reluctant to second guess an officer's testimony as to his or her honest belief in the need for a protective safety search where he or she can articulate reasonably clear and focused reasons that inform their risk assessment. This is particularly so where the objective grounds for the search closely mirror those factors that informed the officer's subjective belief.
- [72] In today's world, weapons may extend to more than conventional guns or knives, and include other forms of weaponry of microscopic size. A lawful protective safety search to address these potential risks, particularly in a dynamic and potentially evolving street encounter with an occupant of a vehicle, need only meet the legal standard of reasonable suspicions. Here, the trial judge, in my view, applied a higher standard for establishing reasonable grounds for a protective safety search than that required by *Mann*. Had he correctly applied the legal standard for a search incidental to an investigative detention, I am unable to conclude that his ruling on this issue would necessarily have been the same.
- [35] Again, in *R. v. Thibodeau*, 2007 BCCA 489, leave to appeal ref'd [2007] S.C.C.A. No. 592, *Newbury J.A.*, for the court, concluded that concerns for officer safety should not be diminished where only a Motor Vehicle Act offence is concerned. She wrote at para. 10:
- [10] With respect to *Mann*, I am not persuaded the passage quoted from para. 43 by the trial judge, and the Supreme Court's concern generally for balancing privacy expectations with concerns for officer safety, do not have application, or have very diminished application where only a Motor Vehicle Act offence is concerned. Certainly, the fact Constable Douglas was dealing with this type of offence as opposed to a murder or bank robbery is one of the circumstances to be considered as part of the "totality", but the fact remains that police officers may have valid safety concerns even where the offence is not a crime and even where the person detained seems polite and co-operative.
- (c) Search powers under investigative detention

- [36] Police do not have an unrestricted power to search incidental to an investigative detention; such a search is only justified for "protective" purposes: Mann at para. 40. An officer must believe, on reasonable and probable grounds, that his or her safety or the safety of others is at risk. If the protective search for officer safety becomes an investigative search to locate evidence, the search will lose its lawful character as incidental to detention: Calderon at paras. 78-85. On that point, Rosenberg J.A., in Byfield at para. 21, concluded as follows:
- [21] Finally, even where the detention is lawful and not undermined by improper purposes, if the police exercise the power unreasonably, that action can violate the detainee's rights. Indeed that is what occurred here. The Crown properly conceded that when the first officer touched the appellant in the groin area for reasons unrelated to officer safety but to investigate whether the appellant was carrying contraband he violated the appellant's rights. The Supreme Court of Canada's decision in Mann, decided after the appellant's trial, confirms the correctness of the Crown's concession. The court there held at para. 40 that the "general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk." There is no suggestion in this case that the initial search near the appellant's groin area was motivated by officer safety.

iii. Analysis

- [37] In my view, the stop of the motor vehicle being driven by the accused constituted a lawful exercise of the authority of the police to stop a motor vehicle. I am satisfied that the stop of the vehicle occurred as a result of the officer having seen a potential violation of s. 7.04 of the Motor Vehicle Act Regulations and not as a ruse for some other investigation. Thus, the stop was lawful and in compliance with s. 9 of the Charter.
- [38] I am also satisfied that, from an assessment of all of the known facts and circumstances of the situation, including reasonable inferences that might be drawn from the information Constable Henly obtained from the PRIME database, Constable Henly had reasonable grounds, both subjectively and objectively, to conduct the accused's "pat down" protective safety search. I draw support for this conclusion from the lengthy discussion in Crocker, quoted above, regarding the issue of officer safety.
- [39] However, on a consideration of all of the circumstances that existed at this traffic stop, including the presence of Sergeant Hyland, I am not satisfied that Constable Henly's subjective belief in the need for a search of the accused's vehicle for officer safety was objectively reasonable. In my view, the protective search for officer safety became an investigative search to locate evidence when Constable Henly began the search of the driver's side of the accused's vehicle. At that time, the accused was already outside of his vehicle and had already been subjected to a "pat down" search by Sergeant Hyland. Therefore, the search of the accused's vehicle lost its lawful character as incidental to detention.

- [40] In sum, the Crown has failed to establish that Constable Henly had reasonable grounds, both subjective and objective, to believe that the search of the accused's vehicle was needed as a protective search. Thus, I find that the search of the accused's vehicle, which resulted in the seizure of the narcotics, the gun and ammunition, was conducted in violation of s. 8 of the Charter.
- [41] The question that remains to be decided is whether, in view of the violation of the accused's s. 8 Charter rights, the fruits of the illegal search of the accused's vehicle should be excluded.

H. R. V. GRANT SECTION 24(2) ANALYSIS

- [42] In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 [Grant] at paras. 60 and 67, Chief Justice McLachlin and Charron J., for the majority, stated that although the test under s. 24(2) of the Charter is "broad and imprecise", the "words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice." Section 24(2), the majority explained, "is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.": at para. 70. In *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 102, Fish J., for the majority, stressed that "[t]he repute of the administration of justice is jeopardized by judicial indifference to unacceptable police conduct."
- [43] In *Reddy*, at paras. 91-94, Frankel J.A. summarized the approach set out in *Grant* for determining the admission of evidence obtained in breach of a Charter right:
- [91] The *Grant* factors are succinctly stated at paragraph 71 of that decision. 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: Harrison 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 [[1987] 1 S.C.R. 265]/Stillman [[1997] 1 S.C.R. 607] 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.

See also: R. v. Stanton, 2010 BCCA 208 at para. 52.

i. The seriousness of the Charter-infringing state conduct

[44] The first Grant criterion requires an examination of the seriousness of the Charter-infringing state conduct. That conduct is placed on a continuum ranging from wilful misconduct to blameless conduct. In this case, the misconduct of Constable Henly can only be described as wilful conduct.

[45] In Byfield, Rosenberg J.A. noted at para. 26:

[26] ...the violation here could not be properly characterized as minor or "minimal in the extreme". I would also make this observation. In R. v. Mann at para. 18, Iacobucci J. considered the justification for undertaking modification of the common law to permit the police to conduct investigative detentions short of arrest. He noted that the "unregulated use of investigative detentions in policing, their uncertain legal status, and the potential for abuse inherent in such low-visibility exercises of discretionary power are all pressing reasons why the Court must exercise its custodial role"... An important lesson from R. v. Mann is that the courts must take seriously the violation of a suspect's rights in the course of an investigative stop.

[46] In R. v. Clayton (2005), 194 C.C.C. (3d) 289 (Ont. C.A.), rev'd 2007 SCC 32, but not on this point, Doherty J.A., for the court, made an observation applicable to the Charter breach in this case. He noted that the seriousness of the breach was significantly aggravated by the fact that the officers' ignorance was institutional and a direct consequence of their inadequate training: at para. 83. Further, at paras. 89-90, he held:

- [89] ... The testimony of these officers strongly suggests that their police force has made no effort to embed the approach to the ancillary power doctrine adopted by the courts into police training. This systemic failure would suggest that the court must deliver its message in a more emphatic way. The exclusion of evidence may provide that added emphasis.
- [90] The systemic failings that underlie the conduct of [these officers] make the infringement of the rights of Farmer and Clayton serious. Police training that leaves officers in the field unequipped to engage in the balancing process required by the ancillary power doctrine invites police officers to ignore individual rights whenever those rights get in the way of the execution of police duties. If the rights guaranteed by the Charter are to have real meaning and shape the interaction between the police and individuals, police forces must take those rights seriously. Officers must be trained to perform their duties in a manner that is consistent with those rights.

Doherty J.A. continued at paras. 93-95:

- [93] If the handguns are excluded from evidence, Farmer and Clayton will in a very real sense have escaped justice and their serious crimes will go unpunished. This harsh reality cannot be ignored in weighing the negative effect brought about by excluding the evidence. Nor, however, can the negative effect of routinely admitting evidence obtained as a result of institutionally engrained disregard for individual constitutional rights be ignored. The adjudication of any specific case on its merits is important to the repute of the administration of justice. So too is the judicial reaction to constitutional abuses within the criminal justice system. As Lamer J. said in *R. v. Greffe* (1990), 55 C.C.C. (3d) 161 (S.C.C.) at 193:

It must not be forgotten, however, that the inquiry under s. 24(2) cannot be focused solely on the specific prosecution at issue; it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered.

- [94] Where, as in this case, constitutional violations reflect an institutional indifference to, if not disregard for, individual rights, judicial failure to disassociate itself from that conduct must have long-term negative consequences for the proper administration of justice. The courts cannot be seen to at one and the same time wave a judicial finger of disapproval at police conduct that violates individual rights while embracing the evidentiary product of those violations whenever they do not undermine trial fairness.
- [95] Courts can best demonstrate that constitutional rights are to be taken seriously by those who exercise powers that may impinge on those rights by excluding evidence obtained by constitutional violations that reflect an institutional failure to equip officers with the training necessary to perform their duties within the strictures of the Charter.

- [47] It is noteworthy that in *R. v. Blake* (2010), 251 C.C.C. (3d) 4, 71 C.R. (6th) 317 (Ont. C.A.) at para. 33, Doherty J.A., for the Court, held: "[i]f there were a taint of impropriety, or even inattention to constitutional standards, to be found in the police conduct, that might well be enough to tip the scales in favour of exclusion, given the very deleterious effect on the accused's legitimate privacy interests."
- (a) Was there good faith on the part of Constable Henly in committing this Charter breach?
- [48] The issue of "good faith" was recently dealt with by the British Columbia Court of Appeal in *R. v. Caron*, 2011 BCCA 56. Frankel J.A., for the court, wrote at paras. 38-42:
- [38] "Good faith" and its polar opposite, "bad faith" (or "flagrant" disregard), are terms of art in the s. 24(2) lexicon: [*R. v.*] Kokesch [[1990] 3 S.C.R. 3] at 30. The absence of bad faith does not equate to good faith, nor does the absence of good faith equate to bad faith. To fall at either end of this spectrum requires a particular mental state. In discussing these two concepts in *R. v. Smith*, 2005 BCCA 334, 199 C.C.C. (3d) 404, Madam Justice Ryan stated:
- [61] To sum up, good faith connotes an honest and reasonably held belief. If the belief is honest, but not reasonably held, it cannot be said to constitute good faith. But it does not follow that it is therefore bad faith. To constitute bad faith the actions must be knowingly or intentionally wrong.
- [39] Although good faith is sometimes inaptly used as a label for other explanations that may lessen the seriousness of a Charter violation, such as inadvertence and urgency, it is a category unto itself. This is reflected in *R. v. Jacoy*, [1988] 2 S.C.R. 548 at 559, wherein Chief Justice Dickson, in discussing the factors pertinent to a s. 24(2) analysis that were first articulated in *Collins*, stated:

The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a Charter violation.

See also: [*R. v.*] Buhay[, 2003 SCC 30, [2003] 1 S.C.R. 631] at para. 52.

- [40] That good faith is distinct from other mitigating explanations is most recently evinced by the judgment of the Chief Justice and Charron J. in *Grant*:
- [75] Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a Charter breach: *R. v. Silveira*, [1995] 2 S.C.R. 297, per Cory J. "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: *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87, per Dickson C.J.; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-33, per Sopinka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the Charter by those very persons who

are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established Charter standards tends to support exclusion of the evidence. It should also be kept in mind that for every Charter breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion.

[41] The specific portions of the Supreme Court's previous decisions referred to in *Grant* reflect the fact that, for a Charter breach to have been committed in good faith, the police officers (or other state agents) involved must, at the time the breach occurred, have honestly and reasonably believed they were acting lawfully. In those decisions the Court held, in brief, that:

- While the police are not expected to have a detailed knowledge of search-warrant law, they are expected to be aware of those requirements that the courts have held are essential for the validity of a warrant: *R. v. Genest*, [1989] 1 S.C.R. 59 at 87;
- While the police are not expected to have an immediate understanding of judicial decisions affecting their powers, they will not have acted in good faith when they either knew, or ought to have known, their actions were unlawful: *Kokesch* at 32, 33; and
- "Good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority": *Buhay* at para. 59, citing *Sopinka, Lederman and Bryant, The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999 at 450.

[42] This view of good faith can be seen in other decisions of the Supreme Court of Canada, such as:

- *R. v. Sieben*, [1987] 1 S.C.R. 295 at 299; *R. v. Hamill*, [1987] 1 S.C.R. 301 at 308: police officers acting in good faith in conducting a warrantless search of a dwelling-house pursuant to a statutorily granted power (i.e., a writ of assistance) that they had no reason to believe violated s. 8 of the Charter;
- *R. v. Simmons*, [1988] 2 S.C.R. 495 at 535: customs officers acting in good faith in not advising a person detained for secondary inspection of her right to counsel, because they were following procedures that they had no reason to believe contravened s. 10(b) of the Charter;
- *Jacoy* at 558, 559: customs officers acting in good faith in not advising a person detained for secondary inspection of his right to counsel, because they were following a policy directive based on a later overruled decision of a Court of Appeal in another jurisdiction holding that s. 10(b) of the Charter did not apply in the circumstances;

- R. v. Duarte, [1990] 1 S.C.R. 30 at 59, 60; R. v. Wiggins, [1990] 1 S.C.R. 62 at 68: police acting in good faith in relying on a statutory provision authorizing "consent" interceptions prior to that provision being found to violate s. 8 of the Charter;
- R. v. Wiley, [1993] 3 S.C.R. 263 at 278, 279: police officers acting in good faith in relying on a later overruled decision of the Court of Appeal in their jurisdiction holding that a warrantless "perimeter search" of a dwelling did not violate s. 8 of the Charter; and
- R. v. Dewald, [1996] 1 S.C.R. 68: police officer acting in good faith in following standard procedure and waiting 15 minutes before administering a roadside screening test, when, at the time, it had yet to be authoritatively decided that, absent a reasonable basis for doing so, such a delay violates s. 10(b) of the Charter.

[Emphasis original to Caron.]

[49] As stated previously, good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority. Thus, in the case at bar, I find that Constable Henly has not established "good faith".

ii. The impact of the breach on the Charter-protected interests of the accused

[50] The second factor identified in Grant is the impact of the breach on the Charter-protected interest of the accused. In this respect, the Court looks at the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused: at para. 109.

[51] Here, there is little doubt that the search and seizure seriously intruded upon the accused's privacy. Although there is low privacy interest in a motor vehicle, this was an intrusive search of the accused's vehicle without legal justification. See, for example: Caron at para. 58; and R. v. Wise, [1992] 1 S.C.R. 527 at 534. While Constable Henly had reasonable grounds to stop and detain the accused, she did not have reasonable grounds to search the accused's vehicle at the time of the initial search of the vehicle and the search was not justified for the purpose of officer protection.

iii. The public interest in having the case adjudicated on its merits

[52] Finally, the third criterion in the Grant inquiry requires a consideration of the effect of admitting the evidence on the public interest in having a case adjudicated on its merits: at para. 110. The reasons of Iacobucci J. in Mann at para. 57 are instructive at this stage:

[57] ... Just as there is no automatic exclusionary rule, there can be no automatic inclusion of the evidence either. The focus of the inquiry under this head of analysis is to balance the interests of truth with the integrity of the justice system. The nature of the fundamental rights at issue, and the lack of a reasonable foundation for the search suggest that the inclusion of the evidence would adversely affect the administration of justice.

[53] What is in issue here is the admission of highly reliable evidence, critical to the prosecution of serious offences. There is no question that the public has an interest in the successful prosecution of persons who unlawfully carry hidden weapons like guns. The dangers that such conduct creates cannot be overstated. However, the public also expects those engaged in law enforcement to respect the rights and freedoms we all enjoy by acting within the limits of their lawful authority.

(a) Seriousness of the offence

[54] The seriousness of the offence committed is a factor for consideration. Although, the Court in Grant held that this factor "has the potential to cut both ways": at para. 84. The Court indicated, at para. 84:

[84] ...while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[55] The British Columbia Court of Appeal, in R. v. Wong, 2010 BCCA 160 at para. 18, indicated that the "[s]eriousness of the crime, while still a relevant consideration, is perhaps of a lesser weight in the analytical exercise now to be performed under s. 24(2)." In some cases, the seriousness of the offence is found to be a "neutral" factor. See, for example: R. v. Martin, 2010 NBCA 41 at para. 96, leave to appeal ref'd [2010] S.C.C.A. No. 302.

[56] In numerous recent decisions, the courts have stated that criminal conduct involving the use of firearms, especially handguns (like the one seized here), is a serious and growing societal danger and, absent a flagrant Charter breach, the exclusion of firearms has a greater negative impact on the administration of justice than admitting them. See: R. v. Grant (2006), 81 O.R. (3d) 1, 209 C.C.C. (3d) 250 (C.A.) at para. 66, varied 2009 SCC 32, but not on this point; R. v. (Wendell) Grant, 2007 ONCA 26 at para. 8; R. v. L.B. (2007), 86 O.R. (3d) 730, 227 C.C.C. (3d) 70 (C.A.) at paras. 80-82; R. v. Mohamed, [2008] O.J. No. 3145 (S.C.J.) at para. 130; and R. v. Bellamy, [2008] O.J. No. 2138 (S.C.J.) at para. 91. However, also see: R. v. Peters, 2006 BCSC 1560; Reddy; and Caron. However, notwithstanding the fact that the items seized here included a gun and ammunition, the possession of which are serious offences, the public also expects those engaged in law enforcement to respect the rights and freedoms we all enjoy by acting within the limits of their lawful authority.

iv. Balancing the factors

[57] Balancing all the factors, I conclude that, in the long-term, the repute of the administration of justice would be adversely affected by admitting the gun, ammunition and the narcotics seized from the search of the accused's vehicle.

"The Honourable Mr. Justice S.R. Romilly"

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