
CANADA / JUDGMENT

R. v. Washington

2007 BCCA 540

COURT

British Columbia Court of Appeal

DECIDED

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2007 BCCA 540 R. v. Washington

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Washington,

2007 BCCA 540

Date: 20071108

Dockets: CA032614, CA032618

Docket: CA032614

Between:

Regina

Respondent

And

Alexis Nicole Washington

Appellant

- and -

Docket: CA032618

Between:

Regina

Respondent

And

Brandi-Ann Beverly Shepherd

Appellant

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Lowry

T.J. Russell

Counsel for the Appellant,

Alexis Nicole Washington

D.J. McKay

Counsel for the Appellant,

Brandi Anne Shepherd

S.D. Frankel, Q.C.

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

November 17, 2006

Place and Date of Judgment:

Vancouver, British Columbia

November 8, 2007

Written Reasons by:

The Honourable Madam Justice Ryan

Concurred in by:

The Honourable Mr. Justice Lowry

Dissenting Reasons by:

The Honourable Madam Justice Rowles (P. 47, para. 109)

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

- [1] On July 11, 2003 a Helijet International Inc. ("Helijet") employee, suspecting that a package shipped via helijet from Vancouver to Victoria contained drugs, opened it for inspection. Inside the package he saw a white powder he believed to be cocaine. The employee re-sealed the package and called Victoria police. On the arrival of the police the package was re-opened and a sample of the white powder taken for analysis by an attending officer. The police officer who collected the sample for analysis recognized the powder as methamphetamine in its crystal form. Shortly thereafter, the package, which was addressed to "Nicole Washington", was picked up at the Helijet terminal by Ms. Washington, who was accompanied to the terminal by Ms. Shepherd. The two women were arrested by the police as they got into a car to leave the terminal.
- [2] A later chemical analysis confirmed that the white powder was methamphetamine. The appellants, Nicole Washington and Brandi Shepherd, were jointly charged with one count of possession of methamphetamine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C.1996, c. 19. They were convicted in the British Columbia Provincial Court in Victoria on October 29, 2004.
- [3] Ms. Washington and Ms. Shepherd appeal their convictions. The appeals were heard together in this Court.
- [4] The appellants say that the police violated their ss. 8 and 9 Charter rights. As a result they say that all evidence collected as a result of the breaches should not have been admitted at trial.
- [5] This appeal discusses how actions taken by non-state agents and the police response to those actions affect the Charter rights of private citizens.

Factual Background

- [6] On July 11, 2003 Alan Stryland was working as a ramp supervisor at the Victoria Helijet terminal. Mr. Stryland was the company's cargo staff supervisor.
- [7] Mr. Stryland said that in late June or early July of that year, a woman came into the Victoria Helijet terminal, wanting to ship a large quantity of cash to Vancouver. Mr. Stryland told her that for security reasons it would be better to send a money order. The woman left the premises.
- [8] On July 2, Mr. Stryland received a call from a person identifying herself as "Brandi Shepherd" (this is the spelling that appears in the transcript of trial). The caller asked if a package had arrived from Vancouver and if she could have it picked up by a Victoria taxi service. Mr. Stryland agreed to release the package to a cab driver. Mr. Stryland testified that shortly thereafter he did just that. The waybill that accompanied the package indicated that it had been sent by "Shawn Nelson" to "Brandy Shepard".

- [9] On July 4, Mr. Stryland overheard a telephone conversation between staff members at the Vancouver and Victoria terminals. Mr. Stryland testified that he recognized the transaction being discussed as the one he had dealt with two days previously and intervened. He telephoned a Victoria number given to him by the Vancouver employee. A woman, whose voice Mr. Stryland recognized as that of the "Brandi Shepherd" he'd spoken with earlier, answered the call. Mr. Stryland said that the woman seemed confused about the pick-up of the package she had asked about on July 2. Mr. Stryland assured her that he had released the package to a cab driver and gave her the car number of the taxi.
- [10] On July 11, Mr. Stryland received a telephone call from a person identifying herself as "Nicole Washington" inquiring about a package being sent from Vancouver. Mr. Stryland said that the voice actually sounded like the "Brandi Shepherd" he had been speaking to earlier. He testified that he thought that it was bizarre that the woman would be using a different name and, in light of the other incidents, became concerned that something dangerous or illegal was happening. Consequently Mr. Stryland telephoned his company's Vancouver terminal to tell the staff not to take the package at that end without asking the person sending it what was inside.
- [11] Mr. Stryland's call was too late; the package was already on a helijet which was airborne. Mr. Stryland obtained a description of the package and a waybill number from the Vancouver staff member. The package was consigned to "Nicole Washington". The sender was "Damien Walsh".
- [12] When the package arrived in Victoria, Mr. Stryland decided to inspect it "because everything seemed not above board". The package consisted of a "Guess" shopping bag containing a gift-wrapped box. On opening the gift-wrapped box Mr. Stryland found some dry pasta, four scented candles, and a clear cylindrical object containing white powder.
- [13] Believing that the white powder was cocaine and concerned that the consignee might show up at any time to pick up the package, Mr. Stryland re-sealed the package and called the police.
- [14] Two uniformed police officers arrived very quickly thereafter. It is unclear whether they told Mr. Stryland to re-open the package, or whether he did it on his own. In any event, he re-opened the package in the presence of the police and an officer took a small sample of the white powder from it before closing it up again.
- [15] Constable Bown, who was in plainclothes, arrived at the terminal and took possession of the sample. The uniformed officers left the area. On cross-examination, Constable Bown agreed that the powder had a unique appearance. It was, he agreed, "a pretty classic crystal meth form" of methamphetamine.

- [16] Twenty minutes after the arrival of Constable Bown, the two appellants drove up to the terminal in a Volkswagen Rabbit. The driver of the vehicle, Ms. Washington, went inside and picked up the package. When she returned to the vehicle, she handed it to the passenger, Brandi Shepherd.
- [17] Constable Bown gave the order to arrest the two appellants. Constable Bown approached the passenger side of the vehicle. He asked Ms. Shepherd to step out of the car, and as she did she placed the Guess bag on the passenger seat.
- [18] Rather than search the vehicle in front of the busy terminal, Constable Bown directed that it be towed to the police station.
- [19] Forty-five minutes after the arrest, Constable Penzari searched the Volkswagen. He seized the following items:
- (a) From the front passenger seat:
 - 1, a box inside of which was a plastic bag containing 2.12 ounces of methamphetamine (along with dry pasta and candles);
 - 2. a black nylon wallet containing \$325.00 in cash, Shepherd's British Columbia Driver's Licence, and her University of Victoria Student Card;
 - 3. a black nylon bag containing a glass pipe, and an orange case within which was a cigarette case containing 14 new large "dime bags", and 12 new small "dime bags" (bearing various logos);
 - 4. a Nokia cellular telephone;
 - (b) From the front passenger seat floor:
 - 5. a "Guess" shopping bag, with a Helijet waybill attached;
 - 6. a black leather pouch containing an electronic weigh scale;
 - 7. a nylon case containing 12 new small "dime bags", and one large "dime bag" (bearing various logos);
 - (c) From the front console:
 - 8. a Sony cellular telephone;
 - (d) From the right rear passenger seat;
 - 9. a blue wallet containing Washington's British Columbia Driver's Licence, and her Care Card;
 - (e) From inside the trunk, a blue nylon bag containing:
 - 10. a plastic syringe;

11. a plastic case bearing the initials "BS", within which were five large "dime bags", containing a total of 1.17 ounces of methamphetamine;
 12. 77 new small "dime bags", and 10 new large "dime bags" (bearing various logos).
- [20] At trial, counsel for the appellants made a number of admissions. They admitted that Ms. Washington had borrowed the car the day before from her step-father and that when her step-father gave it to her there was nothing in the vehicle but golf clubs.
- [21] The Crown filed the report of an expert who opined that "baggies" are the packaging materials of choice for trafficking small amounts of controlled drugs and substances; that the electronic scale was consistent with those used by drug traffickers for weighing out small quantities of drugs for street level sales; that methamphetamine is distributed in capsules, tablets and most commonly in a powder form in small plastic baggies; that methamphetamine is often sold in quantities of one gram or less; and that if all of the methamphetamine found in the vehicle was sold in grams, the street value would be approximately \$8,500. The expert offered the further opinion that the presence of cellular phones, scales and additional packaging materials was consistent with mid-level trafficking.

Position of the Appellants and the Ruling of the Trial Judge

- [22] At trial the appellants took the position that the search of the package at the Helijet terminal without a warrant was unreasonable and violated their s. 8 rights under the Charter. Similarly, the appellants argued that the search of the vehicle was unreasonable and a violation of s. 8. The appellants also alleged that their arrest was arbitrary; a violation of s. 9 of the Charter. To accommodate the defence applications to exclude the evidence obtained in the package search and the vehicle search, the Crown called all of its evidence on a voir dire. The appellants called no evidence on the voir dire.
- [23] At trial and in this Court, the case was argued on the footing that it was open to both appellants to assert a privacy interest in the package addressed to Ms. Washington. I will have more to say about that proposition later in these reasons.
- [24] In resolving the issues raised at trial, the learned provincial court judge first questioned whether Mr. Stryland was an agent of the state. He found that he was not.
- [25] Next the trial judge examined whether Mr. Stryland had a legal right or duty to open the package. Noting that there was "no evidence of [a specific right to inspect the parcel] in the contract of shipping" he continued:
- [27] I am nevertheless satisfied that Mr. Stryland had, by virtue of the provisions of the Transportation of Dangerous Goods Act, [1992, c. 34] and specifically s. 5 which provides:
- No person shall handle, offer for transport or import any dangerous goods unless:
- (a) the person complies with all applicable prescribed safety requirements;

- (b) the goods are accompanied by all applicable prescribed documents; and
- (c) the means of containment and transport comply with all applicable prescribed safety standards and display all applicable prescribed safety marks.

an implied right to search suspicious packages, and if the dangerous goods were found to hand them over to the police [sic].

[28] In the post 9/11 world, no person can have a reasonable expectation of privacy with regard to packages being shipped by air. As Madam Justice Newbury, in the British Columbia Court of Appeal in *R. v. Truong*, (2002) 168 C.C.C. 132, at paragraph 24 said:

In my view, it would be slicing the cheese too fine to find that a person checking in for a flight at Vancouver International Airport would expect that his or her luggage would be searched for purposes of air safety, but would nevertheless have a reasonable expectation of privacy for other purposes. One either has a reduced expectation of privacy or one does not. Airports are obvious conduits for the smuggling of everything from banned seeds and plant materials to currency and illegal narcotics. To suggest that when one travels by air one has a lower expectation of privacy because of security issues but not because of issues of smuggling and illegal activity, is simply to ignore modern realities.

[26] The trial judge had been urged to apply the Newfoundland Court of Appeal decision in *R. v. Fry* (1999), 142 C.C.C. (3d) 166, 29 C.R. (5th) 337 (Nfld. C.A.) to the facts before him. He declined, saying:

[29] [Fry] contains dicta to the effect that once a package has been effectively transported and is being held for pickup, that in that situation one could reasonably expect that the package would remain unopened and uninterfered with, except as might be necessary to deliver it to the intended recipient does not, in my view accord with the reality of the post 9/11 world and with great respect, I decline to follow it.

[27] In the result, the trial judge found that the search of the package was not unreasonable.

[28] According to the trial judge, it followed from this that the police officers had grounds to arrest both Ms. Washington and Ms. Shepherd. The trial judge dismissed their argument that their arrest was arbitrary.

[29] The trial judge then moved to the argument that the search of the vehicle was unreasonable. He found that it was a search incident to arrest designed to ensure the protection of the police, to preserve evidence from destruction at the hands of the arrestee, and to discover evidence which could be used at the arrestees' trial.

[30] Having found no Charter violations, the trial judge allowed that even if he had found a breach, he would have admitted the evidence pursuant to s. 24(2) because its exclusion would bring the administration of justice into disrepute.

[31] After the evidence was admitted, Ms. Shepherd moved for dismissal on the basis that there was no evidence capable of supporting her conviction. The trial judge dismissed this motion.

[32] Both appellants then elected to call no evidence. The trial judge found them guilty of possession of methamphetamine for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, *supra*.

The Grounds of Appeal

[33] Both appellants say that the learned trial judge erred in:

1. Failing to conclude that the search of the package by the police at the Helijet terminal was a violation of their s. 8 Charter right to privacy.
2. Finding that the police had reasonable and probable grounds to arrest the appellants.
3. Failing to find that the search of the Volkswagen was not a search incidental to arrest.
4. Failing to exclude the evidence of the drugs and other items under s. 24(2) of the Charter.
5. That the verdicts are unreasonable and cannot be supported by the evidence.

[34] Ms. Shepherd raises the additional ground that the learned trial judge erred in failing to accede to her "no evidence" motion.

The First Ground of Appeal - the Search of the Package

[35] As I noted earlier, the appellants and respondent proceeded on the basis that both Ms. Washington and Ms. Shepherd had a reasonable expectation of privacy in the package delivered to the Helijet terminal. Their disagreement centres on what became of that privacy interest once the package was opened by Mr. Stryland.

[36] Both appellants say that even though the package was opened by Mr. Stryland they retained a privacy interest in the package that was violated by the warrantless search by the police.

[37] The Crown says that the appellants may have had a privacy interest in the package, but once it was opened and inspected by Mr. Stryland, they no longer had a constitutionally protected reasonable expectation of privacy in the contents. The Crown therefore submits that the ensuing search and seizure by the police did not violate their rights.

[38] While all parties to this appeal recognize that there was a reasonable expectation of privacy with respect to the package shipped to Nicole Washington, the extent of that interest must be examined to determine whether it persisted once Mr. Stryland opened the package, and if the interest persisted, whether the evidence obtained from the package ought to have been excluded under s. 24(2) of the Charter.

a. The Appellants' Privacy Interest in the Package

- [39] For those protected by it, s. 8 of the Charter creates certain areas of personal autonomy that cannot be entered or invaded by the state. These areas of personal autonomy have now been gathered up under the general heading of privacy. (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 para. 15). One definition of "privacy" accepted by the Supreme Court of Canada is found in the Oxford English Dictionary (2nd ed. 1989) which defines it as: "the state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; freedom from interference or intrusion." (*R. v. Edwards*, [1996] 1 S.C.R. 128, 132 D.L.R. (4th) 31, para. 49).
- [40] In *Edwards* the Supreme Court of Canada examined whether a person who stored items at the home of his girlfriend had a privacy interest in her apartment for purposes of s. 8. A significant factor in the conclusion that Mr. Edwards did not have a privacy interest in the apartment was his lack of ability to control its use - specifically his lack of ability to determine who could enter the premises. That decision was his girlfriend's. She rented the apartment and was entitled to make such decisions. The same logic applies to personal possessions. Ownership or even a lesser possessory right entitles the holder of that right to some degree of control or autonomy in making decisions with respect to those possessions.
- [41] In the case at bar, neither Ms. Washington nor Ms. Shepherd testified or called witnesses. There was no evidence as to who actually owned the contents of the package in question. In fact, because there was no evidence of ownership, both appellants say that there was no proof that either of them knew that the package contained drugs. They say the verdict should be set aside for that reason. For the purposes of the Charter argument however, Ms. Washington, as the consignee of the package, claims a possessory right to the package and its contents. It is the right to possession of the package that entitled Ms. Washington to some control over it which in turn conferred the privacy rights protected by s. 8 of the Charter.
- [42] Before Ms. Shepherd was handed the package by Ms. Washington in the car, she had no ostensible connection to the package at all. I am doubtful that it was open to her to assert a privacy interest in the package, but since the argument in both courts proceeded on the basis that it applied to both appellants and we have not heard submissions on that aspect of the question, I have dealt with the s. 8 argument as if it applies to both appellants.
- b. The Effect of the Actions of the Helijet Employee
- [43] The essence of the appellants' argument is that in examining the contents of the package, the police violated an area of their personal autonomy - the right to control the package and to decide what to do with it.
- [44] The argument that the appellants' rights were breached is complicated by the actions of Mr. Stryland. It is common ground that there is nothing in the evidence to show that Mr. Stryland had the authority to open the package. The waybill which constituted the contract between the consignor and Helijet was silent on the issue of inspection. The waybill itself referred to the company's Tariff, but the Tariff was not made part of the evidence. The parties also agree that the Transportation of Dangerous Goods Act, 1992, c. 34, does not give

Mr. Stryland the implied authority to open the package. Mr. Stryland's testimony was that he opened the package because "everything seemed not above board" not because it was not marked properly or posed a physical danger.

- [45] The appellants accept the finding of the trial judge that Mr. Stryland was not a state agent and that therefore his actions do not amount to a Charter breach. They argue that while they cannot say that Mr. Stryland breached their Charter rights, neither can the Crown argue that his actions destroyed their reasonable expectation of privacy as it relates to state action. The appellants say that when the police arrived at the Helijet terminal, they did not have reasonable grounds to inspect the inside of the package. The package had been re-sealed, and what Mr. Stryland told them about what he saw and heard amounted to no more than a suspicion that the unidentified white powder inside the package was a narcotic. With or without a warrant, the appellants say, the police did not have grounds to preside over the re-opening of the package and to seize its contents.
- [46] I mentioned earlier that it was common ground that there was no evidence that Mr. Stryland had any contractual or statutory authority to open the package addressed to Ms. Washington. The trial judge seemed to say that even without such authority the appellants could not expect that it would not be opened. After stating that the Transportation of Dangerous Goods Act, *supra*, implied the right to open the package the trial judge went on to say, "[I]n a post 9/11 world no person can have a reasonable expectation of privacy with regard to packages being shipped by air." By this, I understand the trial judge to mean that since the tragic events of September 11, 2001, people have come to expect tightened security measures which might include random searches for explosive devices in transported bags and packages. I agree with the trial judge that this is the expectation. But the average traveller does not expect that searches will be conducted randomly for other than security reasons. Thus, if Mr. Stryland had been searching for explosives the appellant would likely have no case. But here Mr. Stryland was not searching for explosives. He opened the package because, in effect, he thought that something illegal, not dangerous, was going on.
- [47] In *R. v. Tessling*, *supra*, Mr. Justice Binnie warned that the lack of a subjective expectation of privacy should not be used too quickly to undermine the protection of s. 8. Although he spoke of the lack of a subjective expectation of privacy in the context of expanding spyware technology, his words apply equally to the case at bar. He said at para. 42:

I should add a caveat. The subjective expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society. In an age of expanding means for snooping readily available on the retail market, ordinary people may come to fear (with or without justification) that their telephones are wiretapped or their private correspondence is being read. One recalls the evidence at the Watergate inquiry of conspirator Gordon Liddy who testified that he regularly cranked up the volume of his portable radio to mask (or drown out) private conversations because he feared being "bugged" by unknown forces. Whether or not he was justified in doing so, we should not wish on ourselves such an environment. Suggestions that a diminished subjective expectation of

privacy should automatically result in a lowering of constitutional protection should therefore be opposed. It is one thing to say that a person who puts out the garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a subjective expectation of privacy and thereby forfeits the protection of s. 8. Expectation of privacy is a normative rather than a descriptive standard.

[Emphasis added.]

[48] These words, uttered by the Supreme Court of Canada two years after the decision of this Court in *R. v. Troung*, 2002 BCCA 315, 168 C.C.C. (3d) 132, may circumscribe the dicta of Madam Justice Newbury in that case.

[49] In any event, the Crown did not rely on a diminished expectation of privacy to support its position that the police officers did not breach the appellants' rights under s. 8 of the Charter. Rather, the Crown's position is that the police were entitled to act on the circumstances as they found them. Mr. Stryland had opened the package before he called the police. He called the police because he was concerned that his business was being used for an illicit purpose. If Mr. Stryland had not re-sealed the package but had left the package of powder out in the open, the Crown says, the police would have been justified, if not duty-bound upon recognizing the drug as crystal methamphetamine, to seize the illegal substance. The Crown says that it should make no difference to the outcome in the case at bar that Mr. Stryland re-wrapped the package before calling the police. The Crown says that it pushes the protections afforded by s. 8 beyond their reasonable and common sense limits to require the police to begin as if the package had not been opened. The Crown relies on three decisions from the United States for the proposition that once a private actor has breached the privacy interests of an accused, no matter what that person does with the item discovered, the police need not resort to the warrant requirements to seize the fruits of the private search: *United States v. Jacobsen*, 466 U.S. 107 (1984), *United States v. Pierce*, 893 F. 2d 669 (5th Cir. 1990) and *United States v. Moore*, 943 F. 2d 884 (8th Cir. 1991).

[50] In *United States v. Jacobsen*, *supra*, the employees of a private freight carrier, while examining a damaged package, discovered a white powdery substance in a plastic bag in a tube in the package. The employees placed the tubes back into the package and called the Drug Enforcement Administration ("DEA"). When the DEA agent arrived, he took the tube out of the package and inspected the powder. He removed a trace of it and subjected it to a field test which showed that it was cocaine. Subsequently a warrant was obtained by the DEA to search the address to which the package was addressed. The issue before the Supreme Court of the United States was whether the U.S. Constitution, Fourth Amendment (which protects against unreasonable search or seizure) required the DEA to obtain a warrant before testing the substance. The Court held that the employees' actions, because of their private character, could not violate the Fourth Amendment. The Court held that the additional invasions of the respondent's privacy must be tested only by the degree to which they exceeded the scope of the private search. Justice Stevens delivered the opinion of the court. On this issue he reasoned at pp. 117-121:

Once frustration of the original expectation of privacy occurs [by non-state agents], the Fourth Amendment does not prohibit governmental use of the now nonprivate [sic] information: "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed." [citation omitted]. The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.

When the first federal agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder. It is not entirely clear that the powder was visible to him before he removed the tube from the box. Even if the white powder was not itself "in plain view" because it was still enclosed in so many containers and covered with papers, there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told. Respondents could have no privacy interest in the content of the package, since it remained unsealed and since the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents. The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment.

Similarly, the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not been previously learned during the private search. It infringed no legitimate expectation of privacy and hence was not a "search" within the meaning of the Fourth Amendment.

While the agents' assertion of dominion and control over the package and its contents did constitute a "seizure", that seizure was not unreasonable. The fact that, prior to the field test, respondents' privacy interest in the contents of the package had been largely compromised is highly relevant to the reasonableness of the agents' conduct in this respect. The agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to examine its contents. Under these circumstances, the package could no longer support any expectation of privacy; it was just like a balloon "the distinctive character [of which] spoke volumes as to its contents -- particularly to the trained eye of the officer". [Citations omitted.]

[Emphasis added.]

[51] I need not deal with *Pierce*, *supra*, and *Moore*, *supra*. They are circuit court appeal cases that follow the reasoning in *Jacobsen*, *supra*.

[52] The appellants' response is that the Supreme Court of Canada has already rejected the *Jacobsen* reasoning in *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631. Counsel for the appellants say the principles in *Buhay* govern the case at bar. In *Buhay* the appellant stored a

duffel bag stuffed with marihuana in a locker he rented in the Winnipeg bus depot. Two security guards working for a bus company recognized the odour of marihuana emanating from the locker. They opened the locker, confirmed their suspicions, locked it back up and called the police. On arrival the police smelled the marihuana and had an employee of the bus company open the locker for them. The police seized the drugs. The next day the appellant returned to the locker and was arrested. At the appellant's trial for possession of marihuana for the purpose of trafficking, the trial judge excluded the evidence under s. 24(2) of the Charter as a breach of s. 8. The trial judge concluded that the failure to obtain a warrant was a flagrant breach of the Charter and that to admit the evidence would bring the administration of justice into disrepute. In overturning the decision of the trial judge, the Manitoba Court of Appeal (*R. v. Buhay*, 2001 MBCA 70, 156 Man. R. (2d) 111) concluded that the marihuana had been obtained by the police following a simple transfer of control from the security guards, who were not state agents. The Manitoba Court of Appeal, per Huband J.A., said this at para. 11 of its reasons:

It was only after the marihuana was discovered and under control of the security guards that the police were called in. When the police attended, the locker was reopened and the marihuana taken into police custody. But the reality is that this was a mere transfer of control from the security guards to the police. Had the security guards placed the marihuana into a corner cupboard or into a different locker, there would be no question but that the transfer of the marihuana would not have constituted a search and seizure by the police. Placing the marihuana back into the same locker on a temporary basis, but still under control of the security guards, leads to the same conclusion.

[53] The Supreme Court of Canada disagreed. Madam Justice Arbour (for the Court), referring to this passage, said at paras. 33 and 34:

With respect, I disagree. The appellant initially had a reasonable expectation of privacy regarding the contents of his locker. His privacy was invaded by the security guards. The guards then placed his belongings back in the locker. The appellant's reasonable expectation of privacy was continuous. Just because the security guards violated his privacy once does not mean that any subsequent violations will be permissible. The conduct of the police - opening a locked locker over which the appellant still had lawful control and taking possession of its contents - constituted a "search" within the meaning of s. 8 as well as a "seizure", the essence of which is the "taking of a thing from a person by a public authority without that person's consent": *R. v. Dymment*, [1988] 2 S.C.R. 417 at p. 437, per La Forest J.

This Court has held that in certain circumstances the mere "transfer of control" of evidence from a private citizen to police can constitute a seizure within the meaning of s. 8. In *R. v. Dymment*, supra, La Forest J. said, at p. 435:

If I were to draw the line between a seizure and a mere finding of evidence, I would draw it logically and purposefully at the point at which it can reasonably be said that the individual had ceased to have a privacy interest in the subject-matter allegedly seized.

In this case, it cannot reasonably be said that the appellant had ceased to have a privacy interest in the contents of his locker. The subsequent conduct of the police should be considered a seizure within the meaning of s. 8. I see no basis for holding that a person's reasonable expectation of privacy as to the contents of a rented and locked bus depot locker is destroyed merely because a private individual (such as a security guard) invades that privacy by investigating the contents of the locker. The intervention of the security guards does not relieve the police from the Hunter requirement of prior judicial authorization before seizing contraband uncovered by security guards. To conclude otherwise would amount to a "circumvention of the warrant requirement" (Law, *supra*, at para. 23). The security guards' search of the locker, which is not subject to the Charter, cannot exempt the police from the stringent prerequisites that come into play when the state wishes to intrude the appellant's privacy (*R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 64; Law, at para. 23).

[Emphasis added.]

[54] Later in her reasons Arbour J. said this at para. 37:

The Crown also contends that the seizure was justified under the "plain view" doctrine, because the actions of the security guards put the contraband in plain view of the police. This argument must fail. It is not sufficient to argue that the evidence was in plain view at the time of the seizure. Indeed, it will nearly always be the case that police see the object when they seize it (see *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *R. v. Spindloe* (2001), 154 C.C.C. (3d) 8 (Sask. C.A.), at para. 36). It stretches the meaning of "plain view" to argue that an item placed in a duffel bag inside a locked locker is somehow in plain view of the police. The "plain view" doctrine requires, perhaps as a central feature, that the police officers have a prior justification for the intrusion into the place where the "plain view" seizure occurred (see, e.g., Law, *supra*, at para. 27; *Spindloe*, *supra*; *R. v. Belliveau* (1986), 75 N.B.R. (2d) 18 (C.A.); *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548 (Sask. C.A.); *R. v. Kouyas* (1994), 136 N.S.R. (2d) 195 (C.A.), *aff'd* [1996] 1 S.C.R. 70; *R. v. Fitt* (1995), 96 C.C.C. (3d) 341 (N.S.C.A.), *aff'd* [1996] 1 S.C.R. 70; *Texas v. Brown*, 460 U.S. 730 (1983), at p. 741; *Coolidge*, *supra*). The police did not come upon the marijuana during the course of a routine patrol or by the ordinary use of their senses. The police had no prior authorization to enter into the appellant's locker. While, in the circumstances of this case, they could lawfully enter the bus station, they could not lawfully enter the locker itself without a warrant. It follows the contraband was clearly not in plain view of the police so as to justify the legality of the seizure within the "plain view" doctrine.

[Emphasis added.]

And finally at para. 39:

Before turning to s. 24(2), I wish to address briefly the approach taken by the Court of Appeal in this case. I will make two observations. First, we do not have to decide whether there would have been a "search" by the police had the security guards not replaced the contents inside the locker but had held it in a corner cupboard. This is not what they did here. Had they done so, we might have had to adapt the test in *Broyles*, *supra*, to determine if and when the security guards would

have become state agents or, alternatively, if the "mere transfer of control" in that case could have been characterized as a "seizure" by the police within the meaning of s. 8.

- [55] In my view, in these passages the Supreme Court of Canada has rejected the premises on which the Jacobsen case rests. First, the Court concluded that an initial breach by non-state agents does not destroy the expectation of privacy with respect to state action. It remains in spite of the breach. Second, the Court found that since the security guards had returned the duffel bag to the locker, it could not be said that the contraband was either in plain view or that the guards turned control of the contents of the locker to the police. The Court in Buhay concluded that in the circumstances, nothing discharged the obligation of the police to obtain a search warrant before searching the locker.
- [56] Counsel for the Crown directed our attention to the trial decision in *R. v. Snow*, 2005 NLTD 81, 248 Nfld. & P.E.I.R. 64, which he said had some application to the case at bar. In that case a staff member of a courier company detected an odour emanating from a package addressed to Mr. Snow. She directed it to the company's security department. The security manager, a former drug officer, recognized the odour as something he associated with the manufacture of cocaine. He opened the package and found several packages of what he knew from experience to be cocaine. The police were called. They looked into the package, saw the drug and then formulated a plan to re-seal it and deliver it to Mr. Snow. The trial judge held that the police actions did not violate Mr. Snow's s. 8 rights. The trial judge found that whatever search had taken place, it had been concluded by the time the police arrived. The package had already been opened and its contents identified as an illegal substance. The trial judge said that the role the police played thereafter was to process "the proceeds of crime in progress". (Para. 44.)
- [57] With respect, I am of the view that the *Snow* case does not assist with the resolution of the issues in the case at bar. The trial judge in *Snow* seems to operate on the premise that a "search" for purposes of s. 8 of the Charter is limited to a physical search. That premise is incorrect. The Supreme Court of Canada has defined such a "search" as state activity that invades a personal expectation of privacy. (*R. v. Wise*, [1992] 1 S.C.R. 527, 70 C.C.C. (3d) 193 at p. 533; *R. v. Evans*, [1996] 1 S.C.R. 8, 104 C.C.C. (3d) 23, at para. 11; and *R. v. Tessling*, *supra*, at para. 18). Consequently if Mr. Snow, the owner of the package, retained a privacy interest in the package even after the non-state search, the following examination of its contents by the police might be said to constitute a search within the meaning of s. 8 of the Charter. To that end *Snow* furnished the facts specifically left open by the Supreme Court of Canada in *Buhay*, that is, the presentation to the police by the courier company of the fruits of an earlier search. Those are not the facts we are dealing with in the case at bar.

- [58] Thus it seems to me that the Buhay principles must govern the case at bar. When the police arrived at the Helijet terminal, the suspicious powder had been returned to the package. Applying Buhay, it was a breach of the appellants' reasonable expectation of privacy for the police to open the package or preside over its opening and examine its contents without proper grounds and without a warrant.
- [59] In their arguments, the appellants relied to some degree on the decision of the Newfoundland Court of Appeal in *R. v. Fry*, supra. I have found it unnecessary to refer to that case in reaching my conclusion that there was a breach of the appellants' s. 8 rights. In *Fry* the police were called to the office of a courier company to look at a package that had aroused suspicions because of the way the shipping had been paid for and because of certain delivery instructions. The police understood that the recipient of the package had a lengthy drug-related record. The package had not been opened. The police asked an employee of the courier company to accompany them to the airport to x-ray the package. The x-ray revealed that the package likely contained drugs. The question for the Newfoundland Court of Appeal was whether the recipient had a privacy interest in the package and if so whether the police had grounds to search the package by x-ray. The majority of the court held that the recipient had a privacy interest in the package and that the police were acting only on a suspicion. The court upheld the decision of the trial judge to exclude the evidence. The *Fry* case does not touch, in any material way, the s.8 issue this Court has been required to decide in this case.
- [60] The question becomes whether the trial judge ought to have excluded the evidence.
- Whether the Trial Judge Should have Excluded the Evidence of the Search of the Package
- [61] Section 24(2) of the Charter provides:
- Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
- [62] As Mr. Justice Laskin reminds the reader in *R. v. Grant* (2006), 81 O.R. (3d) 1, 38 C.R. (6th) 58 (C.A.), at para. 50, the language of s. 24(2) directs the court to consider "all of the circumstances" bearing on the repute of the justice system.
- [63] In *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, Mr. Justice Bastarache, speaking for the Court, summed up the process for determining, under s. 24(2) of the Charter, whether the admission of evidence would bring the administration of justice into disrepute. He said at para. 33:

In *Collins*, supra, this Court grouped the circumstances to be considered under s. 24(2) into three categories: (1) the effect of admitting the evidence on the fairness of the subsequent trial, (2) the seriousness of the police's conduct, and (3) the effects of excluding the evidence on the administration of justice. Trial judges are under an obligation to consider these three factors.

[64] The Court also noted in *Law* that a reviewing court will not interfere with a trial judge's conclusions on s. 24(2) absent an apparent error as to the applicable principle or rules of law or an unreasonable finding. (Para. 32.)

[65] In the case at bar, the trial judge said that if there was a Charter breach he would not exclude the evidence under s. 24(2). However, he did not explain in his reasons the process he undertook to reach his conclusion. I infer from the discussion of the trial judge with respect to the appellants' reasonable expectation of privacy, that his conclusion that he would not have excluded the evidence was based, for the most part, on his understanding of the minimal expectation of privacy a person has in goods that are couriered to them by air. I will bear this in mind in my analysis of the factors that must be considered in determining whether the evidence should have been excluded.

a. Trial Fairness

[66] The evidence in the case at bar did not emanate from the appellants. It was therefore non-conscriptive and its admission would not affect adjudicative fairness.

b. Seriousness of the Breach

i. Strength of claim to constitutional protection

[67] The breach in question involves the search of a package addressed to Ms. Washington and couriered by air. In *R. v. Tessling*, supra, Mr. Justice Binnie recognized that different aspects of privacy have stronger claims to constitutional protection than others. He said at paras. 20-24:

Within the general principle thus stated, the cases have come to distinguish among a number of privacy interests protected by s. 8. These include personal privacy, territorial privacy and informational privacy.

Privacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity, and in particular the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal. The state cannot conduct warrantless strip searches unless they are incident to a lawful arrest and performed in a reasonable manner (*R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at paras. 90-92) in circumstances where the police have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest (para. 98). Nor may the police take bodily samples without authorization: *R. v. Stillman*, [1997] 1 S.C.R. 607.

The original notion of territorial privacy ("the house of everyone is to him as his castle and fortress": *Semayne's Case*, [1558-1774] All E.R. Rep. 62 (1604), at p. 63) developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are most likely to take place (Evans, *supra*, at para. 42; *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 140, per Cory J.: "[t]here is no place on earth where persons can have a greater expectation of privacy than within their 'dwelling-house'"; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 43), in diluted measure, in the perimeter space around the home (*R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Grant*, [1993] 3 S.C.R. 223, at pp. 237 and 241; *R. v. Wiley*, [1993] 3 S.C.R. 263, at p. 273), in commercial space (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 517-19; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pp. 641 et seq.), in private cars (*Wise*, *supra*, at p. 533; *R. v. Mellenthin*, [1992] 3 S.C.R. 615), in a school (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at para. 32), and even, at the bottom of the spectrum, a prison (*Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, at p. 877). Such a hierarchy of places does not contradict the underlying principle that s. 8 protects "people, not places", but uses the notion of place as an analytical tool to evaluate the reasonableness of a person's expectation of privacy.

Beyond our bodies and the places where we live and work, however, lies the thorny question of how much information about ourselves and activities we are entitled to shield from the curious eyes of the state (*R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60). This includes commercial information locked in a safe kept in a restaurant owned by the accused (*R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10, at para. 16). Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7. Its protection is predicated on

the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain as he sees fit.

(Report of a Task Force established jointly by Department of Communications/Department of Justice, *Privacy and Computers* (1972), at p. 13)

The distinction between personal, territorial and informational privacy provides useful analytical tools, but of course in a given case, the privacy interest may overlap the categories. Here, for example, the privacy interest is essentially informational (i.e., about the respondent's activities) but it also implicates his territorial privacy because although the police did not actually enter his house, that is where the activities of interest to them took place.

[Emphasis in the text.]

[68] The privacy interest with which we are dealing in this case - the contents of a wrapped package shipped by air - can be characterized as informational privacy. Because the material shipped to Ms. Washington was wrapped in a package, we must infer that the intent of the parties was to keep it private, away from the prying eyes of others.

[69] However, the expectation of privacy in the contents of the package is not as high as that related to bodily integrity or one's home or office. The seriousness of the violation should be judged in this light.

ii. Manner of the search

[70] It can also be said that the search conducted by the police was not particularly intrusive - the original search having been undertaken by Mr. Stryland.

iii. Lack of grounds to search

[71] The most significant point made by the appellants with respect to the seriousness of the breach is that at the time that the police looked into the package, they did not have reasonable grounds to conduct the search. Mr. Stryland suspected that the white powder he found in the package was a drug, but he had no expertise in the area. He had a feeling that the powder was a drug, but as counsel pointed out, to Mr. Stryland's knowledge the powder could just as easily have been bath salts or a cooking ingredient. The officers who arrived first on the scene said that they thought that the powder was probably methamphetamine, but it was only Constable Bown who immediately recognized the powder as that substance.

[72] Based only on what Mr. Stryland told them, the police would not have sufficient grounds to obtain a search warrant had they applied for one. It was only after the package was opened and Constable Bown identified the substance that the grounds existed.

[73] Lack of reasonable and probable grounds weigh heavily in the determination of the seriousness of the breach.

iv. No circumstances of urgency or necessity

[74] Whether there were circumstances of urgency or necessity is not a factor to consider in this case since none of the officers believed that it was necessary to obtain a search warrant in the situation facing them. Nonetheless the question of exigent circumstances was explored by defence counsel. Although it is clear that the police wanted to see what was in the package before the person to whom it was addressed arrived to pick it up, Constable Bown testified under cross-examination that no exigent circumstances existed.

v. Was the breach deliberate or flagrant; or, was it inadvertent; or committed in good faith?

[75] The only person who was asked to explain his grounds for looking into the package, without first obtaining a warrant was Constable Babakaiff, who said that he thought that he had the authority to investigate "suspicious packages". Constable Babakaiff said this in cross examination:

Q. (Counsel for Ms. Shepherd): No. no, I'm not talking about that. I'm talking about generally. Do you believe that you have authority, as a police officer, to go open any package that --

A. (Cst. Babakaiff): No. Not any random package, no.

Q. All right. But on the basis of what that person told you, you believed that you had authority just to open it right there?

A. Absolutely.

Q. And what was the basis of your authority?

A: If we get a complaint that somebody suspects that there's anthrax or a bomb or narcotics of or any form of contraband in a package, then it gives -- depending on their description of the package and its contents, if they did open it, then I have reasonable grounds to continue the investigation.

Q. That's -- that's what you believe -- those are the circumstances you believe that you have authority, right?

A. Yes.

Q. Where do you think you derive that authority from?

A. I'm unsure of the exact --

Q. Criminal Code?

A. -- section.

Q. Sorry. Criminal Code section that allows you to open packages?

A. I don't know the exact section.

Q. All right. Have you been told this by another officer senior to you that -- that if you get a complaint that someone believes there is drugs, that's enough and you can just go and open up the package?

A. Oh, common law certainly covers, you know, a portion that the Criminal Code does not, and I'm not totally up-to-date on the rhetoric from current court files on the exact section that gives me the powers to investigate suspicious packages.

Q. All right. So you -- fair to say, then, you believe you have this authority, but you've got no idea of where from?

A. No. I don't know the exact section.

Q. Okay. And you don't recall anybody telling you that you -- you're allowed to do this?

A. Telling me specifically or in general?

Q. Either.

A. No, no one has specifically told me that I have the civil or legal authority to investigate suspicious packages and they have not quoted any section number of the Criminal Code.

Q. Okay. So this is just basically your sense --

A. No.

Q. -- of what you're allowed to do?

A. No.

Q. Well, you don't have any -- any Criminal Code section. You don't have any statutes that you're relying on. You don't have any directions given to you of any -- any superior officers.

A. I don't know the exact section number for stopping a jaywalker. I do know it is within my legal authority to do so. I can't quote you the Criminal Code.

Q. Okay. But that you know because you've done it and you've seen other officers do it and you've been told that you're allowed to do that, right?

A. Right. Well, I have investigated suspicious packages on previous occasions as well.

Q. And opened them up?

A. Yes. Letters to the Times Colonist with white powder.

Q. Okay.

A. Packages left in McDonald's bathrooms. Suspicious --

Q. I'm just curious. If there's a letter to the Time[s] Colonist with white powder, and you suspect that it's anthrax, and you opened it?

A. We've picked up the package.

Q. Yes.

A. Letters associated to the package.

Q. Yes.

A. And if they suspect that there's a substance in there --

Q. Yes.

A. -- then we'll open an envelope to see if -- what their exact concern is, under controlled circumstances.

Q. Okay. Which means --

A. I don't take a letter opener and wing open the envelope.

Q. Fair to -- fair to say, sir, though, that those are circumstances where there is an immediate safety concern, correct? Anthrax, bombs, that sort of thing, correct?

A. Yeah. There are other situations that aren't as immediate.

Q. Okay. This situation, you agree with me, there were no safety concerns on your mind, were there?

A. No immediate safety concerns.

Q. You were -- you were interested in investigating a criminal offence, correct --

A. Yes.

Q. -- or an offence under the Controlled Drugs and Substances Act?

A. Yes.

Q. And there was no issue about it being an airline or it being a Helijet or it being in a terminal of an airport. There's nothing about that that made you feel that you should open it.

A. There was no immediate public safety risk.

Q. So you direct -- sorry, first, you opened the package yourself?

A. Yes. From the information that the complainant gave me, his description of the contents --

Q. Yes.

A. -- I believed that there was narcotics in that package.

Q. Okay. And you opened the package?

A. Yes.

[Emphasis added.]

[76] Perhaps because the activity was at a Helijet terminal, Constable Babakaiff seemed to equate the investigation of the package in question to investigations of bomb threats, suspicious envelopes sent to newspapers, or packages abandoned at fast food restaurants. No one would question the duty of the police to investigate the latter types of threats. But that was not what was happening in this case. Nothing in the circumstances suggested that the Helijet terminal or any of its staff or passengers were in danger. Here the police were told that a courier suspected that drugs were being sent through its business. There was no suggestion that the package was abandoned. To the contrary, all involved fully expected and were prepared for the addressee to pick up the package.

[77] Nonetheless, from the underlined passage it is apparent that Constable Babakaiff also thought that if the package had been opened by someone else already, he had the authority to "continue the investigation". Although he could offer no specific authority for his understanding, in my view it was not unreasonable.

[78] The relative good or bad faith exercised by the police is one of the most important factors in determining the seriousness of a Charter breach. "Bad faith" can be easy to identify. The courts have had more difficulty with "good faith". Although good faith is not fully defined in the jurisprudence, the underlying notion is the good faith is present when the police have

conducted themselves in manner that is consistent with what they subjectively, reasonably, and non-negligently believe to be the law. This is perhaps better understood as a contrast to situations where the police deliberately, flagrantly and wilfully breach a Charter right to gain some perceived advantage, that advantage usually being the avoidance of compliance with the Charter.

[79] In *R. v. Smith*, 2005 BCCA 334, 199 C.C.C. (3d) 404 this Court reviewed the concept of good faith, noting at paras. 57-62:

In *R. v. Kokesch*, [1990] 3 S.C.R. 3, 61 C.C.C. (3d) 207, Mr. Justice Sopinka juxtaposed the terms "good faith" and "flagrant". He said, at p. 228:

An equally important aspect of the seriousness of the violation is the manner in which the police conducted themselves in deciding to execute this warrantless perimeter search. Was the s. 8 violation committed in "good faith", or was it "flagrant"? Both are terms of art in s. 24(2) cases.

In *Kokesch*, Mr. Justice Sopinka seemed to accept that "good faith" is a state of mind, an honestly held belief, but he also found that to constitute good faith the belief must be reasonably based. The evidence in *Kokesch* established that the police officers were mistaken about their authority to trespass on a homeowner's property. Writing for the majority, Sopinka J. said this about the finding of the trial judge that the officers acted in good faith (at p. 230):

Secondly, even if Judge Cashman found that the constable honestly but mistakenly believed that he had the power to search, it is my view that in these circumstances the constable simply cannot be heard to say that he misapprehended the scope of his authority. As Chief Justice Dickson has amply demonstrated in his reasons in this appeal, "[t]his court consistently has held that the common law rights of the property holder to be free of police intrusion can be restricted only by powers granted in clear statutory language" (p.13) [ante, p. 218]. The contrary contention is, in Chief Justice Dickson's words, "without foundation". The police must be taken to be aware of this court's judgments in *Eccles v. Bourque*, [1975] 2 S.C.R. 739 and *Colet v. The Queen*, [1981] 1 S.C.R. 2], and the circumspection of police powers that those judgments represent.

Either the police knew that they were trespassing, or they ought to have known. Whichever is the case, they cannot be said to have proceeded in "good faith", as the term is understood in s. 24(2) jurisprudence.

[Emphasis added.]

Sopinka J. found support for this proposition in *R. v. Genest*, [1989] 1 S.C.R. 59. He continued:

... Chief Justice Dickson, speaking for the court, held that the Crown could not argue that the police officers' failure to recognize obvious defects in a search warrant was inadvertent. Even in the absence of evidence of bad faith, the seriousness of the Charter violation in that case was enhanced, because "the defects in the search warrant were serious and the police officers should have noticed them"...

[Underlining mine.]

Thus, Sopinka J. does not equate a lack of good faith with bad faith. It seems to follow from this passage that in order to qualify as "bad faith" the actions of the police must be knowingly or intentionally wrong.

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.

[80] The area is a difficult one. In *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14, 4 C.R. (6th) 38 (Ont. C.A.), Mr. Justice Doherty, writing for the court, proposed that rather than trying to pigeon-hole the actions of the police as either good or bad faith it might be more useful to place those actions along a fault-line for the purposes of determining the seriousness of a Charter breach. He said at para. 41:

In any event, I do not think that appellate review of a trial judge's s. 24(2) assessment should fixate on the legal label the trial judge attached to the police conduct. The nature of police conduct, by the officer or officers involved in the breach and on an institutional level, is an important consideration when calibrating the seriousness of the Charter breach. Indeed, where that breach does not implicate trial fairness, the nature of the police conduct will often determine whether the evidence should be excluded. Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for Charter rights: see Hill, "The Role of Fault in Section 24(2) of the Charter", *The Charter's Impact on the Criminal Justice System* (1996), at p. 57, (Cameron ed.). What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct.

[My emphasis.]

[81] In *Kitaitchik* the appellant was suspected of committing a murder. On learning that the appellant had given another party property belonging to the deceased, the police arrested the appellant for possession of stolen property. Suspecting the appellant of murder, the police seized the clothing that the appellant was wearing at the time of his arrest. The clothing turned out to contain evidence linking the appellant to the murder. The officer who seized the clothing testified that he believed that he had the authority to seize it as an incident of the appellant's arrest on the charge of possession of stolen property. The trial judge accepted that the seizure was not authorized by law and consequently held that it violated s. 8 of the Charter. The trial judge found that the common law power to seize as an incident of arrest did not extend to the seizure of things that could afford evidence of a crime other than the crime for which the person was arrested. The trial judge went on to consider whether the evidence should be excluded under s. 24(2), and ultimately decided against exclusion.

[82] The Ontario Court of Appeal upheld the decision of the trial judge to admit the evidence. In doing so the court considered the misunderstanding the officer had with respect to his power to seize as an incident to arrest. Doherty J.A. said this at paras. 39 and 40:

Even if counsel's limited definition of good faith is accepted, I cannot agree that the officer's mistaken belief that he could seize the clothing was an unreasonable one. This seizure occurred in 1991. As Cory J. observed in *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.), at 340-43, the scope of the common law power to search as an incident of arrest was unsettled in Canada prior to *Stillman*, supra, and had been "gradually broadened" by Canadian courts. On my reading of the authorities pre-dating this seizure, there is no clear prohibition against seizure of evidence relating to offences other than the offence for which the accused was arrested. Like many aspects of the common law power to seize as an incident of arrest, this question had not been addressed in the case law predating the seizure: e.g. *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257 (S.C.C.) at 278.

With the benefit of subsequent case law (*R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.) at 109), it is now clear that the power to seize as an incident of arrest does not extend to the seizure of material to provide evidence of an offence other than the offence for which the person was arrested. Given the state of the law in 1991 and the court's willingness to expand, at least from a spatial perspective, the power to search as an incident of arrest, I cannot characterize the officer's belief that he could seize the clothing to further his homicide investigation as unreasonable.

[83] I am of the opinion that we are facing a similar situation in the case at bar. Whether a police officer required a search warrant to seize something a non-state agent had already discovered was a question that had not been settled in Canada until the Supreme Court of Canada released its decision in *Buhay*, supra, on June 5, 2003. As mentioned earlier in these reasons, the Manitoba Court of Appeal had entered a conviction after Mr. Buhay's acquittal at trial. Holding that the seizure of marihuana from a locker at a bus station was a "transfer of control" to the police from the custody of the security guards who had discovered it, the Manitoba Court of Appeal found that that it was not necessary for the police to obtain a search warrant before doing so. The Supreme Court of Canada reversed that decision on July 11, 2003, just six weeks before the events that form the subject matter of the case at bar occurred. The effect of that decision on the facts in the case at bar was the central issue in this appeal. I am not persuaded that the actions of the police, though now found to be wrong, can be said to be flagrant or in bad faith. Their actions, in my view fall closer on the fault line to good faith.

c. The Effect on the Administration of Justice

[84] The two most important considerations in the inquiry into the effect of the exclusion of evidence on the administration of justice are whether the evidence forms a crucial part of the Crown's case and, where trial fairness is not affected, the seriousness of the underlying charge. (*Law*, supra, para. 39).

[85] In the case at bar the evidence in question is crucial to the Crown's case, and the charges are serious.

d. Conclusion as to the Admissibility of the Evidence

[86] As Madam Justice Arbour said in *Buhay*, supra, (at para. 73):

The decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial system on the other: *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 534. This was well put by Doherty J.A. in a recent decision of the Court of Appeal for Ontario, *R. v. Kitaitchik* (2002), 161 O.A.C. 169, at para. 47: "The last stage of the *R. v. Collins*, supra, inquiry asks whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth seeking goal of the criminal trial.

[87] In *Buhay*, the trial judge had concluded that the exclusion of evidence in the case before him did not exact too great a toll. The Supreme Court in *Buhay* paid deference to that opinion. In the case at bar the trial judge said that he would not exclude the evidence. The trial judgment is of limited assistance however, as the trial judge did not undertake a full s. 24(2) analysis in his reasons.

[88] I have concluded that to exclude the evidence in the case at bar would be to extract too great a toll on the truth seeking goal of the criminal trial. The offence is a serious one. The evidence obtained by the breach is central to the Crown's case. The s. 8 right breached was not at the higher end of the expectation of privacy. The breach would not affect trial fairness, as the evidence is non-conscriptive. The breach itself was serious in that a search was undertaken without reasonable grounds. However, in the circumstances the misunderstanding by the police of their authority to do so was not unreasonable. In my view, but for different reasons than given by the trial judge, I have concluded that he did not err in admitting the evidence.

[89] I would dismiss the grounds of appeal relating to the search of the package and to the admissibility of its contents.

Grounds for Arrest

[90] The appellants assert that objective grounds did not exist with respect to their being in possession of the drugs, as there was nothing to indicate that they knew that the package in question contained drugs.

[91] The test that the trial judge was required to apply in determining whether grounds existed to arrest the appellants is stated in *R. v. Debot*, [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193, where Madam Justice Wilson stated at p. 1166:

The question as to what standard of proof must be met in order to establish reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of "reasonable probability" rather than proof beyond a reasonable doubt or "prima facie case." The phrase "reasonable belief" also approximates the requisite standard.

[92] After Constable Bown looked at the contents of the package in the terminal, the police had grounds to believe it contained methamphetamine in a crystal form. The consignee of the package, Ms. Washington, arrived at the terminal to pick it up shortly after it arrived by Helijet. It is a reasonable inference that she likely knew what was being sent to her. At this point the police had grounds to arrest her for possession of the drug.

[93] Ms. Shepherd was with Ms. Washington when she picked up the package. Ms. Washington did not put the package into the trunk of her car, or in the back seat, she handed it to Ms. Shepherd who was in physical possession of it when she was arrested. In my view the trial judge did not err in concluding that there were reasonable grounds to arrest both appellants.

The Search of the Vehicle Incident to Arrest

[94] If the appellants were lawfully arrested, the search of the vehicle in which they were arrested was lawful as an incident of that arrest.

[95] The appellants say that the search became unlawful because it was conducted close to an hour after the appellants' arrest, and after a possible cursory search at the scene. I will return to this last point later in these reasons.

[96] In *R. v. Caslake*, [1998] 1 S.C.R. 51, 155 D.L.R. (4th) 19, at para. 24 Chief Justice Lamer, writing for the majority, said this:

The temporal limits on search incident to arrest will also be derived from the same principles. There is no need to set a firm deadline on the amount of time that may elapse before the search can no longer be said to be incidental to arrest. As a general rule, searches that are truly incidental to arrest will usually occur within a reasonable period of time after the arrest. A substantial delay does not mean that the search is automatically unlawful, but it may cause the court to draw an inference that the search is not sufficiently connected to the arrest. Naturally, the strength of the inference will depend on the length of the delay, and can be defeated by a reasonable explanation for the delay.

[97] In the case at bar, Constable Bown said that the vehicle was towed to the police station because there was traffic in front of the Helijet terminal. This sensible explanation was accepted by the trial judge. In these circumstances it was not unreasonable to conclude that the search remained an incident of a lawful arrest.

[98] I would dismiss this ground of appeal.

Failure to Exclude, under s. 24(2), the Evidence Found in the Vehicle

[99] Any argument that items found in the vehicle should have been excluded under s. 24(2) of the Charter must fail as the evidence was not obtained as the result of a Charter breach.

Unreasonable Verdicts

[100] The uncontroverted facts in the case at bar are:

- (a) A package containing 2.12 ounces of crystal methamphetamine addressed to Ms. Washington was sent, by helijet, from Vancouver to Victoria, in a "Guess" shopping bag;
- (b) Ms. Washington and Ms. Shepherd came to the Helijet terminal in a vehicle which Ms. Washington had borrowed from her stepfather the previous day; Ms. Washington was the driver, Ms. Shepherd the passenger;
- (c) When Ms. Washington borrowed the car it did not contain any drugs, or drug-related paraphernalia;
- (d) Ms. Washington claimed the "Guess" bag from Helijet, returned to the vehicle, and handed it to Ms. Shepherd, at which point both were arrested;
- (e) Ms. Shepherd, who had removed the package from the shopping bag, placed it on the passenger seat of the vehicle as she was getting out;
- (f) Ms. Shepherd's wallet, containing \$325.00 in cash, was on the front passenger seat;
- (g) A bag containing new small plastic bags, being the kind used to distribute methamphetamine, was on the front passenger seat;
- (h) On the floor in front of the passenger seat was a pouch containing an electronic scale, of the kind used by drug traffickers, and a bag containing more new small plastic bags;
- (i) There were two cellular telephones in the vehicle; and
- (j) In the trunk there was a bag containing a further 1.17 ounces of methamphetamine (in a case bearing Ms. Shepherd's initials), and more new small plastic bags.

[101] On the basis of these facts it was open to the trial judge to find, beyond a reasonable doubt, that Ms. Washington and Ms. Shepherd had knowledge and control of all the drugs in the vehicle, and that they were jointly engaged in possessing them for the purpose of trafficking.

[102] Counsel for Ms. Shepherd submitted however, that at the time of Ms. Shepherd's arrest the items found in the vehicle may not have been in the place that they were eventually discovered by police. He submitted that it could be the case that one of the police officers conducted a cursory search of the vehicle at the Helijet terminal before it was towed to the police station, and, that the police officer may have moved some of the items from some place in the vehicle to the front passenger seat.

- [103] The evidence disclosed that Constable Penzari had been present at the scene and had been designated there to conduct the search of the vehicle. He said that before he searched the vehicle Constable Bown decided that the vehicle should be towed to the police station rather than searched at the terminal. Constable Penzari said that the items on the passenger seat of the car were there when he conducted his search at the police station.
- [104] The only basis for the theory that there was a prior search was the cross-examination of Constable Penzari, who agreed with counsel for Ms. Shepherd that it was probably unlikely that Ms. Shepherd would have been sitting on all of the items he found on the front passenger seat.
- [105] I would not set aside the verdict on the basis of the speculative theory that the items in the vehicle had been moved after the arrest of Ms. Shepherd. Even accepting the possibility that the items shifted in the car, perhaps when it was hoisted to be towed, there was enough paraphernalia in the front of the vehicle, no matter where it was originally sitting, that the inference was there for the trial judge to draw.
- [106] The fact that neither appellant testified, nor called any evidence to rebut the strong circumstantial case against them, is a factor this Court can consider in assessing the reasonableness of the verdicts: *R. v. Nobel*, [1997] 1 S.C.R. 874, 114 C.C.C. (3d) 385 at paras. 101-102 (per Sopinka J.).
- [107] As there was a body of evidence upon which a reasonable jury could convict, the trial judge was correct in dismissing the "no evidence" motion of Ms. Shepherd.

Conclusion

[108] I would dismiss both appeals.

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Madam Justice Rowles:

- [109] I have had the privilege of reading in draft the reasons for judgment of Madam Justice Ryan dismissing the appeal. I agree with my colleague, for the reasons she states, that the appellants' reasonable expectation of privacy was not interrupted by reason of the Helijet employee opening the package. I also agree that the police breached the appellants' section 8 Charter rights when they opened and seized the package. The police did not have a warrant to search the package and, at the time the package was opened, the police did not have the necessary reasonable grounds to obtain a warrant. Security concerns did not prompt the opening of the package by either the Helijet employee or the police.

[110] While I agree with my colleague that the appellants' rights were breached, I am unable to agree that the analysis required by *R. v. Collins*, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508 leads to the conclusion that the incriminating evidence should be admitted under s. 24(2) of the Charter.

[111] Section 24(2) provides:

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

[112] In *Collins*, the Supreme Court of Canada established the framework for considering whether the admission of evidence would bring the administration of justice into disrepute. The approach set out in *Collins* requires consideration of three sets of factors: (1) the effect of admitting the evidence on the fairness of the trial, (2) the seriousness of the conduct of the police in violating the appellant's Charter rights, and (3) the effects of excluding the evidence on the administration of justice (*R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227 at para. 33; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631 at para. 41). I will address each in turn.

Trial Fairness

[113] The incriminating evidence in this case is real evidence and the appellants were not conscripted into either its creation or discovery. The admission of the evidence would not affect adjudicative fairness: *R. v. Stillman*, [1997] 1 S.C.R. 607, 144 D.L.R. (4th) 193.

Seriousness of the Breach

[114] The seriousness of the Charter violation largely depends on "whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant" (*Collins*, at para. 38, quoting *R. v. Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655; *Buhay* at para. 52). As Madam Justice Ryan noted, the relative good or bad faith of the police is one of the most important factors in determining the seriousness of the breach, but also one of the most difficult areas of the analysis. Accordingly, a review of the principles established in the jurisprudence on this issue may be helpful.

(i) Good faith

[115] It should be noted at the outset that while the overall burden under s. 24(2) is on the accused, the case authorities support the view that the onus is on the Crown to demonstrate good faith, rather than on the accused to demonstrate bad faith (*R. v. R.J.S.*, [1995] 1 S.C.R. 451, 21 O.R. (3d) 797 at para. 203; *R. v. Burlingham*, [1995] 2 S.C.R. 206, 124 D.L.R. (4th) 7 at para. 98). As stated in John Sopinka, Sidney N. Lederman, & Alan W. Bryant, *The law of evidence in Canada*, (Toronto: Butterworths, 1999) at § 9.50:

[T]he burden of proof with respect to some Charter issues is, in practice, bound to be allocated to the Crown, since many factors in the equation are within the peculiar knowledge of the Crown (e.g., good faith, urgency, the availability of other investigative techniques and discoverability); and, more important, it is the Crown that is functionally responsible for the maintenance of the administration of justice.

[116] The above passage appeared in substantially similar form in the first edition of the text and was cited with approval by Lamer C.J. in *R. v. Bartle*, [1994] 3 S.C.R. 173, 118 D.L.R. (4th) 83 at para 50. In that case, Lamer C.J. went on to illustrate the point by making the following observation with respect to search and seizure cases: "it is clear that, unless the Crown can show that the police had reasonable and probable grounds to act as they did there is a presumption that the violation is a serious one under s. 24(2) which must be rebutted by the Crown" (at para. 50, internal citations omitted). In *R. v. Pastro* (1988), 42 C.C.C. (3d) 485 (Sask. C.A.) at 519-20 Vancise J.A. noted:

the burden of demonstrating good faith on the balance of probabilities must shift to the Crown. In order to ensure that public confidence in the administration of justice is not eroded or undermined, a very high degree of probability [that good faith existed] is required: see *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.). In my opinion, where the State relies on good faith to justify the violation or infringement of a constitutional right, such claim must be scrutinized closely. To do otherwise will render the constitutional right meaningless.

[117] When engaging in an analysis of "good faith", it is also important to clarify its meaning within the context of s. 24(2). It is a term of art that has been used to describe whether the authorities knew or ought to have known that their conduct was not in compliance with the law (see *Sopinka* at § 9.116; *R. v. Silveira*, [1995] 2 S.C.R. 297, 23 O.R. (3d) 256 at para. 65; *R. v. Wise*, [1992] 1 S.C.R. 527, 133 N.R. 161 at para. 97; *R. v. Kokesch*, [1990] 3 S.C.R. 3, 121 N.R. 161 at para. 52). Therefore, an inquiry into good faith examines not only the police officer's subjective belief that he or she was acting within the scope of his or her authority, but it also questions whether this belief was objectively reasonable.

[118] In two cases released at the same time as *Collins*, *R. v. Sieben*, [1987] 1 S.C.R. 295, [1987] S.C.J. No. 11 and *R. v. Hamill*, [1987] 1 S.C.R. 301, [1987] S.C.J. No. 12, the Supreme Court of Canada considered the admissibility of evidence obtained as a result of searches conducted under the authority of writs of assistance issued pursuant to the then existing Narcotic Control Act, R.S.C. 1970, c. N-1. The Court found that the warrantless searches breached s. 8 rights, but nevertheless admitted the evidence under s. 24(2) on the basis of the good faith of the police. Lamer J. (as he then was), speaking for the majority in *Sieben*, stated the following, at para. 6:

The only reason that [the police officers] did not obtain a search warrant is that they believed in good faith that a writ of assistance was sufficient. At that time, the statute authorizing a search under a writ of assistance had not been declared to be inconsistent with the Charter.

[Emphasis added.]

[119] The crucial point in *Sieben* is that the error in the police officers' actions did not stem from their ignorance of the law; rather, the police officers' only "mistake" was that they were unable to predict that the Supreme Court of Canada would rule as invalid the provisions in the statute on which they relied as legal authority for their conduct. It was reasonable for the police to presume the constitutionality of the statute that authorized warrantless searches under writs of assistance and, therefore, the Court found that the good faith actions of the police pointed towards admissibility.

[120] In *R. v. Simmons*, [1988] 2 S.C.R. 495, 55 D.L.R. (4th) 673, the Supreme Court found that customs officials violated the defendant's s. 10(b) Charter rights by detaining and searching the defendant without advising her of her right to counsel, but held that the evidence should nevertheless be admitted. Citing the Court's prior decisions in *Sieben* and *Hamill*, Dickson C.J., speaking for the majority, stated:

[The] constitutional invalidity of a search power does not render evidence inadmissible if the officers conducting the search have relied in good faith on the constitutionality of the provision. In this instance the customs officials were acting in accordance with existing statutory requirements... At the time of this search the decision of this Court in *Chromiak*, *supra*, stood for the proposition that investigative detentions of this sort were not detentions of the type requiring persons to be advised of their right to counsel.

[Emphasis added.]

[121] Subsequent decisions of the Supreme Court of Canada have been consistent in following this approach. In *R. v. Jacoy*, [1988] 2 S.C.R. 548, 89 N.R. 61, the Court found that customs officers who relied "on a policy directive based on a decision of the Court of Appeal" had acted in good faith. In *R. v. Wong*, [1990] 3 S.C.R. 36, 120 N.R. 34, videotaped surveillance evidence was admitted despite the fact that it was obtained in violation of s. 8. Surveillance had not yet been held to constitute a search within the meaning of s. 8 at the time of the breach and, as a result, the Court held that the illegal nature of the police conduct was the result of "an entirely reasonable misunderstanding of the law" (at para. 40). Finally, in *R. v. Caslake*, [1998] 1 S.C.R. 51, [1998] S.C.J. No. 3, the police officer's good faith reliance on an RCMP policy in conducting an inventory search of a car influenced the Court's finding that the breach was "not sufficiently serious" to justify exclusion of the evidence (at para. 34). The evidence was ultimately admitted.

[122] The cases to which I have referred demonstrate the Supreme Court's willingness to find that the state agents acted reasonably and in good faith where there was some legal basis for them to believe their conduct did not violate the law. In other words, where an agent of the state relies in good faith on the ostensible state of the law at the time of obtaining the evidence, "[t]he fact that such authority is subsequently declared constitutionally invalid cannot retroactively undermine that state of mind." (*R. v. Klimchuck* (1991), 67 C.C.C. (3d) 385 (B.C.C.A.) [emphasis added]; see also *Wise* at para. 34).

[123] Conversely, where the legal grounds for the state action are absent, the Supreme Court of Canada has "effectively ruled out good faith" (Sopinka at § 9.122). The Court has stated that "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; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at para. 55 [emphasis added]).

[124] In *Kokesch*, the police conducted a warrantless perimeter of a house in violation of the s. 8 rights of the accused. A majority of the Supreme Court found that the police officers' error as to the scope of their authority was "manifestly unreasonable" because either they knew they were trespassing, or they ought to have known. Sopinka J.'s comments, speaking for the majority, are particularly apt:

There is, in my opinion, a world of difference between the police conduct said to constitute good faith in this case and the police conduct endorsed by this Court in *R. v. Sieben*, [1987] 1 S.C.R. 295; *R. v. Hamill*, [1987] 1 S.C.R. 301; *R. v. Duarte*, [1990] 1 S.C.R. 30; and *R. v. Wiggins*, [1990] 1 S.C.R. 62. In each of those cases, the police acted pursuant to express statutory authority that rendered the particular search lawful. The police are entitled, indeed they have a duty, to assume that the search powers granted to them by Parliament are constitutionally valid, and to act accordingly. The police cannot be expected to predict the outcome of Charter challenges to their statutory search powers, and the success of a challenge to such a power does not vitiate the good faith of police officers who conducted a search pursuant to the power. Where, however, police powers are already constrained by statute or judicial decisions, it is not open to a police officer to test the limits by ignoring the constraint and claiming later to have been "in the execution of my duties". This excuse has been obsolete since, at least, the decision of this Court in *Colet* (see *Ritchie J.*, at p. 9).

[Emphasis added.]

[125] In *Silveira*, the Supreme Court of Canada considered the police officers' initial warrantless entry into the accused's house, which was not authorized by law. Although a majority of the Court ultimately decided to admit the evidence on the grounds that exigent circumstances justified the state intrusion, Cory J. writing for the majority, emphasized at para. 162:

[Section] 24(2) of the Charter should not be used as a matter of course to excuse conduct which has in the past been found to be unlawful. This case has confirmed that to enter and search a dwelling-house without a warrant constitutes a very serious breach. Therefore, in the future, even if such exigent circumstances exist, the evidence would likely be found inadmissible under s. 24(2).

[Emphasis added.]

[126] Thus, it is clear that the Supreme Court of Canada has used the term "good faith" to describe circumstances in which state agents have acted in accordance with legal authority not yet found unconstitutional (*R. v. Grant*, [1993] 3 S.C.R. 223, 159 N.R. 161 at paras. 62-63).

- [127] More problematic are cases in which the state of the law is uncertain at the time of the breach. To demand prescience on the part of the police as to how the law will be settled is unreasonable. *R. v. Kitaitchik*, (2002) 166 C.C.C. (3d) 14 (Ont. C.A.), a case on which Madam Justice Ryan relies, is an example.
- [128] In *Kitaitchik*, one of the issues before the Ontario Court of Appeal was whether the police officer acted in good faith when he directed the seizure of the clothes that the appellant was wearing on arrest. The appellant had been lawfully arrested on a charge of stolen property as part of a larger homicide investigation. The Crown's theory was that the appellant murdered the victim in the course of burglarizing her apartment. Thinking that the appellant's clothing might contain fibres linking him to the homicide scene, the police officer in charge of the investigation obtained a search warrant authorizing the seizure of the appellant's clothing from his home. He then instructed another police officer to seize the clothing the appellant was wearing, believing that such action was permissible as part of the police powers incident to the appellant's arrest on the charge of possession of stolen property.
- [129] In relation to the s. 24(2) analysis, counsel for the appellant submitted that the term "good faith" applied only to conduct which an officer honestly and reasonably believed to be lawful. Applying that definition, counsel argued that while the officer honestly believed he had the authority to order the seizure, he should have known that the seizure of evidence to further a homicide investigation fell outside the scope of police search powers incident to the arrest of a person on a different charge. The Ontario Court of Appeal rejected this argument, stating the following:
- [39] Even if counsel's limited definition of good faith is accepted, I cannot agree that the officer's mistaken belief that he could seize the clothing was an unreasonable one. This seizure occurred in 1991. As Cory J. observed in *R. v. Stillman* [decided in 1997] the scope of the common law power to search as an incident of arrest was unsettled in Canada prior to *Stillman*, and had been "gradually broadened" by Canadian courts. On my reading of the authorities pre-dating this seizure, there is no clear prohibition against seizure of evidence relating to offences other than the offence for which the accused was arrested. Like many aspects of the common law power to seize as an incident of arrest, this question had not been addressed in the case law predating the seizure.

With the benefit of subsequent case law, it is now clear that the power to seize as an incident of arrest does not extend to the seizure of material to provide evidence of an offence other than the offence for which the person was arrested. Given the state of the law in 1991 and the court's willingness to expand, at least from a spatial perspective, the power to search as an incident of arrest, I cannot characterize the officer's belief that he could seize the clothing to further his homicide investigation as unreasonable. [Internal citations omitted.]

[Emphasis added.]

- [130] Madam Justice Ryan is of the view that "we are facing a similar situation in the case at bar." With deference, I must disagree. This is not a case where the state of the law at the time of the breach was sufficiently obscure or uncertain so as to characterize the police officers' error as reasonable. Even if it were true that the question of whether a police officer required a search warrant to seize something discovered by a non-state agent was unsettled before Buhay, there could be no doubt that at the time of the breach in this case, the law was clear. In Buhay, the Supreme Court of Canada unanimously condemned the police officers' "casual attitude" towards the appellant's rights and restored the trial judge's order to exclude the evidence under s. 24(2) of the Charter. If the police officers in Buhay acted on a view of the law that was not regarded as reasonable at that time, it would be illogical to find the same error reasonable in this case after the Supreme Court of Canada has specifically addressed and rejected the suggestion that the action of a third party can obviate the need for a search warrant.
- [131] Absent safety concerns, or exigent circumstances, the police had no statutory or common law power to search and seize the package, and neither were present on these facts. In other words, the police had no reasonable basis to assume that they were authorized to search and seize the package based on the employee's suspicion that the package might contain drugs.
- [132] My colleague's approach widens the interpretation of a 'reasonable error' to include those based on ignorance of the law at the time of the breach. In my view, this is not a case in which the police officers could reasonably have relied on ostensibly valid legal authority at the time of the breach. Nor is it a case of a reasonable mistake in light of unsettled law.
- [133] In Kokesch, after stating that the police "must be taken to be aware of this Court's judgments" regarding the circumscription of police powers, Sopinka J., speaking for the majority, went on to state, at para. 53:
- I do not wish to be understood as imposing upon the police a burden of instant interpretation of court decisions. The question of the length of time after a judgment that ought to be permitted to pass before knowledge of its content is attributed to the police for the purposes of assessing good faith is an interesting one, but it does not arise on these facts.
- [134] In my opinion it would be inappropriate, and unnecessary, to engage in a discussion as to where to draw the line between 'reasonable' and 'unreasonable' errors in terms of the amount of time that has passed following a change in the law. In the case before us, it is sufficient that the Supreme Court of Canada has yet to recognize an error based on ignorance of settled law as 'reasonable' such as to amount to good faith for the purposes of admissibility of evidence. As noted by the Ontario Court of Appeal, "[t]he provisions of s. 24(2) are not intended to place a premium on remaining in ignorance of proper procedures." (R. v. Harris (1987), 35 C.C.C. (3d) 1, [1987] O.J. No. 394 (C.A.), leave to appeal to S.C.C. refused [1987] 2 S.C.R. vii).

- [135] Another point to consider in relation to search and seizure cases is that the relative weight given to the issue of "good faith" as a mitigating factor on the seriousness of the breach heavily depends on whether there were reasonable and probable grounds for the search in the first place. Cory J., speaking for the majority in *R. v. Belnavis*, [1997] 3 S.C.R. 341, 34 O.R. (3d) 806, said, "[t]hese grounds must inform the assessment of the seriousness of the Charter breach, when determining whether to admit the evidence under s. 24(2)." (at para. 27)
- [136] It is notable that in *Belnavis*, *Caslake and Grant*, cases in which there were reasonable and probable grounds for conducting the search, the Supreme Court of Canada concluded that the officers had acted in good faith and admitted the evidence. Similarly, in *Wise and Silveira*, where there were also reasonable and probable grounds for the search, the Court did not specifically make a finding of good faith but rather cited the "absence of bad faith" as a factor reducing the seriousness of the violation. By contrast, in *Buhay*, *Mann and Kokesch*, cases in which legal authority for the search did not exist, the Court either did not make a finding of good faith or it refused to make positive inferences from the officers' lack of bad faith, and ultimately excluded the evidence.
- [137] Considering the burden of proof and the insufficiency of evidence put forward by the Crown, I have concluded that the actions of the police do not amount to good faith and should be placed farther down the "fault line" than my colleague has indicated.
- [138] Madam Justice Ryan noted in *R. v. Smith*, 2005 BCCA 334, 199 C.C.C. (3d) 404, "the absence of good faith may be a neutral factor or an enhancing factor depending on the circumstances of the case" (at paras. 61-62). Further, the Supreme Court of Canada emphasized in *Mann* that "[g]ood faith of the officer is but one factor to be considered alongside other factors which speak to the seriousness of the breach." (at para. 55) With this in mind, I will now consider the other factors that indicate the breach of the appellant's s. 8 Charter rights was serious.

(ii) Other Factors Indicating that the Breach was Serious

- [139] In addition to the lack of reasonable and probable grounds, which "weigh heavily in the determination of the seriousness of the breach", Madam Justice Ryan also noted a number of other factors that militate in favour of excluding the evidence. No exigent circumstances existed and the police were not concerned about their safety; rather, the police simply "wanted to see what was in the package before the person to whom it was addressed arrived to pick it up". The police did not make any attempts to get a telewarrant and "the fact that obtaining a warrant did not even cross the mind of one officer demonstrates a certain casual attitude toward the appellant's Charter rights." (*Buhay* at para 60).
- [140] While it is true that the manner of the search was not particularly intrusive, in balancing all of the relevant factors in the circumstances of the case and in light of the privacy interests at stake, I have concluded that the breach of the appellants' s. 8 Charter rights was serious. There were no reasonable and probable grounds for the search, there was no threat to

public safety, and the police officers could not point to any authority to substantiate their mistaken assumption that they were entitled to open the package. In these circumstances, "such lax police procedures cannot be condoned" (Buhay at para. 63, citing Dymont, [1998] 2 S.C.R. 417, 55 D.L.R. (4th) 503 at para. 39).

Effect of Excluding the Evidence

[141] When the conclusion reached under the "trial fairness" branch of the Collins test does not favour admission but the seriousness of the Charter breach does, the court's role at this stage is to balance the seriousness of the breach against the seriousness of the offence and the importance of the illegally obtained evidence to the Crown's case (Buhay at para. 67; Law at para. 39).

[142] The courts have previously characterized narcotics offences as 'serious' ones, which favour admitting the evidence (Kokesch at para. 36; Jacoy at para. 22). However, as Lamer J., speaking for the majority in Greffe recalled (at para. 51):

There is no doubt that what is at issue in this case is a serious offence, indeed a serious social evil, the possession and importation of drugs. Further, there is no doubt that but for the exclusion of the evidence, the appellant would be convicted of the counts against him. It must not be forgotten, however, that the inquiry under s. 24(2) cannot be focussed 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. As the Chief Justice noted in Genest, *supra*, at p. 82:

While the purpose of the rule is not to allow an accused to escape conviction, neither should it be interpreted as available only in those cases where it has no effect at all on the result of the trial. The consideration whether to exclude evidence should not be so closely tied to the ultimate result in a particular case.

[143] On a balance of factors, I am of the view that the seriousness of the offence does not justify admitting the illegally obtained evidence in this case. The underlying goals of the s. 24(2) analysis "to oblige law enforcement authorities to respect the exigencies of the Charter" and "promot[e] the decency of investigatory techniques" should be borne in mind (Burlingham at paras. 25, 50). The broader implications of ignoring the appellants' right to privacy would have the effect of bringing the administration of justice into disrepute. In the absence of security concerns, the "post 9/11" security situation should not be used to justify greater intrusions by the state into the realm of private life. Individuals are entitled to full Charter protection of their right to privacy. As noted by one scholar:

It will be little comfort to an accused that he or she has established that the evidence was obtained in violation of a major Charter standard when it will nevertheless be used to convict because the violation was not in a home, the police acted in good faith ignorance or the offence is considered serious. Charter rights will only have bite if there are meaningful remedies. In the long-term interests of the integrity of the justice system, there must be a real risk that

investigations that violate Charter rulings may result in exclusion of evidence and acquittal, even in serious cases.

Don Stuart, *The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain*, (1999) 25 Queen's L.J. 65-74 at para. 58.

[144] For the reasons stated, I would allow the appeal and set aside the convictions.

"The Honourable Madam Justice Rowles"

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