SUPREME COURT OF YUKON

Citation: *R. v. MacLeod*, 2013 YKSC 117

Date: 20131128
S.C. No. 13-01507A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

JONATHAN MARK SHANE MACLEOD

Applicant

Before: Mr. Justice L.F. Gower

Appearances:

Jennifer Grandy — Counsel for the Respondent
Kim Hawkins — Counsel for the Applicant

RULING ON CHARTER APPLICATION

INTRODUCTION

[1] This is an application by the accused within a *voir dire* for two forms of relief under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). In the Notice of Application, the accused firstly seeks a stay of proceedings under s. 24(1) on the basis that he was subjected to an unreasonable search, contrary to s. 8 of the *Charter*, and an unlawful arrest and an arbitrary detention, contrary to s. 9 of the *Charter*. Secondly, the accused seeks to exclude evidence, specifically crack cocaine, because of the unreasonable search and arbitrary detention, pursuant to s. 24(2) of the *Charter*.

[2] While it was not clearly argued by defence counsel, it appears that there are two quantities of cocaine which could be subject to exclusion on different bases. The first was seized as a result of a search incidental to an arrest on March 9, 2013 and consisted of 9.4 grams of crack cocaine in 22 individual portions. The theoretical basis for exclusion in this case is an unreasonable search and seizure pursuant to an unlawful arrest. On this date, the investigating officer's grounds for arresting the accused were premised on his belief that the accused had recently smoked a joint of marijuana. The second quantity of cocaine was seized following an arrest of the accused on April 20, 2013 and consisted of 2.8 grams in five individual portions. The theoretical basis for exclusion in this case is an arbitrary detention. On this date, the investigating officer observed the accused discard drugs and a cell phone outside of a Whitehorse hotel.

[3] In this *voir dire* the accused has the ultimate burden of proving each of the alleged violations of his *Charter* rights as well as his entitlement to a remedy in each case. The onus of proof is on the civil standard of a balance of probabilities. This standard does not incorporate the analytical model from *R. v. W.(D.),* [1991] 1 S.C.R. 742, which arises when the accused testifies in a criminal trial. Further, in *F.H. v. McDougall*, 2008 SCC 53, the Court stated, at para. 86:

> "However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored the evidence, finding the evidence of one party credible may well be conclusive of the result because the evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issues in the case..."

[4] As will soon become evident, credibility is a central issue in this *voir dire*, as the evidence of the accused conflicts directly with that of the investigating officer.

EVIDENCE

[5] Constable Menard was the sole witness for the Crown on the *voir dire*. He is an RCMP officer with 14 years of experience. He has been posted in Whitehorse since January 20, 2013. His initial posting was for a period of six years in an area of Surrey, British Columbia, known as Whalley. Constable Menard said that this area is notorious for drug-related offences. At one point, Constable Menard was involved with an enforcement program called “Project Clean Sweep”, which involved six months of foot patrols in an area of Whalley known as “the strip”. He testified that, in this area, there is a homeless shelter, a needle exchange, and numerous “crack shacks”. As a result of that experience, I understood Constable Menard to say that he has performed between 1000 and 2000 drug-related investigations. He says that he has handled almost every street-level drug, including crack cocaine and marijuana.

[6] Constable Menard’s experience with marijuana includes attending hundreds of homes where people have been smoking the drug. He has also been involved in executing search warrants on marijuana grow operations, has handled hundreds of pounds of processed marijuana, and has been involved on foot patrols observing people smoking marijuana in public and in motor vehicles. Constable Menard said that he is very familiar with the smell and appearance of marijuana both in the vegetative state and as a burned substance. He said that he can also distinguish between the smell of recently burned marijuana and marijuana which has been smoked some time ago. He described the smell of burned marijuana in general as “unique”.

[7] Constable Menard also testified about the symptoms of marijuana use. He said that it is a depressant and can cause the user to become slow and delayed in their speech and movements. He said that a user under the influence can be “super-relaxed” and often uses a lot of “uhms” and “ahs” while speaking. Constable Menard also noted that a user under the influence can have red and bloodshot eyes.

[8] Constable Menard testified that he had a total of five dealings with the accused over the period from February 23 to April 20, 2013.

[9] On February 23, 2013, at about 6:30 PM, Constable Menard received a complaint from the 98 Hotel that someone was causing a disturbance by picking fights. He attended the 98 Hotel and one of the staff pointed out the accused as the person causing the problems. The accused was seen standing in front of the hotel. Constable Menard had a conversation with him regarding the complaint. He described this as a casual conversation in which he suggested that the accused was dealing in crack cocaine. Although the accused denied that, he admitted to using crack cocaine. The accused also pointed to a purple “Neon” motor vehicle, which he said was his car. Constable Menard noted that the accused exhibited jaundiced yellow eyes, jittery, fast movements, rapid and incoherent thought, and rapid speech. Based on his experience with Project Clean Sweep in British Columbia, he concluded from these observations that the accused was then high on crack cocaine. Ultimately, Constable Menard asked the accused to leave the area, which he said the accused agreed to do.

[10] On March 9, 2013, Constable Menard was performing random patrols in the downtown area of Whitehorse. He was driving an unmarked white Crown Victoria sedan, equipped with emergency lighting and sirens. He was northbound on Second Avenue at

about 2:50 PM when he noticed the accused southbound in his purple Neon car, turning left onto Wood Street, which passes in front of the 98 Hotel. Constable Menard noted that the accused was not wearing a seatbelt and turned east onto Wood Street to follow the accused, activating his police emergency lights. The accused pulled into an angle parking spot on the south side of Wood Street in front of the 98 Hotel and Constable Menard parked his vehicle behind the Neon. Constable Menard then ran a computer check on the vehicle's licence plate. He determined that the accused was the owner and was subject to a peace bond with conditions as well as a probation order. The latter included a condition not possess weapons.

[11] Constable Menard then walked to the passenger side of the Neon. He gestured to the accused to roll down the window, but said that the accused mouthed back to him that the window did not work. Constable Menard then fully opened the passenger door and noted a strong smell of freshly (i.e. recently) burned marijuana. He also observed a number of ripped and broken cigarettes, as well as various whole, rolled up and stepped-on cigarette rolling papers. Constable Menard said that when marijuana is in bud form, it is commonly consumed by taking tobacco from cigarettes and combining it with the marijuana in a joint, using rolling papers, in order for the marijuana to burn more evenly.

[12] Constable Menard testified that he asked the accused for his registration, insurance and driver's licence, which the accused replied that he had and began searching for. Constable Menard described the accused's movements as slow, delayed and laboured. He described the accused's speech as confused, including long drawn out words, with lots of "ahs". Constable Menard said that the accused's eyes were noticeably red and bloodshot.

[13] Constable Menard stated that, at that time, he also had in mind the information he had gathered from the accused on February 23rd about his crack cocaine use. In his experience, Constable Menard said that crack users commonly smoke marijuana in order to calm down from the jittery symptoms of crack use, to relax and to get back to a normal pattern of behaviour. He described this use as almost “medicinal”.

[14] Constable Menard testified that he formed the opinion that the accused had just smoked a marijuana joint in the car within the previous five to 10 minutes. He said that an average joint is about one quarter of a gram of marijuana and would be more than enough to get one person high.

[15] Constable Menard formed the opinion that the accused was under the influence of marijuana and was also in possession of marijuana. At 2:59 PM, he arrested the accused for possession of a controlled substance. Constable Menard directed the accused to get out of the vehicle and handcuffed his hands behind his back. He escorted the accused to the unmarked police vehicle and searched him incidental to the arrest. Constable Menard testified that he located a plastic baggie in the right sweater pocket of the accused containing 22 portions of crack cocaine wrapped in plastic, for a total of 9.4 grams. From the same pocket he also seized a roll of money, totalling $431, about half of which was organized by denominations and half of which was disorganized. After placing the accused in the police vehicle, Constable Menard returned to search the purple Neon. He seized a cell phone from the door pocket, but did not locate any marijuana.

[16] Constable Menard then took the accused to the RCMP detachment to process him for pictures and prints. At that time he informed the accused that he would be charged

with possession of a controlled substance for the purposes of trafficking. At one point, the accused located a $20 bill which had been up his right sleeve. In part because of that, Constable Menard testified that he formed independent grounds that the accused could be secreting other evidence and decided to perform a strip search. He said that he took the accused to a private location in the detachment and asked the accused to lift up his shirt to check underneath. He also asked the accused to drop his pants and underwear, stating that it is common for drug dealers to place contraband in their crotch area. He said that he did not make a record of this strip search in either his notes or in his Report to Crown counsel, because he didn't think it was a unique procedure and because he did not find any inculpatory evidence as a result of that search. He denied asking the accused to bend over and cough while his underwear was down.

[17] Constable Menard charged the accused with possession of cocaine for the purposes of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C.1996, c. 19 (the "*CDSA*"), and released him on an undertaking. The undertaking included conditions that the accused: (1) not be found within a two block radius of the 98 Hotel; and (2) not possess cell phones. Constable Menard also issued a summary offence ticket to the accused for not wearing a seatbelt.

[18] On March 10, 2013, Constable Menard testified that he realized he had made an error in filling out the summary offence ticket. He therefore rewrote the ticket and went on patrol to see if he could locate the accused to reserve him. He said that he stopped the accused in his purple Neon on Second Avenue for that purpose. When speaking to the accused in his vehicle, Constable Menard noticed that there was a utility tool on the vehicle console with a knife blade. He therefore arrested the accused for possession of a

weapon, as that was a breach of his probation order. He said that he handcuffed the accused in the course of the arrest, but later exercised his discretion to release him without charge after re-examining the nature of the multi-tool, which he considered to be relatively innocuous.

[19] On April 10, 2013, Constable Menard testified that he was on duty driving south on Second Avenue when he noticed the accused in the area of the 98 Hotel. He stopped and arrested the accused for breaching the undertaking issued on March 9th, by being within two blocks of the hotel. Constable Menard testified that en route to the RCMP detachment in the police vehicle, the accused was angry about being arrested, stating that he had just met with legal aid duty counsel and had just received a card arranging an appointment for a further meeting with legal aid, presumably to deal with the charge arising on March 9th. Constable Menard said that once he learned this fact he decided to again release the accused immediately without any charge. In cross-examination, Constable Menard admitted that at the preliminary inquiry he testified that he did not place the accused in the police vehicle on that occasion, but that the entire conversation about legal aid took place at the roadside.

[20] On April 20, 2013, Constable Menard testified that he was on patrol in his police vehicle about 11 PM. He was passing by the Family Hotel on Ray Street, because he said it is a known drug use area. He testified at the *voir dire* that there were four vehicles parked in front of the Family Hotel that night. He acknowledged that he testified at the preliminary inquiry that there were a different number of vehicles parked there that night. He said he noticed an individual coming from behind the southeast corner of the hotel, which was an area familiar to him, because people often gathered there to drink and do

drugs. He recognized the individual as the accused. He said that the accused also appeared to recognize him, as he was driving the same unmarked white Crown Victoria vehicle. Constable Menard said that the accused began to walk briskly away from him in the direction of the entrance to the Family Hotel. Constable Menard turned into the parking lot of the Hotel and observed the accused place his hands in the front pockets of his pants. He said that he saw the accused retrieve a baggie and a cell phone with his right hand and then throw those items under an F-350 Ford truck parked in the parking lot, about 5 metres away from Constable Menard's location. He said he saw the cell phone come apart when it hit the ground.

[21] Constable Menard testified that the accused then ran towards the Family Hotel. He said that he got out of his vehicle and chased the accused. He said that he grabbed the accused inside the hotel and placed him under arrest for a breach of his undertaking. At that time, the accused had a bundle of cash in one hand, which was subsequently determined to be $440, in $50 and $20 bills. Constable Menard handcuffed the accused and placed him in the police vehicle. Constable Menard then went to the F-350 truck and looked underneath to retrieve and seize three items: a black cell phone, a baggie containing five foil packages of crack cocaine totalling 2.8 grams, and a third small clear plastic case, which was empty.

[22] After arresting the accused, Constable Menard took him to the Whitehorse Correctional Center, to be held for a bail hearing the following day. While at the Correctional Center, Constable Menard said that he performed another strip search of the accused in a bathroom area. He said this was performed in the same fashion as the one done previously at the RCMP detachment on March 9th, in that he asked the accused to

lift his shirt and drop his pants and underwear to check for contraband. None was found. Constable Menard eventually charged the accused with possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the *CDSA*.

[23] Constable Menard testified that these were the only interactions he had with the accused over the period from February 23 to April 20, 2013.

[24] The accused also testified on the *voir dire*. In general, the accused's evidence differed from that of Constable Menard in several important respects. It is only necessary for me to deal with a few of those differences for the purposes of illustrating why I conclude on this *voir dire* that the accused has failed to persuade me on a balance of probabilities that he was truthful when testifying about matters that contradicted the evidence of Constable Menard. In other words, I find it more likely than not that Constable Menard's version of those contradictory matters is accurate.

[25] The accused is 35 years of age and has been in the Whitehorse area for three years. He admits to being addicted to crack cocaine. He also admitted to acquiring a criminal record since coming to Whitehorse. It includes assault with a weapon, assault and breaches of a common-law peace bond. He has served jail time for some of those offences.

[26] When the accused first met Constable Menard on February 23, 2013, he denied having a casual conversation with him or telling him about his crack cocaine use. Although he knew that someone had called the police to complain of his behaviour on that occasion, he said that two other police officers arrived before Constable Menard and searched him. He then said that when Constable Menard arrived, he threw the accused against his car, handcuffed him and searched him. He failed to specify why this was

done. Although he said that Constable Menard eventually let him go, he denied leaving the area stating that he told Constable Menard that he was not leaving “Paddy’s Place”, which I understand to be another tavern next door to the 98 Hotel, because he was the “designated driver”. The accused failed to explain that evidence. In cross-examination, the accused admitted that he was using crack cocaine “whenever he could” over the period from February 23 to April 20, 2013. He did not deny being under the influence of crack on February 23rd.

[27] On March 9, 2013, the accused testified that he drove to the 98 Hotel in order to obtain a clean crack pipe from the Outreach Van, which I gather occasionally stops at the hotel to service clients. The accused admitted that he was not wearing a seatbelt, that he was pulled over by Constable Menard, and that the Constable opened the door of the accused’s vehicle. He said that Constable Menard asked him to step out of his vehicle and handcuffed him. The accused said that Constable Menard told him that he had rolling papers and tobacco on the floor of his vehicle and that that was grounds to search him. He denied having consumed any marijuana that day. Indeed, he said that he did not use marijuana at all and did not have any in his vehicle that day. The accused also said that no one else was in his vehicle that day and that the vehicle did not smell of marijuana on that occasion. Rather, he said the vehicle had a musty or mouldy smell because it had been parked over the winter while the accused was serving time in jail.

[28] The accused said that after he was handcuffed, Constable Menard did a pat down search of all his pockets and then placed his hand down the accused’s pants into his crotch area where he pulled out the baggie of crack cocaine. He also testified that the Constable “tore” his car “all apart” before taking him to the RCMP detachment. Then, at

the detachment, the accused said that he was strip-searched by Constable Menard in the following manner: he was required to remove all of his clothing so that he was completely naked, then he was required by Constable Menard to bend over, spread his buttocks and cough.

[29] On March 10, 2013, the accused said that he was stopped by Constable Menard, who was again driving the white unmarked police vehicle. However, the accused also testified that there were two other RCMP "SUVs" involved in that stop. He acknowledged that Constable Menard had a paper for him on the seatbelt charge and that he was arrested, handcuffed and searched as a result of the Constable finding his multi-tool, which he admitted had a knife blade on it. He then said that, although he was not charged with a breach of his probation order, his vehicle was again "torn apart", but this time by the two other officers in the SUVs.

[30] On April 10, 2013, the accused testified that he was stopped and arrested by Constable Menard for being within two blocks of the 98 Hotel. He said that he was taken by the Constable to the RCMP detachment on that occasion and again ordered to submit to a strip search in the same fashion as he alleged had occurred on March 9th. He acknowledged that he was released once Constable Menard examined his legal aid business card with the appointment noted on it.

[31] On April 20, 2013, the accused testified that he was seen by Constable Menard coming around the corner of the Family Hotel. He said the Constable immediately turned into the parking lot and drove towards him in an aggressive fashion. The accused said that he initially walked quickly and then ran towards the main entrance to the hotel and threw his cell phone and a baggie of crack cocaine under a truck in the parking lot. He

said it was dark in the parking lot and that one could not see under the vehicles parked there. The accused said that he was tackled by Constable Menard inside the hotel and arrested there. After he was placed in the police vehicle, the accused said that Constable Menard looked under the vehicles in the parking lot and recovered the accused's cell phone and baggie of crack.

[32] The accused also testified that he was pulled over by the RCMP on at least 20 other occasions over the period between February 23 and April 20, 2013. He said that these often involved the two RCMP SUV's he referred to earlier, as well as Constable Menard's white ghost car. The accused said that it was usual for him to be stopped by a group of police officers and that he was issued at least four motor vehicle offence tickets, as well as "a couple of parking violations". When asked about the number of times Constable Menard was involved in these other encounters, the accused applied "two for sure".

[33] In cross-examination, the accused testified that he did "not really get high" from smoking crack cocaine. When asked whether he felt different after taking crack, the accused replied "I don't understand". He said that he was "not impaired" when he is under the influence of crack cocaine. The accused said that smoking crack is "pretty much the same as tobacco", in terms of its addictive properties.

ANALYSIS OF THE EVIDENCE

[34] As I said earlier, I find that the balance of probabilities favours accepting the evidence of Constable Menard over that of the accused where their evidence conflicts.

[35] While Constable Menard has significant drug enforcement experience, and a particular interest in that aspect of his general police duties, I did not form the impression

that he was a “zealot” in that regard, as suggested by defence counsel. Rather, I agree with Crown counsel there is no evidence that the constable had any particular *animus* towards the accused in these described encounters. Indeed, on three of the five occasions, Constable Menard refrained from charging the accused.

[36] I also do not agree with the suggestion by defence counsel that an adverse inference can be drawn with respect to Constable Menard’s credibility from the fact that certain details are not reflected in his notes or reports to Crown counsel. Firstly, I would not expect a reasonable police officer to always record details not associated with the laying of a charge. Secondly, while I would expect Constable Menard to record his use of intrusive police practices, such as the strip searches he performed, given that these searches were otherwise uneventful and did not produce any inculpatory evidence, I do not find this failure to adversely affect the constable’s credibility.

[37] Further, while there were some inconsistencies in Constable Menard’s testimony, I did not find them to be significant in the context of the totality of this evidence. The issue about the number of vehicles in the parking lot of the Family Hotel was minor. Similarly, the fact that the Constable forgot that his conversation with the accused on April 10, 2013, occurred entirely on the roadway is not particularly significant. His testimony in this *voir dire* was that the conversation occurred in the police vehicle en route to the detachment. However, he did not say that he actually took the accused to the detachment, as the accused testified. Rather, I understood that as soon as the legal aid business card was produced by the accused, Constable Menard released him. Therefore, it does not appear that the entire conversation took more than a few minutes,

which makes it more understandable that the Constable's memory of where it occurred was flawed.

[38] Also, the fact that Constable Menard did not check to see if the accused's undertaking had been amended before chasing him in the parking lot of the Family Hotel on April 20, 2013, as defence counsel suggested might have been prudent, is simply a nonstarter. That was a rapidly unfolding situation, which the Constable understandably responded to quickly.

[39] In summary, I do not agree that the various points raised by defence counsel in her argument constitute a pattern of over-zealous conduct by the officer which should reflect adversely on his credibility.

[40] On the other hand, I have several difficulties with the evidence of the accused.

[41] First, I find that the accused's evidence about what happened on February 23, 2013 is not believable. Firstly, if two other police officers had already dealt with the accused in response to the disturbance complaint, then there would have been no need for Constable Menard to attend. Secondly, the accused gave no evidence to explain why Constable Menard threw him against the vehicle or why he handcuffed and searched him. Thirdly, I find it unbelievable that the accused would have been acting as a designated driver for anyone when he was very likely under the influence of crack cocaine that evening. Lastly, I accept Constable Menard's evidence that the accused was under the crack cocaine that evening (which was not denied by the accused) and that this has significantly impaired the accused's memory of the event.

[42] Second, the suggestion that Constable Menard would have placed his hand down the accused's pants into his crotch area on March 9, 2013, is difficult to accept on a

balance of probabilities. It is simply not logical to conclude that Constable Menard would have risked being seen to perform a potentially unreasonable search in plain view, in the middle of the afternoon, directly across the street in front of the 98 Hotel. Here I think I can take judicial notice of the fact that there are routinely patrons of the hotel standing outside of the entrance on the sidewalk smoking cigarettes and talking, who would have potentially been witnesses to such inappropriate police conduct[i]. It simply makes no sense for Constable Menard to have risked publicly acting in that fashion. If indeed he had reason to search the accused's crotch, he was able to transport the accused to the RCMP detachment in only a few minutes and perform the strip search in private.

[43] Third, the accused's evidence that his car was "torn apart" by Constable Menard on March 9th, and by two other police officers on March 10th, is simply wild exaggeration and, in the latter case, pure fabrication.

[44] Fourth, the accused's evidence about how he is affected by crack cocaine is difficult to believe. Although he admitted to being addicted to crack, he effectively denied getting high on the substance, which seems contradictory. His attempt to portray his crack addiction as being no more serious than his tobacco addiction suggests minimization and denial.

[45] Lastly, the accused's evidence about being stopped by the RCMP on at least 20 other occasions beyond those testified to by Constable Menard is troubling for a variety of reasons. First, since he testified that Constable Menard was only involved on two of those 20 occasions "for sure", then the evidence is largely irrelevant to the accused's argument that the Constable was zealously targeting him as a drug offender. Second, Constable Menard denied being involved in any other occasions beyond the five he

testified about, and I prefer his testimony to that of the accused. Lastly, the accused said that a couple of these occasions had to do with the RCMP serving him with “parking violations”. It strains credulity to accept that the RCMP would go out of their way to target the accused for such minor matters.

[46] Thus, I make the following findings of fact for the purposes of this *voir dire*.

[47] The five interactions between Constable Menard and the accused occurred as the Constable testified.

[48] On March 9, 2013, Constable Menard detected a strong odour of recently burned marijuana emanating from the accused’s vehicle. He also observed broken cigarettes and rolling papers, which he said were consistent with rolling marijuana in bud form into joints. Based on his considerable drug enforcement experience, I accept as reasonable Constable Menard’s opinion that the smell was the result of a joint of about a quarter of a gram of marijuana having been consumed in the vehicle within the previous five to 10 minutes. Further, based upon the symptoms of marijuana intoxication which Constable Menard observed the accused exhibit, together with the context of his experience that crack cocaine users regularly also consume marijuana to normalize their symptoms, it was reasonable for Constable Menard conclude that the accused (as opposed to a potential earlier passenger) had smoked the marijuana.

[49] On April 20, 2013, Constable Menard observed the accused throw a cell phone and a baggie under a vehicle in the parking lot of the Family Hotel. I accept that he was able to clearly see the cell phone. As well, it was reasonable, given his previous dealings with the accused and his on-the-job experience to believe that the baggie contained

drugs. He responded appropriately by chasing the accused into the hotel and arresting him on a breach charge.

The Legality of the Arrest on March 9, 2013

[50] A police officer's statutory authority to arrest without a warrant is found in s. 495(1)(a) and (b) of the *Criminal Code*, R.S.C.1985, c. C-46, (the "*Code*"):

> "495(1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> (b) a person whom he finds committing a criminal offence."

[51] The offence of possessing marijuana is a hybrid offence, punishable either by indictment or by summary conviction: *Controlled Drugs and Substances Act*, S.C 1996, c.19, as amended, ss. 4(4) and (5), Schedule VIII. Should the amount involved be less than 30 grams, then the matter is only punishable by summary conviction. In this case no marijuana was ever found. As well, there was nothing in the evidence of Constable Menard to suggest that he had reason to believe that the accused was in possession of 30 grams or more. If anything, his evidence tended to point towards a belief in the possession of a smaller amount.

[52] In *R. v. Janvier*, 2007 SKCA 147, ("*Janvier*"), the Saskatchewan Court of Appeal concluded, at para. 28, that "the standard for arrest without a warrant for the commission of a summary conviction offence pursuant to s. 495(1)(b) is <u>more strict</u> than the standard for arrest for an indictable offence under s. 495(1)(a)" (my emphasis). That is because in the former case, the police officer must find the person "committing" an offence, rather

than simply believing on reasonable grounds that an offence has been, or is about to be, committed.

[53] In *S.T.P. v. Canada (Director of Public Prosecutions Service)*, 2009 NSCA 86 ("*S.T.P.*"), the Nova Scotia Court of Appeal faced a similar fact situation to the one at bar, in which two police officers noted the smell of burned marijuana coming from the car in which the accused was a passenger. The police arrested the three occupants of the car for marijuana possession, but none was found. The appellant, S.T.P., was searched incidental to his arrest and found to be in possession of cocaine. At para. 17, the Court stated:

> "Now in this case no marijuana was ever found, nor were any of the young men so charged. So the amount involved, whether 30 grams or less, would be purely hypothetical. Taking the appellant's argument at its strongest, I will assume, without deciding the issue, that the summary conviction regime under s. 495(1)(b) applies. Thus, to be lawful, the police would have to "find" S.T.P committing the contemplated offence, namely possession of marijuana."

I assume the Court took the appellant's argument "at its strongest" because the standard under s. 495(1)(b) is arguably more strict, and therefore more favourable to the appellant, than under s. 495(1)(a). In any event, I propose to take the same approach in the case at bar. See also *Janvier*, at para. 14.

[54] At para. 18 of *S.T.P.*, the Nova Scotia Court of Appeal stated that, despite the fact that no marijuana was found, it was still open to the trial judge to conclude that s. 495(1)(b) had been complied with "because courts in this country have consistently interpreted the reference to "finds committing" in s. 495(1)(b) to mean *apparently* committing" (emphasis already added). Then, continuing at paras. 20 through 22, the

Court held that the arresting officer must establish three things in order to meet the standard of “finds committing”. First, the officer must be present while the apparent offence is taking place. Second, the officer must actually observe or detect the commission of the offence by one of his or her senses, including the sense of smell. Third, there must be an objective basis for the officer’s conclusion that the offence is being committed. In other words, it must be apparent to a reasonable person placed in the circumstances of the arresting officer at the time.

[55] In the case at bar, I conclude that there was no objective basis for Constable Menard’s conclusion that the offence of possession of marijuana was being committed by the accused while he was in Constable Menard’s presence. In coming to that conclusion, I rely on the line of cases referred to in *Janvier* which stand for the proposition that it is not objectively reasonable to conclude that un-smoked marijuana is currently present based on the smell of burned marijuana alone. Rather, the smell of burned marijuana is evidence upon which an inference can be drawn that a person has recently smoked and therefore possessed marijuana *in the past*. To conclude that such evidence suggests a person has more, un-smoked marijuana would be “speculative at best” (para. 46).

[56] Further, while it is apparent that Constable Menard based his arrest upon more than the smell of burnt marijuana alone, the additional circumstances upon which he relied still do not support an inference of anything more than that the accused was *previously* in possession of the burned marijuana. In my view, there were no indicia to suggest that the accused was *currently* in possession of more un-smoked marijuana.

[57] Thus, Constable Menard did not have an objective basis for his opinion that the accused was committing the offence of possessing marijuana at the time of the arrest.

Accordingly, the arrest was unlawful and the warrantless search of the accused cannot be justified as incident to a lawful arrest. In the result, Constable Menard violated both the accused's right to be secure against unreasonable search or seizure under s. 8 of the *Charter*, as well as his right not to be arbitrarily detained under s. 9.

Should the evidence be excluded under s. 24(2) of the *Charter*?

[58] Section 24(2) states;

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

[59] On this issue *R. v. Grant*, 2009 SCC 32 ("*Grant*"), is the leading authority. *Grant* holds that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three questions:

1) How serious was the *Charter*-infringing state conduct?

2) What was the impact on the *Charter*-protected interests of the accused?

3) What is society's interest in the adjudication of the case on its merits?

At para. 71 of *Grant*, the majority stated:

> "[71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system

> condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute…"

1) Seriousness of the breach?

[60] *Grant* holds that the more severe or deliberate the conduct leading to the *Charter* violation, the greater the need for the courts to disassociate themselves from that conduct (para. 72). On the other hand, good faith on the part of the police will reduce the need for the court to disassociate itself from the police conduct (para. 75).

[61] In this case, it would seem that the roadside detention was fairly brief and that the intrusiveness of the search of the accused's jacket pockets was relatively low on the scale. I acknowledge that the overall detention included the time spent by the accused at the detachment, as well as the strip search which took place there. However, the entire time that the accused was detained does not appear to be much more than an hour or so and the strip search took place after the inculpatory evidence was seized.

[62] I must also keep in mind that Constable Menard appears to have been acting in good faith. While I disagree with the objective reasonableness of his opinion that the accused was apparently committing the offence of possessing marijuana, in *R v. Boyd*, 2013 BCCA 19, ("*Boyd*"), the British Columbia Court of Appeal recognized that, at paras. 32 and 33, these kinds of cases are very much fact driven and different triers of fact could reach different conclusions. Indeed, *Boyd* observes that there is a divergence between the line of cases referred to in *Janvier* and the jurisprudence in British Columbia, in that

the latter seems to support the conclusion that an inculpatory inference of present possession may be drawn from the smell of burned marijuana alone. In other words, it would appear to be the type of matter upon which reasonable people can disagree.

[63] I conclude that the breach of the accused *Charter* rights was not so serious as to favour exclusion of the evidence.

2) Impact on the accused's Charter interests?

[64] Again, *Grant* notes that the impact of a *Charter* breach can range from fleeting and technical to one which is profoundly intrusive (para. 76). The more serious the impact, the greater the risk that admitting the evidence will bring the administration of justice into disrepute.

[65] With respect to the arbitrary detention, I recognize that the accused was unjustifiably denied his liberty for about an hour or so.

[66] With respect to the unreasonable search, while the accused had an expectation of privacy *vis-à-vis* the search of his jacket pockets, in relative terms, the search was not unduly intrusive or demeaning to his dignity.

[67] On balance, I conclude that the violations of the accused *Charter* interests here are relatively neutral, in the sense that they do not give rise to a significant risk that the admission of the evidence would bring the administration of justice into disrepute.

3) Society's interest in having a trial on the merits?

[68] As stated in *Grant*, this question asks whether the truth-seeking function of the criminal trial process would be better served by the admission or the exclusion of the evidence (para. 79). Among the considerations here are the reliability of the evidence and the importance of the evidence to the prosecution's case (paras. 81 and 83).

[69] In the case at bar, there is no question about the reliability of the seized crack cocaine and the importance of that evidence to the Crown's case. Were the evidence to be excluded, the Crown would be unable to prove three of the seven counts on the indictment. Accordingly, I conclude that the truth seeking function of the criminal trial process would be better served here by admitting the evidence.

[70] Weighing all three *Grant* factors, I find that the balance is in favour of admitting the crack cocaine seized on March 9, 2013 as evidence in the accused's trial.

Was there an arbitrary detention on April 20, 2013?

[71] As I understood defence counsel here, her principal submission is that Constable Menard arrested the accused without knowing what breach of undertaking, if any, was being committed. Constable Menard's testimony was that, after pulling into the parking lot of the Family Hotel, he saw the accused throw a cell phone and a baggie under an F-350 truck from a distance of about 5 metres away. He said he had his headlights on at the time and that the clearance of the F-350 truck was high enough that he could crawl under it on all fours, when he later retrieved these items. Constable Menard said that the cell phone came apart when it hit the ground. He said that he saw this as "plain as day". He also testified that when he gave chase to the accused, he yelled at him that he was arresting him for a breach of undertaking, but without specifying the specific condition. When he eventually captured the accused inside the hotel, he again informed him that he was arresting him for a breach of his undertaking, but without stating the specific condition which had been breached. It is obvious from the entirety of Constable Menard's testimony that the breach he had in mind was the accused's possession of a cell phone.

[72] The accused similarly testified that he threw the baggie of crack and his cell phone under a vehicle in the parking lot before running away from Constable Menard. However, he suggested that there was not enough light in the parking lot for Constable Menard to have been able to identify what those items were. Once again, I prefer the evidence of Constable Menard on this point.

[73] Defence counsel submitted that it was significant that Constable Menard did not check to see if the conditions of the undertaking of March 9, 2013 had been amended since the Constable released him on that date. The suggestion here was that it was unreasonable of the Constable not to have done so, given that a period of about six weeks had passed since the accused's initial release. I earlier rejected this argument as untenable. The situation in the parking lot that night was rapidly unfolding and the Constable was properly reacting in a timely fashion. Further, there was no particular reason for the Constable to suppose that the cell phone condition would have been vacated in the intervening six weeks, since the Constable was not sure at that time whether the accused had made his first appearance on the charges arising on March 9th. In short, this argument does not assist the accused in attempting to establish that there was an arbitrary detention on April 20th.

[74] Further, the fact that the Constable did not specifically inform the accused during the chase or upon his capture that he was being arrested for breaching the cell phone condition in particular does not make the detention arbitrary. The Constable had good reason to believe that the condition was still in force and clearly saw the accused in possession of a cell phone.

[75] A breach of undertaking under s. 145(3) of the *Code* is a hybrid offence punishable either by indictment or by summary conviction. It is presumed to be an indictable offence until the Crown's election: see *Collins v. Brantford Police Services Board,* [2001] O.J. No. 3778, at para. 13. Thus, the arrest was under s. 495(1)(a) of the *Code*. I am satisfied that Constable Menard had reasonable grounds to believe that the accused had committed the breach and that the arrest was lawful and not arbitrary. Accordingly, the accused's application in this regard must fail.

[76] In her submissions on the alleged arbitrary detention of April 20, 2013, defence counsel also indicated that I would have to weigh the evidence that there were numerous prior stops of the accused by Constable Menard. While I have accepted that there were four prior interactions between the accused and Constable Menard, the nature of those interactions do not support the suggestion that there was an arbitrary detention on April 20th. Further, I have rejected the accused's evidence that there were at least two additional interactions between them over the period from March 9 to April 20, 2013.

[77] If I am wrong about the absence of an arbitrary detention, I agree with the Crown that there would be no basis for excluding the seized cell phone and crack cocaine in any event, since there was no nexus between the arrest and the seizure. Constable Menard observed both items in the accused's possession before making the arrest. Theoretically, he might have chosen to seize the items before pursuing the accused into the hotel and arresting him. Had he done so, the accused certainly would have had no basis for arguing that they be excluded. The fact that the Constable chose to seize the items afterwards does not convert them into the fruits of the arrest and make them subject to exclusion.

Is there a basis for a stay of proceedings under s. 24(1) of the *Charter*?

[78] Section 24(1) of the *Charter* provides:

> "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

[79] In the Notice of Application on this *voir dire*, defence counsel indicated that this relief is sought on the basis that the accused's search was unreasonable, that his arrest was unlawful, and that his detention was arbitrary. Further particulars were not provided about which occasion counsel was referring to, and there was no reference to either the March 9th or April 20th incidents.

[80] In her oral submissions, defence counsel indicated that she was arguing the issue of "trial fairness" here, in that Constable Menard had not kept proper notes or records of his investigations of the accused, and that therefore there were none to disclose to the accused about certain key areas of his evidence. I presume she is referring in particular here to the two strip searches, although counsel also complained about the lack of "VICS" video recordings from Constable Menard's police vehicle on any of the occasions, the absence of cellblock video recordings of his dealings with the accused at the RCMP detachment and the Correctional Center, and the absence of any "PROS" reports for two of the five incidents. Defence counsel also complained about the fact that the notes which Constable Menard did make did not include important details. For example, his notes about the February 23, 2013 encounter with the accused in front of the 98 Hotel did not include any details regarding his observations of the accused apparently under the influence of crack cocaine, or his conversation with the accused at that time. Finally, counsel submitted that since there is no other remedy available for this failure to keep

proper records, such as the exclusion of evidence, then a stay of proceedings is the only "appropriate and just" remedy.

[81] The authority which the accused relies upon for seeking a stay of proceedings is *R. v. O'Connor*, [1995] 4 S.C.R. 411. That case involved non-disclosure by the Crown of certain medical records relating to the complainant in a case involving charges of sexual assault. The accused alleged a breach of his right to life, liberty and security of the person under s. 7 of the *Charter*. The majority held that where an accused seeks to establish that non-disclosure has violated s. 7, he or she must establish that the impugned non-disclosure has, on a balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. The focus must primarily be on the effect of the impugned actions on the fairness of the trial. Once a violation is made out, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). If it is not possible to remedy the prejudice in any other manner, then a stay of proceedings will be appropriate. However, the majority made it clear that this would be an exceptional circumstance. At para. 82, the majority stated:

> "It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued."

[82] I will deal with the accused's complaints about Constable Menard's poor record keeping in reverse order.

[83] First, Constable Menard acknowledged in cross-examination that his notes of two of his interactions with the accused, on February 23 and April 20, 2013, did not include

certain details he testified about. While more thorough notes would have been preferable, it is difficult to fault the Constable for having what appears to be a good memory of those incidents. Further, the Constable testified about those incidents at the preliminary inquiry on July 15, 2013, which was not long after their occurrence, and it is reasonable to infer that this testimony helped to solidify his memory of them. Finally, his trial testimony on October 15, 2013, was well within a year of the incidents, which is not an overly long period of time for a professional witness. On balance, I am not surprised by or suspicious of the reliability or veracity of the Constable's memory on these points.

[84] Second, Constable Menard acknowledged that he made no "PROS" reports of his interactions with the accused on March 10 and April 10, 2013. However, he explained in re-examination that it was "quite regular" not to make a PROS report when he has interacted with someone, but has not charged them with an offence. Given the relatively minor seriousness of his interactions with the accused on those days, that seems a reasonable explanation.

[85] Third, Constable Menard explained that the absence of any video footage of his interaction with the accused at the RCMP detachment on March 9, 2013, was due to the fact that only certain areas of the detachment are under video surveillance, and those areas did not include the side door of the building which he and the accused used to enter the detachment, nor the private room where he performed the strip search. I do not believe the Constable was cross-examined about why there was no video of his dealings with the accused at the Whitehorse Correctional Center on April 20, 2013.

[86] Fourth, Constable Menard explained that the absence of a VICS video recording on March 9, 2013 was because the recording equipment in his police vehicle was not

working that day. Later, the Constable explained more generally that, prior to his posting with “M” Division in the Yukon on January 20, 2013, he had not used a VICS system. He noted that the system can fail in cold weather and needs to be rebooted at times. While the Constable’s lack of experience and apparent frustration with the VICS system is no excuse for not using it, there is no evidence whether there is any RCMP policy about the use of the system, let alone whether its use is mandatory. Prudent police practice would support the use of such a system whenever reasonably possible. However, the failure of Constable Menard to do so on these occasions does not on its own, or together with the other record-keeping complaints by the accused, constitute a violation of the accused’s *Charter* rights.

[87] Arguably, the strongest point raised by defence counsel here is the absence of any notes by Constable Menard of either of the two strip searches. A leading case on strip searches is *R. v. Golden*, 2001 SCC 83. That case recognized that searches of a person incident to an arrest are an established exception to the general rule that warrantless searches are prima facie unreasonable. However, because strip searches are inherently humiliating and degrading for detainees, regardless of the manner in which they are carried out, they cannot be done simply as a matter of routine policy. Rather, there must be independent reasonable and probable grounds to justify the strip search over and above the grounds for a lawful arrest. At para. 99, the majority stated:

> “In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to

> reasonable and probable grounds justifying the arrest. Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the *Charter*."

[88] Here I agree with defence counsel that, given the constitutionally required justification for a strip search, proper police practice should probably include keeping a record of the reasons for performing such a search and the manner in which it is conducted. Indeed, such record-keeping was included in a list approved of by the majority in *Golden* as being in accordance with the constitutional requirements of s. 8 of the *Charter*. This list was set out at para. 101:

> "In this connection, we find the guidelines contained in the English legislation, P.A.C.E. concerning the conduct of strip searches to be in accordance with the constitutional requirements of s. 8 of the *Charter*. The following questions, which draw upon the common law principles as well as the statutory requirements set out in the English legislation, provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the *Charter*:
>
> 1. Can the strip search be conducted at the police station and, if not, why not?
> 2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
> 3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
> 4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
> 5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
> 6. What is the minimum of force necessary to conduct the strip search?

7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?"

[89] In *R. v. Samuels*, 2008 ONCJ 85 ("*Samuels*"), Nakatsuru J., of the Ontario Court of Justice, entered a stay of proceedings under s. 24(1) of the *Charter* because of his finding that the police had conducted a strip search of the accused as a matter of routine policy. That was a drinking and driving case and to the strip search occurred after breath samples were taken from the accused. Therefore, the accused could not seek exclusion of the evidence under s. 24(2). The trial judge concluded that no other remedy was available and granted a stay of proceedings, in part because of the perceived need to prevent the continuation of such strip searches as a matter of practice by the police force involved.

[90] In the case at bar, the strip searches were similarly conducted after the relevant evidence had been seized. Thus, the accused is unable to seek exclusion of the evidence under s. 24(2) of the *Charter* as a result of the searches.

[91] Regarding the search on March 9, 2013, Constable Menard testified that he formed independent grounds that the accused could be secreting evidence because of

the fact that he found a $20 bill up the accused's right sleeve. I earlier accepted Constable Menard's testimony about the manner of the search. He asked the accused to lift up his shirt so that he could visually inspect his upper body. He then asked the accused to drop his pants and underwear, presumably for the sake of doing a similar visual inspection of his crotch area. He denied asking the accused to bend over, spread his buttocks and cough, as the accused testified. Constable Menard said that the search occurred in a private area of the detachment and there was no evidence that anyone else was present in the room at the time.

[92] While Constable Menard was not intending to hold the accused in custody on that occasion, it must be remembered that this was a drug-related arrest. Crack cocaine in 22 individually-wrapped packets, all in a single plastic baggie, as well as a roll of over $400 in cash were found on the accused's person at the roadside. I expect the cash money will form part of the inculpatory evidence against the accused on the charge of possession for the purposes of trafficking. Thus, I find that locating the $20 bill up the accused's sleeve provided Constable Menard with further reasonable and probable grounds justifying the strip search "for the purpose of discovering…evidence related to the reason for the arrest", to use the language in *Golden*. In addition, the manner in which the search was conducted generally complied with several of the best practices approved of in *Golden*:

1) it was conducted at the police station and not in public at the roadside;
2) Constable Menard was the only officer involved and is of the same gender as the accused;
3) the search was conducted with a minimum of force;

4) it appears to have been conducted as quickly as possible and in a way that ensured the accused was not completely undressed at any one point in time; and

5) it appears as though the search involved only a visual inspection of the accused's crotch area.

[93] As for the strip search on April 20, 2013, Constable Menard testified that this occurred in a bathroom area at the Whitehorse Correctional Center and was performed in the same manner as the search on March 9th. I infer from this that only Constable Menard was involved. I do not recall defence counsel cross-examining the Constable about the reason for this search, but it is reasonable to infer that it was because the accused was about to be placed into custody at the jail, pending a bail hearing. Although there was no evidence that the accused was being placed into the population of other serving prisoners, there is nevertheless good reason to distinguish this search from one immediately incidental to arrest. As stated by the majority in *Golden*, at para. 96:

> "It may be useful to distinguish between strip searches immediately incidental to arrest, and searches related to safety issues in a custodial setting. We acknowledge the reality that where individuals are going to be entering the prison population, there is a greater need to ensure that they are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment…"

[94] Further, the court in *Samuels*, cited above, at para. 42, opined that the standard for reasonable and probable grounds "may well be…lower when a detainee actually physically enters a prison population given the greater need for security."

CONCLUSION

[95] The accused has persuaded me that, on March 9, 2013, Constable Menard violated both his right to be secure against unreasonable search or seizure under s. 8 of

the *Charter*, as well as his right not to be arbitrarily detained under s. 9. However, I decline to exclude the evidence seized on that occasion pursuant to s. 24(2) of the *Charter*.

[96] The accused has failed to persuade me that he was arbitrarily detained on April 20, 2013, but even if he was, I would not have excluded the evidence seized following that arrest.

[97] Finally, given my factual findings, and considering all of the circumstances, the accused has failed to persuade me on a balance of probabilities that his s. 8 *Charter* right was violated as a result of either of the strip searches. Therefore, there is no basis for a remedy under s. 24(1) of the *Charter*. Accordingly the application for a stay of proceedings is dismissed.

Gower J.

[i] The 98 Hotel is about a half block from the Court House.