SUPREME COURT OF YUKON

Citation: *R v Gaber,* 2015 YKSC 38

Date: 20150825
S.C. No. 14-01508
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Plaintiff

And

MICHAEL GABER

Defendant

Before Mr. Justice R.S. Veale

Appearances:
Ludovic Gouaillier — Counsel for the Crown
David C. Tarnow — Counsel for the defendant

REASONS FOR JUDGMENT
(Voir dire – ss. 8, 9 and 10(b) *Charter* breaches)

INTRODUCTION

[1] Mr. Gaber is charged on a two-count indictment for drug offences that are alleged to have occurred in the course of his employment as a Corrections Officer at the Whitehorse Correctional Centre ("WCC"). Count one alleges that he possessed methylphenidate (Ritalin), a Schedule III substance, for the purpose of trafficking, and count two alleges that he possessed cannabis for the purpose of trafficking.

[2] Counsel for Mr. Gaber is challenging the detention and search at the hands of his supervising officers which led to the discovery of Ritalin on Mr. Gaber's person and

cannabis in his vehicle. He says Mr. Gaber's ss. 8, 9 and 10(b) *Charter* rights were infringed and he seeks to exclude the recovered drugs from evidence under s. 24(2).

[3] The Crown concedes that the search of Mr. Gaber's vehicle was not lawful, however he argues against the s. 24(2) remedy and says that the marijuana found in that location should be admissible as evidence. He takes the position that no *Charter* rights were breached in the discovery of the Ritalin. The Crown is not seeking to introduce any of the statements made by Mr. Gaber to his supervising officers.

[4] For the reasons that follow, I order that the cannabis shall be excluded as evidence and that the Ritalin is admissible.

BACKGROUND

[5] The Crown called three witnesses on this *voir dire*: Deputy Superintendent of Operations, Geoff Wooding; Superintendent Jayme Curtis; and Blaine Demchuk, a Manager of Correctional Services. The following facts are not really in dispute. Given the Crown's position, none of the statements given to corrections staff are admissible for the truth of their contents, although some of what Mr. Gaber said was introduced as part of the narrative.

[6] Mr. Gaber arrived at the WCC for a scheduled work shift at 2:30 p.m. on December 26, 2013. On his entrance into the facility, he was met by D/Supt. Wooding who immediately brought him into a boardroom with Supt. Curtis.

[7] D/Supt. Wooding and Supt. Curtis had information that Mr. Gaber was involved in providing 'contraband' to WCC inmates. This information had initially been relayed to Blaine Demchuk by an inmate whose identity is protected by informer privilege. The evidence of the witnesses was unclear about whether the suspected contraband was

illicit drugs or other items, such as cell phones or tobacco, which, while prohibited in the jail, are legally possessed outside the facility. D/Supt. Wooding and Supt. Curtis received the information on December 23, 2013, and believed it to be credible.

[8] On Mr. Gaber's arrival in the boardroom, Supt. Curtis advised him of the allegation against him and told him that he was going to be searched by D/Supt. Wooding. After a search of his backpack revealed nothing, Mr. Gaber's pockets were emptied. One of the items produced was a condom with what appeared to be pills inside. While Mr. Gaber initially said they were his, he was unable to explain what they were.

[9] This discovery led D/Supt. Wooding to retrieve Mr. Gaber's car keys and head out into the parking lot to search his vehicle. Before he left the boardroom, Mr. Demchuk was called in to sit with Supt. Curtis and Mr. Gaber. Mr. Gaber was asked to write out information about the source and destination of the contraband drugs. D/Supt. Wooding subsequently returned to the boardroom with a vacuum-sealed package containing what appeared to be tobacco and marijuana, as well as a baggie with $5 and $20 bills. At this point Supt. Curtis called the RCMP.

[10] The RCMP arrived at 3 p.m. and Mr. Gaber was arrested at 3:27 p.m. He was given his first *Charter* warning at this time and he asked to speak with a lawyer.

[11] The pills were subsequently determined to be methylphenidrate, or Ritalin, and a total of 59 were seized. In addition, 120 grams of marijuana were recovered from Mr. Gaber's vehicle.

ISSUES

[12] While agreeing on the basic unfolding of events, the defence and Crown take very different positions about the authority under which Supt. Curtis and D/Supt. Wooding brought Mr. Gaber into the boardroom, about the interactions in the boardroom and whether Mr. Gaber was detained such that his *Charter* rights were engaged, and obviously about whether the drugs found during the investigation should be admitted. As noted earlier, the Crown has conceded that the search of Mr. Gaber's vehicle was not lawful, in that it was not authorized by the *Corrections Act, 2009,* S.Y. 2009, c. 3 ("the *Act"*) and associated regulations.

[13] Accordingly, the issues to be determined are:

1. Was the search of Mr. Gaber in the boardroom lawful?
2. Was Mr. Gaber detained and was his s. 10(b) *Charter* right to counsel engaged?
3. Should the drugs found on Mr. Gaber's person and in his vehicle be excluded from evidence under s. 24(2) of the *Charter?*

THE BASIS FOR SEARCHING MR. GABER

The *Corrections Act* and associated policies

[14] Sections 20 through 22 of the *Act,* set out the parameters for searches of inmates and police prisoners (s. 20), search and detention of visitors (s. 21) and search and detention of staff members (s. 22). There is also a *Corrections Regulation* (O.I.C. 2009/250) that deals with searches of inmates and policy that sets out the procedures for searches of inmates, visitors and staff.

[15] Section 22 of the *Act* reads:

Search and detention of staff members
22(1) An authorized person may without individualized suspicion conduct

> (a) routine searches, authorized for security or safety purposes by the person in charge, of staff members entering or leaving or in the correctional centre, and of any personal possessions, including clothing, that staff members may be carrying or wearing; and
>
> (b) random searches, authorized for security or safety purposes by the person in charge, of staff members' lockers.

(2) A staff member must not impede or obstruct an authorized person conducting a search under subsection (1).

(3) If an authorized person believes on reasonable grounds that a staff member is carrying contraband or is in possession of evidence relating to an offence under subsection 23(1) [contraband and trespassing offences]

> (a) the authorized person may, with the staff member's consent, conduct a search of the staff member, the staff member's locker in the correctional centre and any personal possessions, including clothing, that the staff member may be wearing or carrying, in order to find the contraband or evidence; or
>
> (b) the person in charge may authorize the detention of the staff member in order to obtain the services of the police.

(4) With the staff member's consent, a search under paragraph (3)(a) may include a strip search conducted in accordance with the Regulations.

(5) A strip search of a staff member must be conducted by an authorized person of the same sex as the staff member unless the delay that would be caused by complying with this requirement would result in danger to human life or safety.

(6) If contraband or evidence relating to an offence under subsection 23(1) [contraband and trespassing offences] is found in a search under subsection (1) or paragraph (3)(a),

> the person in charge may authorize the further detention of the staff member in order to obtain the services of the police.
>
> (7) A staff member detained under this section must
>
> (a) be informed promptly of the reasons for the detention and of their right to retain and instruct counsel; and
>
> (b) be given a reasonable opportunity to retain and instruct counsel.
> [my emphasis]

[16] Policy B 3.2 is titled "Searches" and it "sets out the authority and procedure for conducting individual searches of inmates, visitors and other persons as well as searches of inmate areas and vehicles".

[17] Under the heading "Searches of correctional centre staff", Policy B 3.2 states the following:

> 24. Staff members, their lockers and effects may be searched, without individualized grounds, with the authorization of the Person In Charge.
>
> 25. The Person In Charge may specify a routine program of searches or may specify the search of a person or group of persons.
>
> 26. The search in section 24 may be a screening technique, a frisk search or, with the consent of the staff member, a strip search.
>
> 27. A staff member may not impede or otherwise refuse a search except for a strip search.
>
> 28. The Person In Charge may authorize the detention of a staff member who refuses a search or who is found with contraband to allow for the assistance of the police in the matter.
>
> 29. The requirements of section 23 of this policy apply equally to staff members who have been detained.

[18] Section 23 of the policy requires that, on detention, a person, in that case a visitor, must be promptly informed of the reason for their detention and given a reasonable opportunity to retain and instruct counsel.

[19] Policy B 3.2 also indicates that "Correctional Officers may lawfully conduct searches of ... vehicles entering correctional centre property" (s. 1.3). Further to this, ss. 30 and 31 of the Policy ("Search of vehicles") read:

> 30. The Person In Charge may make rules under the authority of section 15 of the *Act* providing for searches, without individualized grounds, of any vehicles entering onto the grounds of a correctional centre.
>
> 31. Where the Person In Charge makes a rule described in section 30 of this policy, he or she must provide clear notice of that rule at all vehicular entrances to the correctional centre.

[20] Section 15 of the *Act* is a generic rule-making provision which requires the person in charge to make rules, "not inconsistent with this *Act* and the Regulations", that must include rules about the conduct and activities and inmates and "other matters necessary or advisable for the maintenance of order and good management of the centre" (s. 15(1)(c)). I note that ss. 15(2) and (3) require that inmates, but not staff or visitors, be informed of and comply with the rules set by the person in charge**.**

ANALYSIS

Issue 1: Was the search of Mr. Gaber in the boardroom lawful?

[21] It is trite law that policies and rules cannot provide authority that is not granted by legislation. To the extent that policies contemplate jurisdiction that is in excess of the legislative grant of jurisdiction, they are of no effect. Although s. 25 of the policy allows

the Person In Charge to "specify the search of a person or group of persons", in the context of jail staff, the search cannot be one outside the parameters set by the *Act.*

[22] The Crown says that the informer's tip about Mr. Gaber was not sufficiently reliable to provide reasonable grounds for a belief that he was committing a contraband offence. The Crown therefore takes the primary position that Supt. Curtis and D/Supt. Wooding were acting under s. 22(1) of the *Act*, despite having what he admits was an individualized suspicion with respect to Mr. Gaber. In the Crown's submission, there is a legislative "gap", in that the *Act* does not permit the search of a staff member when there is individualized suspicion falling short of reasonable grounds to believe. In order to fill the gap, it must be the case that the type of search contemplated in s. 22(1) is possible in the circumstances of an individualized suspicion as well as in the absence of such suspicion.

[23] In the alternative, the Crown says that the investigation of Mr. Gaber was outside of the search provisions of the legislation. Rather it occurred in an employment or workplace context, and Mr. Gaber had some kind of a work-related reason to cooperate.

[24] While defence counsel agrees that the informer's tip was not reliable and that Supt. Curtis and D/Supt. Wooding were not acting pursuant to any legislative authority, he disagrees with there being a gap to be filled and says simply that Mr. Gaber was unlawfully detained and searched.

[25] Although, as the Crown points out, employees at correctional centres have a reduced expectation of privacy at work and are subject to heightened scrutiny (*R. v. March*, 2006 ONCJ 62), there are limits expressly placed on that scrutiny by the *Corrections Act*. Subject to my comments below on detention, I do not believe that

there are other general employment law principles that would displace the *Act* and provide for more permissive searches.

[26] I not agree with the Crown that there is a gap in the legislation. However, I accept that the search powers under s. 22(1) are available to authorized persons acting with individualized suspicion as well as to authorized persons acting without individualized suspicion. In either case, what the *Act* permits are random searches of staff members' lockers and routine searches of staff members and their personal possessions. What the Act does not permit on grounds falling short of reasonable belief is a targeted search directed at one individual. Routine is defined by the Oxford Dictionary as "performed as part of a regular procedure rather than for a special reason". The singling out of Mr. Gaber for an individual search in the jail's boardroom was obviously premised on a "special reason".

[27] It is also illogical that the Crown's position would allow for more intrusive searches on the basis of a suspicion than on the basis of reasonable grounds for belief. If the Crown's view of the legislation is accepted, it would be possible for WCC authorities to target and search a staff member without their consent on a less robust suspicion foundation, while requiring the same authorities to obtain consent where their grounds for suspecting a staff member of a contraband offence are significantly stronger. This is problematic.

[28] The *March* case filed by the Crown provides a rationale for the legislative scheme as it is drafted. In *March,* the accused Correctional Officer was charged with possession of marijuana. In the Ontario legislation, as with this legislation, there is a power to search an employee with "reasonable cause to believe that [the] employee is

bringing or attempting to bring contraband into or out of the institution". There, as here, the interest in Mr. March began with a tip from a confidential informant. In response to the tip, surveillance of Mr. March was undertaken, and the Chief of the Correctional Investigation and Security Unit observed what appeared to be a contraband drop, with Mr. March picking up two coffee cups with rolling papers, money, and two bales of tobacco from the parking lot immediately before reporting to his shift. This gave the Superintendent the reasonable cause to authorize a search.

[29] In considering Mr. March's *Charter* arguments about the lawfulness of the search, which were ultimately unsuccessful, McKerlie J. noted the appropriateness and necessity of administrative investigations, which in the case of Mr. March utilized surveillance in advance of Mr. March's detention and search, in order to ensure that the suspicions rose to the requisite level of reasonable cause.

[30] It is clear that the search conducted by Supt. Curtis and D/Supt. Wooding was targeted and premised on the informer's tip. It is equally clear, given the concession of the Crown, the fact that the tip was not corroborated, and the evidence of Blaine Demchuk that such allegations are fairly commonplace, that the individualized suspicion held about Mr. Gaber did not objectively rise to the level of reasonable grounds for a belief that he was bringing contraband into the jail. Despite the submission of the Crown, Supt. Curtis and D/Supt. Wooding were not incapacitated by a legislative gap at this point; they had the option of conducting an investigation and using tools such as surveillance to elevate the suspicion to reasonable grounds.

[31] As described above, the *Act* does not allow for the targeted search of an employee based on a suspicion. The *Act* permits routine or random searches without

individualized suspicion and in my view such routine searches may also be carried out when a suspicion is present. What is not authorized on the basis of an individualized suspicion is the targeted search of an individual; more robust information about the suspected activity is required. By searching Mr. Gaber on grounds that fell short of reasonable grounds for belief, Supt. Curtis and D/Supt. Wooding acted outside the ambit of the search authority granted by s. 22 of the *Act*. Moreover, even if there were reasonable grounds to believe that Mr. Gaber was carrying contraband, they would have had to obtain his consent before searching him under s. 22(3), and there was no real suggestion that Mr. Gaber so consented. While a requirement for consent may seem like it could essentially thwart any search power held by the authorized person, as observed in *March*, the failure of a staff member to consent could lead to disciplinary consequences, including dismissal from employment. Alternatively, where the reasonable grounds threshold is reached, it is open to the authorized person to detain the staff member and involve the RCMP in any subsequent investigative steps, including a search pursuant to a warrant or to arrest.

[32] I conclude that the search of Mr. Gaber on his entry into the boardroom was not authorized by law and was therefore unreasonable and a breach of his s. 8 right to be secure against unreasonable search.

Issue 2: Was Mr. Gaber detained and was his s. 10(b) *Charter* right to counsel engaged?

[33] All three of the Crown's witnesses went to significant lengths to explain that Mr. Gaber was not detained. They maintained that this was the case both before and after the discovery of the pills, despite the fact Mr. Demchuk, who stands 6'4" and

weighs over 250 pounds, was called in to, in the words of D/Supt. Wooding, “supervise Mr. Gaber” while his car was being searched. Supt. Curtis and Blaine Demchuk did at least concede that leaving would not have been simple for Mr. Gaber. While he was not informed that he was detained and therefore, in their view, was not detained, they did say that if he had attempted to leave the room after the pills were recovered, “a decision” would have had to have been made, and Supt. Curtis testified that he would have asked him to stay.

[34] The position that Mr. Gaber was not detained after the Ritalin pills were produced is simply not tenable. While it is true that the pills had not been identified, the manner of their packaging and the inability of Mr. Gaber to identify them obviously moved Supt. Curtis and D/Supt. Wooding into a situation where they had reasonable grounds to believe that Mr. Gaber was committing a criminal offence, beyond any institutional infraction that they may have suspected before. Indeed, D/Supt. Wooding testified in-chief that he realized Mr. Gaber was in possession of something illegal once the pills were produced. According to Supt. Curtis, Mr. Gaber at this point also volunteered that there was marijuana in his car. Further, both D/Supt. Wooding and Supt. Curtis were concerned enough to bring Mr. Demchuk, a physically-imposing individual, into the boardroom to keep an eye on things. Whether or not Mr. Gaber was formally advised he was detained, given the discovery the pills, the revelation that there was marijuana in his car, the fact that D/Supt. Wooding was headed out to search his vehicle, and the presence of Mr. Demchuk, a reasonable person in Mr. Gaber’s position would have concluded that he had no choice but to stay where he was (see *R. v. Suberu,* 2009 SCC 33).

[35] It is less obvious that Mr. Gaber was detained when he was first brought into the board room by D/Supt. Wooding, although defence counsel urges this finding as well.

[36] In *R. v. Vandenbosch*, 2007 MBCA 113, Steele J.A. in a majority decision, found that, while *Charter* concerns are generally engaged when prison officials single out an individual and step outside of routine administrative searches, they are generally not engaged if the intervention is preventative rather than about law enforcement (paras. 29 and 51). *Vandenbosch* also likens the expectation of liberty and privacy in a prison to that of a border.

[37] Given the legislation and policy in the area, it should be clear to anyone working at the WCC that they may be subject at any time to routine or random searches of their person and/or belongings, or, especially if contraband allegations are as commonplace as suggested, to investigations into those allegations.

[38] Here, the decision to intercept Mr. Gaber at the start of his shift and bring him into the boardroom to question him about the allegations did not amount to a detention. While Mr. Gaber would have no doubt been uncomfortable leaving and may have faced administrative consequences for doing so, the decision of his employer to confront him in this manner about a contraband-related allegation was appropriate.

[39] I find that Mr. Gaber was detained from the point at which the pills were discovered. Given s. 22(7) of the *Act* and s. 23 of Policy B 3.2, Mr. Gaber should have at this point been informed promptly of his right to retain and instruct counsel and given a reasonable opportunity to do so. The failure of Supt. Curtis and D/Supt. Wooding to provide Mr. Gaber his right to counsel in these circumstances amounts to a breach of Mr. Gaber's s. 10(b) *Charter* right.

[40] It should be noted that defence counsel's *Charter* application also referenced a breach of s. 9, although virtually all of the argument was subsumed by submissions on s. 8 and s. 10(b). On the evidence, I do not find that Mr. Gaber's s. 9 right to be free from arbitrary detention was breached.

Issue 3: Should the drugs found on Mr. Gaber's person and in his vehicle be excluded from evidence under s. 24(2) of the *Charter*?

[41] I have found breaches of Mr. Gaber's ss. 8 and 10(b) *Charter* rights. The search of Mr. Gaber in the boardroom was done outside of the scope of searches permitted by the *Corrections Act,* and was not done pursuant to law. Similarly, the search of his vehicle, which the Crown concedes was unlawful, represents a breach of s. 8. I further determined that Mr. Gaber was detained from the point at which D/Supt. Wooding located condom-wrapped pills in his pocket and that he was not promptly advised of his right to counsel, as is required by both the *Corrections Act* and s. 10(b) of the *Charter.*

[42] The remaining question is whether these breaches should result in the exclusion of the drugs from evidence. Section. 24(2) of the *Charter* states:

> (2) 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.

The *Grant* framework

[43] In *R. v. Grant,* 2009 SCC 32, the Supreme Court of Canada reiterated the purpose and focus of s. 24(2) and set out the factors relevant to its application. The section is essential to maintaining the integrity of, and public confidence in, the justice

system (para. 68). It has a prospective and societal focus, and is aimed at systemic concerns (paras. 69 and 70). An inquiry under s. 24(2) is objective and asks whether a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute (para. 68).

[44] The factors to be considered are: (i) the seriousness of the *Charter*-infringing state conduct, (ii) the impact of the breach on the *Charter*-protected interests of the accused, and (iii) society's interest in the adjudication of the case on its merits.

(i) The seriousness of the *Charter*-infringing state conduct

[45] The more severe or deliberate the state conduct leading to the *Charter* violation, the greater the need for the courts to dissociate themselves from the conduct by excluding evidence. While an inadvertent or minor violation may not favour the exclusion of evidence, a wilful or reckless disregard of *Charter* rights will have a negative effect on the public confidence in the rule of law. Extenuating circumstances may attenuate the seriousness of a breach, as will good faith on the part of the investigator. Wilful or flagrant disregard for the *Charter* or deliberate conduct in violation of established standards tend to support exclusion.

[46] In this case, there were three distinct *Charter* breaches.

[47] The first breach of s. 8 of the *Charter* flowed from the initial search of Mr. Gaber when he was brought into the boardroom for an investigation into the allegation about contraband. Although the Crown conceded that the informant's tip did not rise to the level of reasonable grounds for belief, from the testimony of Supt. Curtis and D/Supt. Wooding it seems that they were operating as if they had these grounds. Indeed,

D/Supt. Wooding testified to his view that they "had ample reasonable grounds" based on the information from the informant. Supt. Curtis was less clear about the strength of his belief, calling the initial interview and search with Mr. Gaber an "investigation into information".

[48] Regardless of the strength of the grounds, s. 22 of the *Corrections Act* is clear that non-routine searches of specific staff members for cause can only be done with consent. Absent such consent, the person in charge has the option of detaining the staff member and bringing in the police.

[49] There was no real suggestion that Mr. Gaber consented to the search that was conducted. Although D/Supt. Wooding initially framed the search of Mr. Gaber's backpack, jacket and pockets as a request, when pressed, both he and Supt. Curtis described advising Mr. Gaber that he was going to be searched. Although Mr. Gaber said "okay", Supt. Curtis testified in-chief that he did not specifically ask for consent or ask if it was okay to search him. I find that there was no consent sought, and that, even with a subjectively flawed view of the strength of the grounds underpinning the search, there was a failure on the part of Supt. Curtis and D/Supt. Wooding to comply with their authority under the legislation. While on its own, this breach is not particularly severe or deliberate, it is more troubling in the context of the subsequent excesses of authority and in light of what was at times evasive and self-serving evidence given by Supt. Curtis and D/Supt. Wooding in particular, and which will be discussed below.

[50] The second breach, also of s. 8, was with respect to the search of Mr. Gaber's vehicle in the parking lot. Although Policy B 3.2 purports to give authority to search vehicles in the WCC parking lot, the Crown conceded the breach as there is no source

for this jurisdiction in the *Act* or Regulations. The *Act* refers to searches of visitors, including any personal possessions, including clothing, that are being carried or worn into the facility, but does not go further (s. 21). The provision is similar for staff members (s. 22). Section 15, which the Policy relies on, clearly contemplates the making of rules for inmates and its scope cannot be expanded to authorize searches not otherwise addressed by the search provisions of the *Act*. The internal WCC policy cannot confer jurisdiction that the *Act* does not grant. While the conduct of D/Supt. Wooding and Supt. Curtis may not have been deliberate, the breach was as a result of flawed but pervasive operational policy, a factor that increases the severity of the breach.

[51] The third *Charter* breach is, in my view, the most serious. Once suspiciously-wrapped and unidentified pills had been discovered on Mr. Gaber, it should have been clear to everybody that he was facing very real criminal jeopardy. In his examination-in-chief, Supt. Curtis was asked at what point he realized Mr. Gaber was in possession of something illegal, as in criminal, and his response was “That would be after he pulled the pills from his pocket that were condom wrapped”.

[52] In addition to this direct evidence, the actions taken by Supt. Curtis and D/Supt. Wooding strongly imply that they recognized the criminal jeopardy Mr. Gaber was in; they called a third corrections officer, Mr. Demchuk, into the boardroom to, in D/Supt. Wooding’s words, “supervise Mr. Gaber” and also set about compelling Mr. Gaber to write out the details of his drug trafficking transactions.

[53] Nonetheless, throughout cross-examination, all three of the Crown witnesses either evaded questions about whether Mr. Gaber was detained or outright denied that he was. All relied on the fact that “[Mr. Gaber] was not told he was detained”, although

they varied within their own evidence at points on whether he would have been able to leave. For example, in-chief, D/Supt. Wooding said that Mr. Gaber would have been allowed to leave after the pills were discovered, but then conceded that if he got up and left, they would have had to decide whether to detain him or not. In the context of his earlier evidence about Mr. Demchuk coming in to "supervise Mr. Gaber", this characterization of the detention is not credible. Similarly, although Supt. Curtis was candid about his belief that Mr. Gaber was trafficking drugs in the institution, and indeed sought and received a lot of details about that activity from Mr. Gaber, he also evaded questions about Mr. Gaber's detention status with the same recital about not telling Mr. Gaber he was detained. Supt. Curtis did go further than D/Supt. Wooding and concede that he would have asked Mr. Gaber to stay, although this was only after he was confronted with having given that evidence at the preliminary inquiry.

[54] The inference I draw from the responses to lengthy questioning in this area is that D/Supt. Wooding and Supt. Curtis are deliberately disavowing a detention in order to justify their decision to not give Mr. Gaber his right to counsel and defend their actions in gathering self-incriminating evidence through both oral and written statements. Apart from offending the *Charter*, they knew or ought to have known that the failure to advise Mr. Gaber of his right to counsel was in explicit contravention of WCC legislation and policy and their persistent investigation in the absence of providing access to a lawyer is reprehensible.

[55] I accept that despite rather lengthy career experience in and with prisons, both D/Supt.Wooding and Supt. Curtis have not often been called on to detain individuals other than the inmates they supervise. D/Supt. Wooding testified that in 28 years he

could not recall ever detaining an individual, and Supt. Curtis, who has been in corrections for 19 years, had never before searched a staff member for contraband. While this could provide an explanation for the problematic way this investigation unfolded and bolster the position that the Superintendent and Deputy Superintendent were acting in good faith, it is, to say the least, disturbing that corrections employees in such senior positions are unaware of the characteristics of a detention or will go to such great lengths to justify their view that an individual is not detained until he is told he is. More troubling yet is their conduct in gathering inculpatory statements from Mr. Gaber without any consideration of allowing him to call a lawyer.

[56] Although I have doubts about the sincerity of the detention evidence given by all three corrections officers, my view that D/Supt. Wooding's evidence about Mr. Gaber's detention status was disingenuous is bolstered by the fact that he has in the past been judicially criticized for undermining *Charter* rights in the course of his employment. This was in the context of a position he held as an Inspector with the B.C. Investigation and Standards Office and while he was acting in a role intended to provide independent investigation and review of inmate complaints and discipline. In *R. v. Bacon*, 2010 BCSC 805, McEwan J. found that Mr. Wooding engaged in "a degree of collaboration with the police and [Surrey Pretrial Services Centre] that appears at odds with the responsibilities of the ISO" and collaborated with the police and the detention facility in a notionally independent investigation into institutional restrictions placed on Mr. Bacon. McEwan J. also found that Mr. Wooding acted to thwart "FOI [Freedom of Information]" requests by offering to destroy documents he was provided by the Deputy Warden of

the facility. This past conduct further detracts from his credibility with respect whether the errors in the investigation into Mr. Gaber arose in good faith.

[57] While each individual breach described here may not be characterized as severe or deliberate in isolation, the cumulative effect of multiple breaches is relevant to a determination about the overall seriousness of the *Charter*-infringing conduct. In *R. v. Lauriente,* 2010 BCCA 72, the British Columbia Court of Appeal reaffirmed the principles established in the pre-*Grant* case *R. v. Bohn,* 2000 BCCA 239, and specifically concluded that in a situation where there are multiple *Charter* breaches, each of which, taken individually, may not favour exclusion of evidence, a trial judge is "entitled to have regard to all of [the] breaches, both in placing the seriousness of the individual breaches in context, and, more particularly, in determining whether this pattern of disregard of the *Charter* by the authorities could bring the administration of justice into disrepute" (para. 39). *Grant* also has language to this effect, noting at para. 75 that "evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion".

[58] Given the seriousness of the s. 10(b) breach, the flawed institutional policy that led to the s. 8-infringing vehicle search, and the overall pattern of disregard or ignorance of the *Charter* and the provisions of the *Corrections Act,* this factor tends to heavily support exclusion of the drug evidence found in Mr. Gaber's possession.

(ii) Impact on the *Charter*-protected interests of the accused

[59] This factor considers the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused and assesses the extent to which the breach actually undermined those interests. A breach can have a fleeting and technical impact

or it can have a profoundly intrusive impact. In the case of a s. 8 breach, the higher the expectation of privacy in an area, the more serious the breach.

[60] In terms of the first s. 8 breach in the context of the unauthorized search of Mr. Gaber's pockets and backpack, I do not find that the impact on his *Charter*-protected right to privacy or human dignity was high. Mr. Gaber was an employee at a jail, a place where there are reduced expectations around privacy. As an officer in contact with inmates being housed at the facility, the legislation provides that he can be subject to random and routine searches of his clothing and belongings. His expectation of privacy in the places searched was low as was the impact of the search.

[61] The search of Mr. Gaber's vehicle had a somewhat more serious impact on his *Charter*-protected interests. While the WCC's reasons for instituting a policy about vehicle searches are understandable and in keeping with legislation elsewhere in the country, Yukon's *Corrections Act* does not provide for such searches. A vehicle owner has a reasonable expectation of privacy in his or her car. However, given the sign in the parking lot, which advises that all persons and vehicles are subject to search, and the internal policy to that effect, I do find that, regardless of the legality of the search, Mr. Gaber's expectation of privacy was considerably attenuated in the circumstances.

[62] In contrast, the s. 10(b) breach had a significant impact on Mr. Gaber's *Charter*-protected right to silence, as well as on his liberty and autonomy interests. Mr. Gaber was not only detained without being advised of his right to counsel but was also questioned at some length about the details of the offences he was suspected of. In what I assume is in recognition of this serious incursion on Mr. Gaber's interest in

choosing whether or not to speak to authorities, the Crown has agreed that the statements made to Supt. Curtis and D/Supt.Wooding should be excluded.

(iii) Society's interest in an adjudication on the merits

[63] This final factor requires a consideration of whether the truth-seeking function of the trial process will be better served by admitting versus excluding the evidence. The reliability of the evidence is an important factor in this inquiry; something which is not at issue with respect to drug evidence. This factor weighs in favour of admission.

Balancing

[64] The issue is whether the drugs found in the course of the investigation should be excluded from evidence at Mr. Gaber's trial.

[65] With respect to the marijuana found in Mr. Gaber's car, it is excluded. While the impact on Mr. Gaber's *Charter*-protected privacy interest was relatively low and the drugs are clearly reliable, the improper conduct of Supt. Curtis and D/Supt. Wooding during this phase of the investigation was serious. I say this taking into account both the s. 8 and the s. 10(b) *Charter* breaches. Although Mr. Gaber's car would have undoubtedly been searched at some point, the s. 10(b) breach still had a temporal, if not causal, effect on the discovery of the marijuana in the vehicle. The nature of the right to counsel breach and the subsequent efforts of Supt. Curtis and D/Supt. Wooding, and to a lesser extent, Mr. Demchuk, to deny Mr. Gaber's detained status in this *voir dire* reflect a wilful disregard or even disdain of the *Charter* on the part of the investigating officers. Similarly, the s. 8 breach is made more serious by the fact that the warrantless search of the car on the WCC property was expressly permitted by flawed institutional policy that had the potential to make such unlawful searches commonplace. The

admission of the marijuana in Mr. Gaber's trial would undermine public confidence in the rule of law, and this factor overwhelms the other two in my view.

[66] In balancing the s. 24(2) factors with respect to the Ritalin evidence, although there were multiple *Charter* breaches in the course of the investigation, including the s. 8 breach that led to the discovery of the Ritalin, the conduct of Superintendent Curtis and Deputy Superintendent Wooding prior to locating this evidence was less egregious than their conduct afterwards. Again, the impact of the state conduct on Mr. Gaber's *Charter*-protected interests was minimal, and the drug evidence is reliable and critical to the Crown's case. In the context of the allegations and the profound breach of public trust that a conviction for these offences would represent, in my view a reasonable person informed of the relevant circumstances and the values underlying the *Charter* would conclude that the exclusion of the Ritalin would more negatively impact the administration of justice than its inclusion.

[67] This case is set for the continuation of the trial on November 5 and 6, 2015.

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VEALE J.