QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2014 SKQB 5**

Date: **2014 01 15**
Docket: QBG 3/2012
Judicial Centre: Swift Current

BETWEEN:

HER MAJESTY THE QUEEN

- and -

[redacted]

Counsel:

Denis Quon	for the Crown
Patrick Fagan, Q.C.	for the accused

JUDGMENT
January 15, 2014

GUNN J.

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[1] The accused is charged with the possession of cocaine for the purpose of trafficking on October 21, 2011 in Swift Current District, Saskatchewan.

THE APPLICATION

[2] The accused seeks a stay of proceedings pursuant to the inherent jurisdiction of the court and s. 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*"). The Applicant asserts that the conduct of the authorities in failing to preserve

evidence has impaired his right to make full answer and defence, as guaranteed by s. 7 of the *Charter*.

[3] In the alternative the Applicant seeks an order for the exclusion of evidence pursuant to s. 24(2) of the *Charter*. Specifically the Applicant seeks exclusion of all evidence and derivative evidence acquired by the police during the course of the investigation giving rise to this prosecution, including, but not limited to: any and all evidence obtained in the arrest and search of the Applicant and the vehicle he was driving and any and all statements made by the Applicant. The Applicant states his rights as guaranteed by ss. 7, 8, 9 and 10 of the *Charter* have been violated.

PRELIMINARY ISSUES

[4] At the commencement of the trial the Crown admitted that the police conducted a warrantless search and that the onus was on the Crown to establish admissibility. The Crown indicated it was its intention to immediately commence the trial with a *voir dire* in which it would lead all of its evidence. This evidence would not be restricted solely to the issues to be determined on the *voir dire*. The Crown anticipated that a ruling would be made on the *voir dire* and subject to any defence evidence there would be a ruling on the trial. The Crown stated it was unlikely that it would call any additional evidence on the trial.

[5] The court made it clear to the parties that a ruling would be given on the issues raised in the *voir dire*. The parties would be given an opportunity to apply any evidence tendered on the *voir dire* to the trial proper. This might include all or part of the

evidence tendered on the *voir dire*. Then each party would be given the opportunity to call any additional evidence on the trial proper.

[6] Prior to the commencement of the trial the accused sought disclosure from the Crown of the operational manual of the RCMP manuals in relation to video equipment, such as that used at the roadside in this case. The Crown resisted production of these manuals. The accused withdrew his application for disclosure at the commencement of the trial. However in due course portions of the operational manual were introduced into evidence by counsel for the accused.

[7] Two issues arose which could affect the weight to be attributed to evidence tendered. An order was made for exclusion of Crown witnesses until they had concluded their evidence at the trial. The Crown advised that a similar order was made at the preliminary hearing and that in error the Crown sent the wrong transcript of evidence from the preliminary hearing to two of its witnesses. Having heard the evidence, I am satisfied that the officers in question appreciated the error immediately and the weight of their evidence will not be adversely affected by this issue.

[8] It became apparent during the cross-examination of Cpl. Halbauer that prior to offering his testimony to the court he had been in the court room prior to the opening of court and he had the opportunity to see some exhibits tendered in evidence by the defence during the *voir dire*, including the RCMP operational manuals. Had Cpl. Halbauer not seen the manuals when he examined the exhibits he would not have known they had been tendered in evidence — as he was bound by the exclusion order made by the court. The practice of permitting witnesses to review exhibits once the trial has

commenced is not to be encouraged as it has the possibility of negatively affecting the strategy of defence counsel in the conduct of their cross-examination.

EVIDENCE

Constable Harris:

Experience:

[9] Constable Harris has been a member of the RCMP for seven years. His first three years of service were spent in Swan River, Manitoba doing general duties. His next posting was in Easterville, Manitoba, a remote community in northern Manitoba, also doing general duties. He was involved in about 15 drug investigations during his time in Manitoba.

[10] At the time of this incident he was a member of the Roving Traffic Unit (RTU) in Swift Current, Saskatchewan. He had been a member of this unit for two years and this involved investigating breaches of *The Traffic Safety Act,* S.S. 2004, c. T-18.1 including ie. seatbelt infractions, speeding, impaired driving; also investigations of breaches of the *Criminal Code,* R.S.C. 1985, c. C-46 — ie. firearms and drugs. Cst. Harris took the Pipeline Training course in 2008 as well as a refresher course in 2010. Cst. Harris described this as a course "intended to enhance the officer's ability to look beyond the traffic stop to other things which might be developing or right in front of your face during the traffic stop."

[11] In the time Cst. Harris spent in Swift Current up to the time of this incident, he indicated he had been involved in approximately five or six drug investigations. He conducted searches in these previous investigations. When asked by the Crown how often he had been right in his "so called hunches", he indicated he was right about 90% of the time.

Cpl. Walkden:

Experience:

[12] At the time of this incident, Cpl. Walkden was the corporal in charge of the RTU at Swift Current, Saskatchewan. He had held this position for about 3 years. The primary function of the RTU is to enforce safety of the travelling public and to enforce the traffic acts.

[13] Cpl. Walkden has 24 years experience with the RCMP. His experience as a peace officer is quite extensive. He began his career in Thompson, Manitoba in 1989 where he served for two years doing uniform work. He was then seconded to the plain clothes unit doing general investigation where 80-90% of his time was spent on drug investigations. This amounted to about seven investigations per week. During that time he received training in drug identification and drug investigations. He went to Ottawa to take a three week advanced drug investigations course. He also took a four week course in undercover drug investigations.

[14] Cpl. Walkden spent 10 years in Winnipeg, Manitoba in the customs and excise unit. This involved investigating the smuggling of contraband from the United States into Canada and across Canada. Cpl. Walkden then moved to a traffic services unit where he served for about 12 years. Cpl. Walkden formed the RTU in Manitoba and managed the unit. The Pipeline program came to Canada at about this time from the United States. This program was developed to enhance an officer's ability to detect travelling criminals through the articulation of the indicators they observed on their traffic stops. Cpl. Walkden took the Pipeline training course and subsequently became a national instructor for the Pipeline Training course. He has taught over 5,000 police officers in Australia, the United States and Canada about criminal indicators and how to articulate those indicators. He has lectured at a number of conferences in the United States about concealment methods, including compartments and the detection of travelling criminals. Cpl. Walkden testified that he has seized approximately 300 kilograms of cocaine in his career.

PARTICULARS OF THE STOP LEADING UP TO THE COMMENCEMENT OF THE SEARCH OF THE VEHICLE

[15] October 21, 2011 Cst. Harris was on duty having started work at 7a.m. Cst. Harris started his day in the office and then parked his marked Crown Victoria police car facing west in an approach in the median dividing the east and west bound lanes of highway No. 1, about one kilometer east of Swift Current at about 9 a.m. He was in position to observe the eastbound traffic on the highway and his vehicle was not concealed in any way.

[16] About 9:34 — 9:35 a.m., Cst. Harris observed a greenish coloured Chrysler approaching from the west, travelling eastbound. It was travelling at an appropriate speed for that highway at that time — ie. not too fast and not too slow. The driver appeared to be engaged in a normal driving pattern in a normal lane of traffic. The equipment on the vehicle appeared to be fine. The vehicle was being driven in a lawful manner.

[17] Cst. Harris indicated that he noticed the driver of this Chrysler was sitting very low in his seat. When the vehicle passed the police car the driver did not make any eye contact with Cst. Harris, or even look his way to acknowledge he was there. Cst. Harris acknowledged there was nothing illegal about this but he found this to be a cause for concern because in his experience 95% of people will acknowledge a marked police vehicle. Cst. Harris testified he found it odd that the driver of this vehicle did not look at him or acknowledge him. In addition the vehicle had Manitoba plates.

[18] Cst. Harris said he did not know how long the driver had been on the highway, so he decided to stop him to see if he was okay to drive. When asked in direct examination what his purpose was for stopping the vehicle, Cst. Harris testified that he was enforcing *The Traffic Safety Act* and he wanted to make sure the driver had a proper driver's licence, that the vehicle registration was valid, that the driver was not fatigued and that he was sober.

[19] When asked in cross-examination why he stopped the vehicle Cst. Harris testified there were three reasons: the fact that the driver was sitting low in his seat; the fact that the driver did not acknowledge him when he drove by; and the fact that the

vehicle had a Manitoba licence plate. Then Cst. Harris indicated he also wanted to check the operator's license and his sobriety.

[20] Cst. Harris turned his police vehicle around to follow the Chrysler. It had travelled about 4 kilometers along the highway. He turned on his emergency lights and the vehicle stopped in 15-20 seconds, having travelled an additional ½ to 1 kilometer. Cst. Harris was unable to provide any information in respect to the speed of the Chrysler. The vehicle stopped on the shoulder of the east bound lane of the No. 1 highway. Cst. Harris pulled his police vehicle in directly behind the Chrysler, about 5-6 feet behind it.

[21] Prior to approaching the Chrysler, Cst. Harris placed a call to his supervisor Cpl. Walkden to advise that he had pulled a vehicle over because the driver drove by and did not look at him. Cst. Harris did not suggest he called his supervisor every time he made a traffic stop, but he denied he called him in this case because he had embarked on a drug investigation. Cpl. Walkden confirmed this telephone call and indicated that Cst. Harris wanted him to do some checks on the RCMP computer system for him.

[22] Cst. Harris approached the driver's side of the Chrysler. Cst. Harris did not ask the driver about his posture, even though that had been a concern. The driver's window was down. Cst. Harris said good morning to the driver, who we now know was [redacted], and asked to see his driver's licence and registration. Cst. Harris saw no indicia of any impairment due to alcohol or drugs. Cst. Harris looked over the interior of the vehicle as he spoke to Mr. [redacted]. He saw nothing unusual, did not smell any air fresheners, nor did he smell any drugs.

[23] Cst. Harris observed the driver attempting to retrieve documents from his wallet and his hands were shaking "very bad". The shaking was described as being no more than 1 inch back and forth. Mr. [redacted] was having a hard time retrieving the documents from his wallet. He did retrieve the documents for him. All of this took a matter of seconds.

[24] As the vehicle was registered to a third party, Mr. [redacted] explained that the vehicle belonged to a friend who had loaned it to him because his own vehicle had been in an accident. Mr. [redacted] explained that he was going to Winnipeg to return the car to his friend. He planned to fly back to Calgary. At some point Mr. [redacted] also told Cst. Harris that he had a daughter in Winnipeg.

[25] Cst. Harris testified that he has stopped numerous vehicles in the course of his police work and he acknowledged some of the drivers he has stopped tend to be nervous, but this subsides after a short time. Cst. Harris testified that from his training and experience, Mr. [redacted] hands were shaking a little bit out of the ordinary, more than he would generally see.

[26] Cst. Harris testified that as a result of his training and experience, these obvious nerves caused his awareness to be heightened that something might be going on.

[27] Cst. Harris engaged the driver in conversation. He asked Mr. [redacted] where he was coming from and Mr. [redacted] indicated he was coming from Calgary. Cst. Harris asked Mr. [redacted] where he was going and Mr. [redacted] indicated he was going to Winnipeg.

[28] Cst. Harris was asked in cross-examination about the Pipeline course, which he acknowledged is a course designed to enhance the ability of police officers to investigate criminal offences. Cst. Harris denied that he had stopped Mr. [redacted] as part of a drug investigation. He acknowledged that the Pipeline course encourages officers to engage people in conversation — which he did with Mr [redacted]. He acknowledged that Mr. [redacted] was stopped and could not go anywhere. He was detained under *The Traffic Safety Act*.

[29] Then Cst. Harris returned to his police vehicle and ran a driver's licence check on Mr. [redacted] on his police computer. This revealed that Mr. [redacted] had a valid classified drivers licence from Calgary. He then ran a criminal index, CPIC check which revealed that Mr. [redacted] had a history of drug activity. He had previously been charged and convicted of conspiracy and trafficking in a controlled substance in 2000 and he had been sentenced to three years. Cst. Harris noted there were other drug charges and proceeds of crime charges, but he did not know if there had been convictions on those.

[30] Cst. Harris considered the totality of circumstances presenting themselves. He summarized these as being: Mr. [redacted] nervousness, and that he was travelling from Calgary (a source hub for narcotics) to Winnipeg (a known distribution centre for narcotics). Cst. Harris indicated the source of his knowledge on the above issues came from his training and experience and from discussions with his colleagues who have quite extensive experience.

[31] At this point Cst. Harris contacted his supervisor, Cpl. Walkden to describe what was happening. Cst. Harris asked Cpl. Walkden if he was familiar with the driver

and the answer was "no". Cst. Harris did not discuss with Cpl Walkden anything in respect to the sobriety of the driver or the operation of the motor vehicle.

[32] In direct examination Cst. Harris testified he advised Cpl. Walkden that he believed he had enough to detain Mr. [redacted] at that point. In cross-examination Cst. Harris was asked whether at the time of the cell phone conversation with Cpl. Walkden he had decided to detain Mr. [redacted]. Cst. Harris responded that "not fully, he hadn't decided to detain him." He would not agree with counsel that he had in fact decided to detain him. Cst. Harris testified he was forming his grounds to detain him based on the totality of circumstances he had before him at that time.

[33] Cst. Harris was reminded of his testimony at the preliminary inquiry when he was asked the following questions and provided the following answers:

> Q. And as of the time of this cellular communication with Corporal Walkden, had you decided to detain Mr. [redacted]?
>
> A. Yes, it was in my head that that's where I was going with this investigation.
>
> Q. The question is easier than that. Had you made a decision to detain Mr [redacted]?
>
> A. Yes.
>
> (Page 71 lines 319 to 320 inclusive)

[34] Cst. Harris then agreed that at the time of his conversation with Cpl. Walkden he had decided to detain Mr. [redacted]. Cst. Harris testified that there was nothing said to him by Cpl. Walkden which assisted him in formulating the grounds to detain Mr. [redacted]. The conversation with Cpl. Walkden took place between 9:40 to 9:44 a.m.

[35] At about 9:45 a.m. Cst. Harris went back to speak to Mr. [redacted]. In cross-examination, Cst. Harris initially denied that at this point in time he was clearly conducting a drug investigation. He maintained that he was still conducting a traffic stop in spite of the fact that he had already made the decision to detain Mr. [redacted] for a drug investigation. Subsequently Cst. Harris acknowledged that when he went back to talk to Mr. [redacted] he had decided to detain him for a drug investigation and he was in the middle of a drug investigation.

[36] Cst. Harris did not tell Mr. [redacted] he was conducting a drug investigation. He told Mr. Santos he was waiting for some information to come up on the computer with respect to the registration of the vehicle. Cst. Harris said Mr. [redacted] was not yet detained for a drug investigation. He was still conducting his duties pursuant to the traffic stop.

[37] Cst. Harris returned to his police vehicle and almost immediately placed a call on his cell phone to Cpl. Halbauer. Cpl. Halbauer was a more senior member, (well trained and highly accurate) of the RCMP who had been a member since 2003. Cpl. Halbauer worked regularly with a drug dog named Nugget. Cst. Harris denied he called Cpl. Halbauer because he had the dog. Cst. Harris testified in cross-examination that 90% of the time he calls for back up on a routine traffic stop because he does not know who he is dealing with on the No. 1 highway.

[38] Cst. Harris told Cpl. Halbauer that he had a guy stopped who had previously been convicted of conspiracy to traffic in a controlled substance. Cst. Harris did not talk to Cpl. Halbauer about the registration status of the vehicle. Cst. Harris confirmed that the question of the registration was not particularly important as he had already received

proper documentation from Mr. [redacted] about the vehicle relating to registration and insurance. Cst. Harris asked Cpl. Halbauer if was available to attend. At that point, Cst. Harris said he had a suspicion there might be some criminal activity going on. This suspicion was based on his training and experience, the totality of the circumstances and how things were unfolding. Cst. Harris said he thought he was going to detain Mr [redacted] — which he ultimately did.

[39] Cst. Harris made no notes of his conversation with Cpl. Halbauer as it was being recorded on the in car audio video system. However approximately one minute into the conversation with Cpl. Halbauer, Cst. Harris intentionally turned the audio off and muted the conversation. When this is done the conversation is not being recorded and cannot be recovered. Cst. Harris confirmed that some of this conversation would have been germane to the issue of detention of Mr. [redacted].

[40] Cst. Harris went back to Mr. [redacted] vehicle and he testified that he ended the traffic stop. Cst. Harris returned Mr. [redacted] driver's licence and registration. He noted that Mr. [redacted] hands were still shaking at this point. He thanked Mr. [redacted] and told him that everything was okay. Cst. Harris proceeded to walk away from Mr. [redacted]' vehicle, but he said he wanted to ask him some more questions, so he turned around after two or three steps and walked back to Mr. [redacted] window and explained he wanted to ask him a couple more questions. Cst. Harris told Mr. [redacted] he was not obligated to answer his questions, but there were a couple of questions he wanted to ask him. Mr. [redacted] said "yeh, sure." Cst. Harris asked Mr. [redacted] to step out and come to the back of his vehicle which he did.

[41] Cst. Harris did not tell Mr. [redacted] that he was detained at this point for a drug investigation. It was Cst. Harris' intention to ask Mr. [redacted] some further questions when he asked him to step outside the vehicle and he proceeded to ask him some additional questions.

[42] In cross-examination Cst. Harris initially testified that he did not ask additional questions outside the vehicle to raise Mr. [redacted] level of nervousness. However when confronted with his testimony at the preliminary hearing he confirmed that he did ask additional questions for the purpose of raising Mr. [redacted] level of nervousness. There was considerable prevarication on this issue. He ultimately said he wanted to confirm his suspicions and so he asked him three questions.

[43] Cst. Harris said to Mr. [redacted], "so you're coming from Calgary going to Winnipeg?" Mr. [redacted] responded "yes". Cst. Harris asked Mr. [redacted] what time he left Calgary. Mr. [redacted] thought about it briefly and said he thought it was about 5 a.m. when he left Calgary. Cst. Harris asked Mr. [redacted] how he was getting back from Winnipeg and he responded he was going to fly.

[44] When Cst. Harris was asked by defence counsel whether he was not totally satisfied that he was going to detain him until he got answers to these three more questions, Cst. Harris responded — "yes, that's why I asked the questions." Then Cst. Harris went on to say that it was his intention to detain him but he wanted the answers to these three more questions. Cst. Harris did not agree with counsel's suggestion that Mr. [redacted] had already been detained and that Cst. Harris had received answers to all the

questions he wanted to ask without ever telling Mr. [redacted] he was detained and that he had certain rights which flowed from that detention, ie. the right to call a lawyer.

[45] Cst. Harris testified that if Mr. [redacted] had refused to get out of the vehicle he would absolutely have let him drive away. I will address this later, but must say at this point that I do not find this to be credible given that Mr. [redacted] was initially detained pursuant to the traffic stop and Cst. Harris had already confirmed that he had made the decision to detain Mr. [redacted] for a drug investigation. Cst. Harris was already involved in a drug investigation.

[46] Cst. Harris said he explained to Mr. [redacted] that he was suspicious there may be drugs in his vehicle and that he was being detained for a drug investigation. Cst. Harris could not recall exactly what he said to Mr. [redacted] at this time. Cst. Harris said he advised Mr. [redacted] of his rights on detention. He told Mr. Santos that he was not under arrest or charged, but he was not free to go. Cst. Harris told Mr. [redacted] he had a right to contact a lawyer. Cst. Harris says he thinks he asked Mr. [redacted] if he wanted to contact a lawyer at that time and he said "no" or "not now" — something along those lines. Cst. Harris also advised him that he need not say anything, he had nothing to hope from any promise of favour and nothing to fear from any threat whether or not he said anything. Cst. Harris told Mr [redacted] that anything he did say could be used in court if he was charged. Cst. Harris told Mr. [redacted] that if anything illegal was found in the vehicle he could face criminal charges. Cst. Harris testified that Mr. [redacted] appeared to understand this.

[47] Cst. Harris cannot recall his exact words, but he recalls telling Mr. [redacted] that he wanted to conduct a search of his vehicle because he had a suspicion there might be drugs in there. Mr. [redacted] said "yeh, sure, go ahead", and Mr. [redacted] pointed to his vehicle. Cst. Harris testified that he told Mr. [redacted] he was conducting the search with Mr. [redacted] consent and it was his choice to stop the search at any time. Cst. Harris testified he asked Mr. [redacted] to have a seat in the back seat of his police vehicle while the search was being conducted. Cst. Harris said he did this for Mr. [redacted] safety and his own safety. This is a secure area in the police vehicle. There are no door handles. Mr. [redacted] could not exit the vehicle once he was in there. A plexiglass barrier with a metal bottom separated the back seat from the front seat of the police vehicle. Cst. Harris testified he put the window down where Mr. [redacted] was sitting and he advised him to "sing out" if he wanted the search to stop.

[48] Cpl. Halbauer arrived at about this time. Cst. Harris told Cpl. Halbauer that Mr. [redacted] was detained and that Mr. [redacted] had consented to a search of his vehicle. Cst. Harris briefly summarized for Cpl. Halbauer what had happened so far and they continued to search the vehicle together.

THE SEARCH

[49] Cst. Harris and Cpl. Halbauer began the search of the vehicle together. This was at about 9:51:48. The vehicle was very clean and contained only a cell phone and a jacket. Cst. Harris testified that based on his training and experience, when people are involved in criminal activity, their vehicles are very clean. They travel very lightly.

[50] Cpl. Halbauer testified that he went to speak to Mr. [redacted] who was seated in Cst. Harris' vehicle. It was clear that Mr. [redacted] could not get out of Cst. Harris' police vehicle without police assistance. Cpl. Halbauer asked Mr. [redacted] if he wished to speak to a lawyer and Mr. Santos said he did not. Cpl. Halbauer asked Mr. [redacted] where he was going and Mr. [redacted] said he was going to Manitoba to visit or pick up his daughter. Cpl. Halbauer asked Mr. [redacted] who owned the vehicle and Mr. [redacted] replied it belonged to a friend he had known for 25 years. Cpl. Halbauer returned to the vehicle. Cpl. Halbauer did not tell Cst. Harris he was going to talk to Mr. [redacted] and the conversation was not recorded.

[51] Cst. Harris testified he noticed something in the [redacted] vehicle he thought was unusual. There was spray foam insulation between the frame of the vehicle and the back seat on both sides. This was only observed by pulling the upholstery away from the frame. Cst. Harris believed the vehicle had been modified in some way. Cst. Harris said he and Cpl. Halbauer discussed this theory.

[52] The officers then searched in the trunk. Cst. Harris noticed a piece of metal in an area where it did not belong. This 2 ½ — 3" metal piece was covered in a paste (referred to by Cst. Harris as bondo). This product is generally used for body work. The paint also appeared to be a different shade in this area. Cst. Harris felt that the vehicle had been modified and that this was done to permit things to be carried that people did not want the police to see. This was at about 9:53 a.m. Cpl. Halbauer had some special training courses dealing with contraband and he did not think things looked quite right in the trunk. Cpl. Halbauer saw a void between the back seat and the trunk area. He observed a rivet which appeared to be a different colour of grey.

[53] Cst. Harris called Cpl. Walkden to explain what had happened to date. Cst. Harris asked Cpl. Walkden to run some further checks on Prose, a police information system and then asked if Cpl. Walkden would attend to the scene.

[54] Cst. Harris and Cpl. Halbauer had a conversation about the legal authority for them to deploy the dog for a search. They concluded that the dog could be deployed outside the vehicle because Mr. [redacted] was detained. But the dog could not be deployed inside the vehicle unless Mr. [redacted] consented.

[55] Cst. Harris asked Mr. [redacted] if he would consent to having the police dog search the vehicle. Cst. Harris told Mr. [redacted] that it was up to him, but if the dog did not find anything he would be on his way. Mr. [redacted] agreed at about 10:16 a.m. Mr. [redacted] was also told he could retract his consent at any time.

[56] Cpl. Halbauer deployed his police dog Nugget to assist in the search. Nugget searched outside and inside the vehicle. The dog did not detect any narcotics but Mr. [redacted] was not permitted to leave.

[57] Cpl. Walkden arrived at the scene. Cpl. Walkden acknowledged in cross-examination that he might have approached Mr. [redacted] and had a conversation with him when he arrived. He does not recall this with any certainty, he has no notes and any conversation was not captured by the audio system.

[58] When Cpl. Walkden arrived Cst. Harris summarized what he had seen and done so far and discussed the development of his grounds to search. Cpl. Walkden

summarized what he was told by Cst. Harris. Cst. Harris told him he had conducted a traffic stop and in the course of the traffic stop he became suspicious because of the actions of the person driving the vehicle. The suspicions were based on the individual's travel, the time of travel, the vehicle he was driving, and the nervousness of the individual. According to Cpl. Walkden, Cst. Harris advised him that he detained the subject for further drug investigation at that time and that currently the subject was detained. Cst. Harris also told Cpl. Walkden that as a result of this detention he obtained the consent of Mr. Santos to conduct a search of the vehicle. Cpl. Walkden was advised by Cst. Harris that the police dog had done a check of the vehicle and that it did not indicate the presence of a narcotic. Cpl. Walkden was advised that Cpl. Halbauer had discovered an area behind the back seat in the trunk area that he believed was a compartment manufactured for the purpose of concealing items.

[59] Cpl. Walkden said as a result of this briefing he went to the vehicle and began to search the vehicle pursuant to the consent to search given by Mr. [redacted] Cpl. Walkden testified he noticed the trunk area and concluded there was a void behind the back seat in the lower area where the top of the trunk was. This area sounded hollow when it was tapped, similar to compartments he had seen in the past. Cpl. Walkden could not see any way to gain access from the trunk. He looked in the back seat and pulled the seats away from the frame. He noticed a spray foam insulation which appeared to be after market. Cpl. Walkden also noticed a grey spray paint which did not match the colour of the car. Cpl. Walkden concluded that modifications had been made to the vehicle. Cpl. Walkden believed there was a compartment sealed into the back of that vehicle.

[60] Cpl. Walkden asked Cpl. Halbauer to get a fiberoptic scope for further investigation. This is a video camera on a wire with a tip. Initially the scope did not work as it needed batteries. When Cpl. Halbauer returned with the scope he advised that the accused had withdrawn his consent to search.

[61] When Cpl. Halbauer walked by the police vehicle in which Mr [redacted] was seated, Mr. [redacted] indicated to Cpl. Halbauer that he wanted to speak to Cst. Harris. When Cst. Harris went to speak to Mr. [redacted], the accused told Cst. Harris he wanted the search to stop. This was at about 10:39 a.m. Mr [redacted] said he did not know why the police were searching the vehicle and he wanted to be on his way.

[62] Cpl. Walkden testified that at that point he believed there was a compartment in that vehicle being used for the transport of illegal narcotics.

[63] Cst. Harris indicated that the police stopped the search immediately — but they were not prepared to let Mr. [redacted] leave at this point. Cpl. Walkden then told Cst. Harris to make some inquiries with the vehicle manufacturer to get some further information on what they believed to be modifications to the vehicle. The information obtained by Cpl. Walkden was that the spray foam insulation, the "bondo" and the metal in the trunk would not have been part of the original way in which the vehicle was manufactured.

[64] Cst. Harris indicated he was not prepared to arrest Mr. [redacted] at this stage, given what he knew. He testified his training and experience did not give him the grounds to arrest Mr. [redacted] at that stage.

[65] Cpl. Halbauer testified that even after the deployment of the dog turned up nothing, he thought there might be contraband in the vehicle based on the suspicious compartment, the history of Mr. [redacted] provided by Cst. Harris, and the fact that he was driving a third party vehicle. Cpl. Halbauer testified that after thinking about everything, he believed it was reasonable and probable to believe there were drugs in the vehicle.

[66] Cpl. Walkden indicated he was going to arrest Mr. [redacted] for possession for the purpose of traffacking in narcotics. Cpl. Walkden had many years experience in these types of investigations in the RCMP compared to Cst. Harris, whose experience was far more limited.

[67] Cpl. Walkden testified about his grounds to arrest Mr. [redacted] He based his grounds on the articulation of the total stop, what he was advised by Cst. Harris, and his grounds for detention. Cpl. Walkden said all this was consistent with what he had found with other drug couriers on the highway. The subject was going from Calgary, Alberta to Winnipeg. The west is a very strong source of cocaine and other illegal narcotics. Cpl. Walkden testified he knew this from working in Winnipeg and from doing projects in Winnipeg and from interviewing past couriers. The stop was made at approximately 9:30 that morning which meant that Mr. [redacted] would have left Calgary at about 4:30 that morning. The expectation was that Mr. [redacted] would arrive in Winnipeg at a relatively busy time and go in with the flow of traffic. Other couriers like to travel during the day because they like the high volume of traffic. Here Mr. [redacted] left early. Cst. Harris had advised Cpl. Walkden that Mr. [redacted] was nervous, beyond that of a normal person. Most people are nervous when stopped by police but their nervousness subsides when they know why they have been stopped. (Cpl. Walkden did not personally notice any

nervousness being exhibited by Mr. [redacted]) The vehicle was a third party vehicle. According to Cpl. Walkden couriers use third party vehicles for several reasons. One is to provide the courier with total anonymity. Mr. [redacted]s had been involved with the police before. He was using a vehicle belonging to a person who had not been involved with the police before. Also, if the vehicle were to be seized it might prevent forfeiture if it belonged to someone else. Mr. [redacted] was detained and he provided his consent to the search. According to Cpl. Walkden most people provide consent on commercial vehicles, but not always on private vehicles. People sometimes provide consent on private vehicles if they have a really sophisticated hidden compartment which they believe will not be detected. After Mr. [redacted] withdrew his consent Cpl. Walkden obtained information from Chrysler and learned that what the police were seeing in Mr. [redacted] vehicle were after market modifications. Cpl. Walkden did not take the fact that Mr. [redacted] withdrew his consent as an indicator, but he did take note of when this was done — ie. when they were concentrating on the portion of the car which subsequently yielded the items ultimately seized. Cpl. Walkden reiterated that he believed Mr. [redacted] had a compartment in the vehicle.

[68] Cpl. Walkden was asked to review the grounds for arrest during his cross-examination. The first ground was the fact that Mr. [redacted] was travelling from Calgary to Winnipeg. He agreed with counsel that many motorists do this every day. Cpl. Walkden was not prepared to agree that many of these motorists might leave Calgary at strange times. Cpl. Walkden agreed that Medicine Hat is a city between Calgary and Swift Current. Cpl. Walkden did not know if Mr. [redacted] spent the previous night in Medicine Hat. Cpl. Walkden agreed that 9:30 in the morning would be a common time to find police on day shift on the highway using radar.

[69] Cpl. Walkden acknowledged that he knew that Mr. [redacted] had produced all the documents requested of him, and he knew that Mr. [redacted] had been co-operative throughout. Cpl. Walkden found this to be an indicia of a guilty conscience. He would have expected someone who was not guilty to be more upset.

[70] Cpl. Walkden spoke to Mr. [redacted] after first asking if the audio was turned on. Cpl. Walkden said "based on looking at the back seat modifications after market consistent with people concealing narcotics and based on the whole traffic stop, right now I believe there may be narcotics behind the seat". Cpl. Walkden asked Mr. [redacted] if he understood that and Mr. [redacted] replied that he did. And then Cpl. Walkden said "because I believe that, I don't have to believe it within reason. Okay. All I have to do is believe it from my training and experience. Okay? Right now, because of that I am placing you under arrest for trafficking in narcotics. Do you understand that? Okay."

[71] Cst. Harris was present when Mr. [redacted] was placed under arrest by Cpl. Walkden. According to Cst. Harris, Cpl. Walkden told Mr. [redacted] he was under arrest for trafficking in narcotics, that he had a right to contact a lawyer, private or legal aid and that he need not say anything. Cpl. Walkden advised the accused not to talk to the police. Cst. Harris said it appeared that Mr. [redacted] understood and that he did not want to contact a lawyer. Cpl. Walkden then indicated to Mr. [redacted] that the police were going to search the vehicle incident to arrest.

[72] The police continued with their search at this stage. The scope was inserted between the frame of the vehicle and the back seat. When Cst. Harris looked through the scope he saw something shiny. Cpl. Halbauer testified that the search continued as

incidental to Mr. [redacted]' arrest. The vehicle was still parked on the side of the No. 1 highway. They removed the back seat of the accused's vehicle. They observed an indentation in the middle of the frame. There was a motor for raising and lowering the convertible roof of the vehicle. Two rubber supports for the motor were missing. Cpl. Walkden put his pocket knife in through one of the holes and when he removed it there was white powder on the tip of the knife. They had a NIK test with them, which ostensibly identifies the presence of cocaine and it tested positive. Cpl. Walkden testified the white powder on his knife looked like other white powder he knew to be cocaine.

[73] After objection was taken by the accused to the introduction of this evidence, the Crown indicated for the record that the NIK test is not proof of the substance found, but that it was relevant on the *voir dire* in relation to the actions taken by the police.

[74] After this Cpl. Walkden arrested Mr. [redacted] for possession of cocaine for the purpose of trafficking. The police did not search the vehicle any further on the roadside. The vehicle was seized and towed to an auto body shop in Swift Current. This was a 2005 Chrysler Seabring serial Number 1C3El45X55N625776. Mr. Santos was taken to the city RCMP detachment.

[75] A search of the vehicle revealed four bricks of white substance wrapped in grey duct tape.

[76] Cst. Harris testified in direct examination that he did not seize anything from Mr. [redacted]s. Later in his direct examination Cst. Harris testified that a search of Mr. [redacted] revealed 12 — $50 bills and 20 — $20 bills.

[77] Cst. Harris also seized from the vehicle three Blackberries, one Samsung telephone, one ipod and a laptop computer. He seized some documents including gas receipts and 'score sheets'. Copies were made of various documents seized and the originals were returned to the accused. The Crown tendered the copies of the documents into evidence. An objection was taken by the accused at the time of their introduction as not being in accord with the best evidence rule. The documents were marked for identification on the *voir dire* (P-18 and P-19 for identification on the *voir dire*). I am satisfied these documents may be marked as full exhibits.

VIDEO EVIDENCE

[78] Cst. Harris' vehicle was equipped with an in car video/audio system. The RCMP has policies concerning these systems. The relevant policies contain the following provisions in part:

> **5.10. In-Car Digital Video System**
>
> 1. **General**
>
> 1.1 A member who is required to use a vehicle equipped with an In-Car Digital Video System (ICDVS) must be familiar with the use and operation of the equipment.
>
> ...
>
> 2. **Roles and Responsibilities**
>
> 2.1 **Member**
>
> 2.1.1 Activate the ICDVS, both audio and video, for all contact with the public or when investigating an occurrence.
>
> 2.1.2 When appropriate, advise a person that he/she is being video and audio recorded.
>
> 2.1.3 Do not deactivate the ICDVS before the conclusion of a contact or investigation, unless an informant may be placed at risk.

> 2.1.4 Do not erase any part of the video or audio as it may be subject to disclosure in court.
>
> ...
>
> **16.4 Closed Circuit Video Equipment**
>
> 1. **Policy**
>
> 1.1 The primary role of closed circuit video equipment (CCVE) is to enhance public safety, allow for the collection of "best evidence" (see sec. 2.4), reduce the impact of crime on victims and to act as a general deterrent to crime.
>
> ...
>
> 2.4 **Best evidence** means providing evidence of an event in the best format to allow the most accurate review by an investigator, trier of fact, inquiry, inquest or internal investigation. Evidence is neutral so it may exonerate the innocent as well as convict the guilty.
>
> [Emphasis in Original]

[79] Cst. Harris testified there was an in car audio/video system in his police vehicle which was operating throughout the traffic stop. A DVD of the video evidence was entered into evidence by the Crown. The time recorded on the video screen at the beginning of the process was 9:35:26. The equipment in the police vehicle permitted both audio and video recording and for some of the tape, both audio and video were present. However for great portions of the roadside stop, Cst. Harris turned off the microphone so the audio was not recorded. Cst. Harris testified that he intentionally turned off the audio when he was having conversations with other police officers. It was his intention to have the audio turned on when he was talking to the accused. This was done for the most part, however he did not record the conversation with Mr. [redacted] when Mr. [redacted] withdrew his consent to the continuation of the search. Cst. Harris testified it was not his intention to deprive the court of the best evidence when he turned off the audio. It appears

that Cpl. Halbauer and Cpl. Walkden each spoke to Mr. [redacted] separately. Those conversations were not captured by the audio equipment.

[80] When asked by defence counsel to review the RCMP policies earlier referenced and to explain his actions in the face of these policies, Cst. Harris' explanation generally was that he agreed with the policy, he just didn't follow it when talking to other police officers. He did not believe he was in breach of the policy as he just de-activated the audio not the video. He also did not tell Mr. [redacted] that he was being audio/video recorded.

[81] Cst. Harris confirmed that he continues with this same practice today. He testified that he observed other officers doing the same thing, that it was the practice in the unit, so he did it as well.

[82] Cst. Harris first turned off the microphone when he was speaking to Cpl. Halbauer on the phone at about 9:45 a.m. when he was discussing his findings. Cst. Harris said he told Cpl. Halbauer that he had a vehicle stopped, that Mr. [redacted] had a history with drugs, and described his suspicions. Cst. Harris cannot recall word for word what he said to Cpl. Halbauer and he cannot recall what Cpl. Halbauer said to him. He agrees some of what was said was germane to his detention of Mr. [redacted]

[83] This conversation would be particularly relevant to the issue of when Mr. [redacted] was detained for a drug investigation and to the reasons for the initial stop.

[84] The search of Mr. [redacted] vehicle commenced at about 9:51:48 when Cpl. Halbauer arrived. Cpl. Walkden called at about 9:54:25 and the microphone was muted until 10:14:35. Cst. Harris cannot recall exactly what was said, but it was about the drug investigation.

[85] The conversation with Cpl. Walkden would once again have been relevant to the reasons for the initial stop and the issue of the grounds for the subsequent detention and the timing of that detention.

[86] At 10:14:35 the sound was back on. Cst. Harris and Cpl. Halbauer had a conversation about whether they had any lawful authority to deploy the dog. Some of this was recorded, but Cst. Harris testified that it was a mistake that the sound was on for this conversation. Cpl. Halbauer's view was that the dog could search outside the vehicle without the consent of Mr. [redacted], but his consent would be required for the dog to search inside the vehicle.

[87] When Cpl. Walkden arrived there was a conversation with Cst. Harris about the development of his grounds to search the vehicle. This conversation was muted by Cst. Harris.

[88] Cpl. Halbauer testified that he knew there was an audio/video system in Cst. Harris' car. He did not know that Cst. Harris was turning the microphone on and off. Generally it was not something he would have done himself and he knew of no reason why it would have been done by Cst. Harris in these circumstances.

PROOF OF SUBSTANCE

[89] Four bricks of white substance were seized from the Chrysler Seabring on October 21, 2011. Cst. Harris removed samples from each brick on December 7, 2011 and placed the samples in exhibit envelopes. Cst. Harris placed the envelopes in the RCMP outgoing mail directed to Health Canada likely on the same day, although he does not specifically recall when. The samples were sent by courier. Cst. Harris testified that the samples in this case had similar "characteristics" to other cases in which he was involved and in which the substance was found to be cocaine. The "characteristics" were not defined or detailed in any way.

[90] Cst. Harris received the exhibit envelopes and certificates of analysis back from the lab on February 22, 2012. When first asked about this in cross-examination he testified that he does not recall if he made copies of the certificates on the day he received them back, but he does recall making copies some time in February 2012. He placed the original certificates in the exhibit locker and he placed the copies on the police file.

[91] Moments later in cross-examination Cst. Harris testified that to the best of his recollection he made copies of the certificates on the day he received them from the lab and that he exhibited the originals and placed the copies on the file. The copies of the certificates on the file were accessible to any regular or civilian member of the RCMP.

[92] Cst. Harris did not make any effort to serve Mr. [redacted] personally with the certificates of analysis and Cst. Harris was not aware of any efforts made by any other police officer. Cst. Harris confirmed that he was aware of Mr. [redacted] address during this

time period and he was aware there was a residence requirement on Mr. [redacted] interim release conditions. Cst. Harris also knew that Mr. [redacted] was subject to a curfew. Cst. Harris testified there was nothing preventing him from serving Mr [redacted] personally.

[93] June 7, 2012 Cst. Harris addressed a letter to Patrick C. Fagan at #304 1117 1st St. S.W. Calgary, AB. The substance of the letter was the following:

> Regina v. [redacted]
>
> Please find attached Certificates of Analysis and Notice of Intention to Produce regarding this matter. These documents will be served in person to you and your client on the day of Preliminary Hearing dated July 24, 2012. (Exhibit P-13)

[94] Attached was a Notice of Intention to Produce Certificates of Analysis. The Notice provided as follows:

> To: [redacted]
> of 38 Shrewood[sic] Court NW, Calgary, Alberta
> TAKE NOTICE that at your Preliminary Hearing on the following charge(s):
> Section 5(2) of the Controlled Drugs and Substances Act
> Possession of Property obtained by crime. Sections 354 and 355 of the Criminal Code
> pursuant to section 28(1) of the Canada Evidence Act...
> it is intended to produce the attached Certificates of Analysis in evidence.
> Dated this 7 day of June A.D., 2012.

[95] Certificates of Analysis 11 09660W, 11 09659W, 11 09658W & 11 09657W were attached. The salient information contained in each of the certificates referenced was the following:

> Stéphane Balcaen being a person on the staff of the Department of Health duly designated as an Analyst under the Controlled Drugs and Substances Act, and also duly designated as an Analyst under the Food and Drugs Act, do hereby certify:
>
> 1. That at the Health Canada laboratory in Winnipeg in the province of Manitoba on the 12th day of December 2011 there was delivered by Courier from **Swift Current Region Traffic Services R.C.M. Police** a sealed and unopened package which bore the following identification marks, initials or numbers:
>
> ...
>
> 2. That I did take possession of the sealed and unopened package on the 8th day of February 2012.
>
> 3. That I did open the said package and did remove therefrom a sample for analysis.
>
> 4. That I duly analysed and examined the said sample and found it to contain a controlled substance within the meaning of the Controlled Drugs and Substances Act, to wit:
>
> ... Cocaine ...
>
> 5. That this certificate is true to the best of my knowledge and skill.
>
> Dated at Winnipeg, Manitoba
>
> This 10th day of February 2012.
>
> [Emphasis in Original]

[96] This letter was sent by regular mail. Cst. Harris did not call Mr. Fagan's office to ascertain whether he was prepared to accept service of the certificates on behalf of Mr. [redacted], nor did Cst. Harris call to ascertain whether indeed the certificates sent by regular mail had been received. Cst. Harris does not know if his letter was received by Mr. Fagan.

[97] Cst. Harris did not serve these documents personally at the preliminary hearing on either the accused or his counsel. He cannot explain why he did not. No evidence was presented at the preliminary hearing in relation to the nature of the substance seized as it was admitted to be cocaine, for the purpose of the preliminary hearing.

[98] On September 23, 2013 at the end of the first day of the trial, the Crown filed a copy of a letter from Mr. Quon, trial counsel for the Crown, dated September 19, 2013 directed to Mr. Fagan referencing the transmission of four Certificates of Analyst 11 09657W, 11 09658W, 11 09659W & 11 09660W which he intended to tender in evidence. These documents were ostensibly faxed to Mr. Fagan's office in Calgary. Objection was taken by Mr. Fagan to the filing of these documents and they were marked for identification only on the *voir dire* (P-14 for identification on the *voir dire*). This exhibit was subsequently withdrawn by the Crown.

[99] On September 24, 2013, the second day of the trial, the Crown filed an affidavit dated September 24, 2013 of Sarah Pichler, (exhibit p-15 for identification on the *voir dire*) an employee of Quon Ferguson, counsel for the prosecution in which Ms. Pichler deposes to the following in part:

> ...
>
> 2. That we received a letter from Patrick C. Fagan, dated September 5, 2013, on the same date, which is attached hereto and marked as exhibit "A" to this my affidavit and which indicates his mailing address and fax number.
>
> 3. On September 19, 2013, at approximately 2:10 PM, I served the letter and enclosures, which are attached hereto and marked as exhibit "B" to this my affidavit, by sending it to the said Patrick

> C. Fagan by fax to 1-403-517-1776 and attached hereto and marked as exhibit "C" is the fax transmission verification report in relation thereto.

[100] The attachments in Exhibit "B" to the affidavit of Sarah Pichler include a letter from Denis I. Quon to Patrick C. Fagan dated September 19, 2013 referencing the transmission of 4 Certificates of Analyst 11 09657W, 11 09658W, 11 09659W & 11 09660W which he intends to tender in evidence.

[101] In the face of a successful application by Mr. Fagan for leave of the court to cross-examine Ms. Pichler on her affidavit counsel for the Crown made the following admissions:

1. The Certificates of Analyst attached as appendix B to the affidavit of Sarah Pichler (P-15 for Identification) were not copied from the original certificates of analyst by Sarah Pichler but from a copy given to her by Mr. Denis Quon from the prosecutor's file.
2. That Mr. Denis Quon, Agent for the Public Prosecutions Service of Canada, received a letter by courier from Patrick Fagan dated December 19, 2012 in an unrelated prosecution under the CDSA stating the practice of Mr. Fagan germane to the service of certificates of analysis of analysts in prosecutions under the CDSA.

This letter stated the following in part:

> ...
>
> As an Agent for the Public Prosecution Service of Canada I trust you are abundantly aware of the fact that in each and every drug

case the Crown must prove beyond a reasonable doubt the nature of the impugned substance. To assist the Crown in this regard the law provides a statutory procedural "short cut" by way of section 51 of the *Controlled Drugs and Substances Act* (hereinafter referred to as the "CDSA") Please be advised that I am not in the practice of assisting the Crown in proving this critical element of a drug offence without clear instructions from my clients. Whether or not those instructions are forthcoming turn upon the particular circumstances of each case. ...

Please be advised that my general practice germane to the issue of service aforesaid is governed by the jurisprudence in this area including a recent decision of The Honourable Judge Stevenson (formally Assistant Chief Judge Stevenson) in *Regina v. Mark Gabriel Castro Dublado, Provincial Court of Alberta (Calgary), February 23, 2012*..... Of particular note (in light of your comments germane to my refusal to assist the Crown or the police relative to service) are Judge Stevenson's cautionary remarks to defence counsel hereunder:

> *In my view, when the issue is joined by a not guilty plea and the matter is set down for trial, the service of the certificate procedure begins. Whether or not the matter goes to trial is irrelevant to the requirement of service.* ***There has developed in this jurisdiction, and perhaps others, a practice, I'll call it a loose practice, of counsel or members of counsel's staff accepting service of these certificates.*** *It's my opinion that unless counsel has received clear instructions from his or her client to accept service on the client's behalf, he cannot do so, nor unless counsel has in turn, if he's received those instructions, relayed those instructions with the consent of his client to members of his staff, service cannot be effected in that way....*
>
> [Emphasis in Original]

3. That Sarah Pichler did not contact the office of Patrick Fagan before or after faxing Exhibit B to the Affidavit of Sarah Pichler which is Exhibit P-15 for Identification to determine if Mr. Fagan would be

in the office on Thursday September 19, 2013 or Friday, September 20, 2013.

[102] The only other evidence regarding the nature of the substance seized came from Cpl. Walkden, an officer with considerable drug experience. He was not qualified as an expert witness but indicated that the packaging and his observation of the substance seized were similar to other seizures made by Cpl. Walkden of material which was found to be cocaine. No detailed description was provided with respect to the alleged similarities.

EXPERT EVIDENCE

[103] The defence admitted as a fact that if the substance seized is cocaine, the amount seized is inconsistent with personal use and is consistent with trafficking.

ISSUES

[104] There are a number of issues to be assessed in this *voir dire*. In addition to the issues properly the subject of the *voir dire*, counsel seek a ruling on whether or not the Crown has proven beyond a reasonable doubt the nature of the substance seized from Mr. [redacted] vehicle. Although not foreclosed from doing so, the Crown has indicated it is unlikely any further evidence on this issue will be tendered and the decision on this point could be determinative of the prosecution.

PROOF OF THE SUBSTANCE

[105] Accordingly I will deal in the first instance with whether or not the Crown has proven beyond a reasonable doubt that the substance seized was cocaine.

(1) Was the accused given reasonable notice of the Crown's intention to introduce the Certificate of Analyst at his trial?

A. The Legislation

[106] The following provisions of the *CDSA* are relevant:

> **45**.(1) An inspector or peace officer may submit to an analyst for analysis or examination any substance or sample thereof taken by the inspector or peace officer.
> (2) An analyst who has made an analysis or examination under subsection (1) may prepare a certificate or report stating that the analyst has analysed or examined a substance or a sample thereof and setting ut the results of the analysis or examination.
> ...
> **51**.(1) Subject to this section, a certificate or report prepared by an analyst under subsection 45(2) is admissible in evidence in any prosecution for an offence under this Act or the regulations or any other Act of Parliament and, in the absence of evidence to the contrary, is proof of the statements set out in the certificate or report, without proof of the signature or official character of the person appearing to have signed it.
> (2) The party against whom a certificate or report of an analyst is produced under subsection (1) may, with leave of the court, require the attendance of the analyst for the purpose of cross-examination.
> (3) Unless the court otherwise orders, no certificate or report shall be received in evidence under subsection (1) unless the party intending to produce it has, before its production at trial, given to the party against whom it is intended to be produced reasonable notice of that intention, together with a copy of the certificate or report.
> **52**.(1) For the purposes of this Act and the regulations, the giving of any notice, whether orally or in writing, or the service of any document may be

> proved by the oral evidence of, or by the affidavit or solemn declaration of, the person claiming to have given that notice or served that document.
> (2) Notwithstanding subsection (1), the court may require the affiant or declarant to appear before it for examination or cross-examination in respect of the giving of notice or proof of service.

B. The Law

[107] In *R v. Dillon*, [2005] O.J. No. 2516 (QL)(Ont. Sup. Ct.) Justice Casey Hill noted that:

> 7 .... Statutory authorization for certificate of proof of elements of the offence charged is effectively an evidentiary shortcut. The conditions precedent for admission of a certificate is upon the party benefitting from its use: R v. Bourque (1991), 66 C.C.C. (3d) 548 (N.S.C.A.) , at p. 554.

[108] Justice Hill also set out the requirements for certificate evidence as follows:

> 12 The reasonableness of notice respecting certificate evidence must be assessed in light of the purposes of such notice including:
>
> > (1) to enable the accused person to know precisely the nature of the case against him or her thereby providing an adequate opportunity to make full answer and defence: *R v. Tam*, [2000] O.J. No. 2185 (QL)(C.A.) At para 17
> > (2) "the notice must be precise and accurate and reasonably certain so that an accused person is alerted with certainty as to the procedure to be invoked": *R v. Henri* (1972), 9 C.C.C. (2d) 52 (B.C.C.A.), at p. 56; *R v. Cordes* (1978), 40 C.C.C. (2d) 442 (Alta C.A.), at p. 449 (affirmed (1979) 47 S.C.C. (2d) 46 (S.C.C.))
> > (3) to permit adequate deliberation time as to whether an application to the court ought to be made for an order requiring attendance of the analyst or certificate for the purpose of cross-examination

> (4) "simplifying the production of evidence": *R v. Morrison, supra* at p. 197
> (5) "reducing the time and cost of criminal prosecutions": *R .v. Morrison*, at p. 197; *R v. Bowles*, at pp. 431, 435.

[109] In *R. v. Marcil* (1976), 31 C.C.C. (2d) 172, [1976] S.J. No. 418 (QL) (Sask. C.A.) Chief Justice Culliton held that compliance with the notice provisions of what was then s. 9 of the *Narcotic Control Act* (the predecessor to the *CDSA*) is a "condition precedent" to the admission of the certificate. Chief Justice Culliton cited with approval *R. v. Henri, supra* at p. 174:

> I think it is obvious that Parliament intended that the trial judge must find and determine there was compliance with s-s. (3) before admitting the certificate in evidence. Whether or not there was reasonable notice is a question of fact: *R. v. Flegel* (1972), 7 C.C.C. 2nd 55. Reasonable notice, as well, refers to the substance as well as the timing of the notice: *R v. Henri* , (1972), 9 C.C.C. 2nd 52, [1972] 6 W.W.R. 368. Thus, the admissibility of the certificate depends upon the trial judge's finding of fact. ...

C. Analysis

[110] The onus remains on the Crown throughout to prove each and every element of the offence beyond a reasonable doubt. This includes a requirement to prove that the substance seized was cocaine as set out in the indictment filed with the court.

[111] The *CDSA* provides a convenient method by which the Crown may satisfy this requirement by permitting the proof to be provided by the introduction of a certificate of analyst. There are, however, conditions precedent to the admission of the certificate.

[112] The substance in question was seized on October 21, 2011. By February 22, 2012 Cst. Harris was in possession of the certificates of analyst. The preliminary hearing was held in Swift Current on July 24, 2012. Both Mr. [redacted] and his counsel were present at the preliminary hearing. The certificates of analyst were not tendered in evidence at the preliminary hearing. Mr. [redacted] has been bound by the conditions of his release requiring him to live at a specified address in Calgary and also requiring him to maintain a curfew at that address. Mr [redacted] has been represented by Patrick Fagan, Q.C. throughout the proceedings. No evidence was tendered of any attempt by the Crown to serve either Mr. [redacted] or his counsel personally during any of the 23 months between the date of the seizure and the date this trial commenced.

[113] I will now consider what steps were taken by the Crown to effect service of the notice of intention to produce and the certificates of analyst. Cst. Harris testified he mailed copies of the certificates to Mr. Fagan by regular mail on June 7, 2012. Cst. Harris had no knowledge of whether this package was received at the office of Mr. Fagan. No other evidence was presented to indicate whether the package was received.

[114] I am not satisfied that sending the notice of intention and the certificates by regular mail to counsel for the accused amounts to notice within the meaning of the legislation. Crown counsel candidly acknowledged in his brief that he knew of no authority suggesting that service on counsel by ordinary mail would constitute sufficient notice.

[115] The next step taken with respect to service was the sending of a faxed communication from the Crown Prosecutor to Mr. Fagan's law office on September 19, 2013.

[116] In this regard the Crown relies on *R. v. Baker (R.G.),* 2007 SKQB 221, 295 Sask. R. 289. In *Baker*, Pritchard, J. accepted as service of the notice of intention the fact that it was faxed to counsel and that the fax machine produced no error report. Ultimately Justice Pritchard did not have to decide whether she would have been prepared to allow the certificate of analyst as an exhibit as it was filed as an exhibit at the preliminary hearing. That is clearly distinguishable from the case at bar.

[117] I am not prepared to say that service by fax on counsel for the accused can never amount to notice. Each case will turn on its own facts.

[118] In *R. v. Yonis*, 2009 ABCA 336, 13 Alta. L.R. (5th) 199 the court held at para. 12:

> 12 There may be circumstances in which service of reasonable notice of intention, together with a copy of the certificate, may be made upon a law office. One such circumstance is with the lawyer's knowledge and consent....

[119] In *R. v. Phung,* 2011 ABQB 427, 50 Alta. L.R. (5th) 329 Madam Justice Nation dealt with this issue at some length. She said the following at para. 23 of her decision:

> 23 An analysis of the law indicates that strict compliance with s. 51(3) is required as the admission of the Certificates of Analyst proves an essential element of the offence. The focus is on the meaning of "reasonable notice of the intention". Over the years, Courts have interpreted that section. This has included the interpretation to allow service on counsel for the accused, as opposed to always insisting on service on the accused. Likewise, case law has stated that service in writing is not necessary, it can be oral. Looking at the cases carefully, and particularly the *Yonis* case which is binding on this Court, the requirement is that the service on counsel for the accused must be personal, or by service upon a person at his law office authorized to accept service of documents. The lawyer's knowledge and consent are the overarching concerns with non-personal service, the concern is that the lawyer receives the documents.

[120] In these circumstances the fact that counsel for the accused had made it clear to the Crown that he was not prepared nor instructed to accept service is sufficient for me to find that service by fax on Mr.Fagan was not notice to the accused.

[121] As a result, I find the service by fax in this case is not sufficient.

[122] Even if I were prepared to find that service by fax in this case was sufficient, in spite of the position taken by defence counsel and known by the Crown, I find that the notice was not reasonable in the circumstances.

[123] The fax was not sent until September 19, 2013, a Thursday afternoon, to counsel's Calgary office when the trial was set to begin on the following Monday morning in Swift Current, Saskatchewan. There is no evidence that the fax was even received by Mr. Fagan. The Crown had 23 months to effect service. I do not find it to be reasonable that it did not do so until one business day prior to the commencement of the trial.

[124] The notice itself was not accurate in that it indicated that the certificates would be tendered pursuant to s. 28 of the *Canada Evidence Act*, R.S.C. 1985, c.C-5, not the *CDSA*. I am reminded of the comments of Hill, J. in *Dillon* quoted *supra*: "the notice must be precise and accurate and reasonably certain so that an accused person is alerted with certainty as to the procedure to be invoked". Clearly s. 28 of the *Canada Evidence Act* is not applicable to the introduction into evidence of certificates of analysis pursuant to the *CDSA*. It is of some interest that s. 28 also speaks to the reasonableness of any notice and says that in any event that notice shall not be less than 7 days.

[125] Counsel has sought a ruling on the sufficiency of the notice and its reasonableness. I find that the certificates will not be received in evidence under s. 51(1) of the *CDSA* as the Crown has not provided reasonable notice of its intention to produce the certificates.

(2) Was there any other evidence of proof of the substance?

[126] The Crown sought to introduce into evidence Cpl. Walkden's opinion as to the nature of the substance he had seized. Cpl. Walkden had not been qualified as an expert witness, nor had the Crown provided any notice of its intention to qualify Cpl. Walkden as an expert as required by Section 657.3(3) of the *Criminal Code*.

[127] The Crown submitted that it was entitled to lead circumstantial evidence concerning the nature of the drug. The defence did not disagree with this proposition but was concerned that it would be cloaked as opinion evidence.

[128] The court ruled the Crown was permitted to elicit evidence from Cpl. Walkden on how the packaging of the substance seized in this case compared with packages seized in other investigations conducted by Cpl. Walkden where the substance was tested and found to be cocaine. And further Cpl. Walkden was permitted to testify as to how the white powder on his knife compared with other cases where he observed white powder that was tested and found to be cocaine.

[129] Cpl. Walkden testified that the packaging here was similar to other seizures he has made where the substance was tested and found to be cocaine. He further testified that the substance on his knife looked similar to other substances seized by him which turned out to be cocaine. Cpl. Walkden provided no details about what he found to be similar — ie. colour, smell, texture, etc. Cpl. Walkden's conclusions on similarity are not sufficient.

[130] I find the weight of this evidence to be negligible. I am not satisfied that this is any evidence of the nature of the substance seized from Mr. [redacted] vehicle.

[131] I adopt the comments made by McClung, J.A. in *R. v. Grant,* 2001 ABCA 252, [2001] A.J. No. 1257 (QL) at paragraph 2:

> 2 We will deal with this case on the certificate issue alone. A proper scientific analysis of a suspected substance is essential. Granted that a lay person can recognize various things such as smell, sights, sounds and speeds, and that such evidence may be admitted, the danger of permitting lay identification of an allegedly illegal substance is manifest and ought not to be encouraged. The chemical or scientific analysis of an illegal substance may well provide, and normally does provide, the court with reliable and trustworthy evidence that the substance was actually illegal according to its components. The certificate of analysis conveys just that. In practice, the

> certificate ends any debate about what was seized. Were we to uphold the course followed here the certificate of analysis practice will be at risk in future. The police will rely on nothing but opinion evidence given by themselves. That is a step that should only be permitted by Parliament by way of the repeal of the analysis legislation. The use of the certificate has long been entrenched in the Statute, and for good reason, and can only be replaced by expert testimony by a qualified analyst.

[132] In conclusion the Crown has not proven beyond a reasonable doubt that the substance in question is cocaine.

[133] Unless additional evidence is called by the Crown, this ruling essentially disposes of the case against Mr. [redacted]. However, in the event that the Crown calls additional evidence on the trial or in the event that an appellate court disagrees with my conclusion, I will deal with the other issues raised on the *voir dire* so a complete record may be available and considered.

[134] The second issue which I will deal with is somewhat discrete as it relates to the intentional muting of the microphone by Cst. Harris in the audio-visual system provided in the police vehicle.

DESTRUCTION OF EVIDENCE

[135] The accused submits that the intentional suppression of the audio evidence at roadside is an egregious investigative practice and a breach of the accused's s. 7 right to make full answer and defence. The accused seeks a stay of proceedings as a remedy for that breach. The accused submits that a stay is necessary to maintain the integrity of the administration of justice. The accused submits that the Crown, which includes the

RCMP had a duty to preserve and disclose the evidence gathered at roadside. The accused submits the Crown cannot establish the absence of unacceptable negligence in the intentional destruction of the audio recording. The accused submits that the statements and discussions of the officers at roadside are critical to the Applicant's *Charter* motions and the destruction of the audio recording of many of these conversations has deprived the court of the best evidence to determine precisely what happened at the roadside and has prejudiced Mr. [redacted] ability to make full answer and defence.

A. The Law

(1) General principles on lost or destroyed evidence

[136] The law regarding lost or destroyed evidence has been set out by the Supreme Court of Canada in *R v. La*, [1997] 2 S.C.R. 680, [1997] S.C.J. No. 30 (QL). Justice Sopinka held that when the prosecution loses evidence that should have been disclosed, the Crown has a duty to explain what happened to it. If the explanation is satisfactory the Crown has discharged its constitutional obligation to disclose. If the explanation is not satisfactory there is a breach of the *Charter*. Additionally a remedy may be ordered in an extraordinary case where a satisfactory explanation is provided and no abuse of process is found but the evidence is so important that its absence implicates the accused's right to a fair trial. (*La* at para. 1)

[137] Justice Sopinka held *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1 gives rise to a Crown obligation to preserve relevant evidence (*La* at paras. 16 and 17) Justice Sopinka held that:

20 ... The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in *Stinchcombe (No. 2), supra*, recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the *Charter*. Such a failure may also suggest that an abuse of process has occurred, but that is a separate question. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.

21 In order to determine whether the explanation of the Crown is satisfactory, the Court should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

22 What is the conduct arising from failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 78-81, *per* Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases an unacceptable degree of negligent conduct may suffice.

23 In either case, whether the Crown's failure to disclose amounts to an abuse of process or is otherwise a breach of the duty to disclose and therefore a breach of s. 7 of the *Charter*, a stay may be the appropriate

remedy if it is one of those rarest of cases in which a stay may be imposed, the criteria for which have most recently been outlined in *O'Connor, supra*. With all due respect to the opinion expressed by my colleague Justice L'Heureux-Dubé to the effect that the right to disclosure is not a principle of fundamental justice encompassed in s. 7, this matter was settled in *Stinchcombe (No. 1), supra*, and confirmed by the decision of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80. In *Stinchcombe (No. 1)* the right to make full answer and defence of which the right to disclosure forms an integral part was specifically recognized as a principle of fundamental justice included in s. 7 of the *Charter*. This was reaffirmed in *Carosella*. In para. 37 I stated on behalf of the majority:

> The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. To paraphrase Lamer C.J. in *Tran* [[1994] 2 S.C.R. 951], the breach of this principle of fundamental justice is in itself prejudicial. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the *Charter*.

24 The Crown's obligation to disclose evidence does not, of course, exhaust the content of the right to make full answer and defence under s. 7 of the *Charter*. Even where the Crown has discharged its duty by disclosing all relevant information in its possession and explaining the circumstances of the loss of any missing evidence, an accused may still rely on his or her s. 7 right to make full answer and defence. Thus, in extraordinary circumstances, the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial. In such circumstances, a stay may be the appropriate remedy, provided the criteria to which I refer above have been met.

25 It is not necessary to elaborate a test to be used in such cases in order to deal with the case at bar. Suffice it to say that, where the Crown has met its disclosure obligations, in order to make out a breach of s. 7 on the ground of lost evidence, the accused must establish actual prejudice to his or her right to make full answer and defence. This requirement is seen most clearly in lost evidence cases reviewed by my colleague Justice L'Heureux-Dubé in her reasons in *Carosella, supra*; see paras. 76-80.

[138] In terms of a remedy, Justice Sopinka said the following at para. 27:

> 27 The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit. This is the procedure adopted by the Ontario Court of Appeal in the context of lost evidence cases. In *R. v. B. (D.J.)* (1993), 16 C.R.R. (2d) 381, the court said at p. 382:
>
> > The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal.
>
> Similarly, in *R. v. Andrew* (S.)(1992), 60 O.A.C. 324, the court found at p. 325 that unless the *Charter* violation "is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial. See also: *R. v. François (L.)* (1993), 65 O.A.C. 306; *R. v. Kenny* (1991), 92 Nfld. & P.E.I.R. 318 (Nfld. S.C.T.D.).

[139] In *La, supra* the officer recorded a 45 minute conversation with a child victim of sex trafficking. The accused was later charged with an offence in relation to the child. Although potentially relevant to the accused's case, the tape was lost and was never disclosed.

[140] The tape was made for the purpose of a secure treatment application regarding the complainant. The tape was made before any criminal investigation against the accused began. The officer testified that he had been involved in a stressful shooting a few days before recording the tape.

[141] Justice Sopinka held that the officer had failed to take reasonable steps to preserve the evidence in the circumstances. The explanation of the officer did not amount to an abuse of process. Furthermore, the accused could not establish that his right to make full answer and defence had been impaired as a result of the lost tape. (paras. 30, 31)

[142] The law regarding lost or destroyed evidence was summarized by the Nova Scotia Court of Appeal in *R. v. B. (F.C.)*, 2000 NSCA 35, 142 C.C.C. (3d) 540 as follows at p. 547:

> The basic principles applicable to the analysis of all three grounds of appeal raised in this case were summarized by Sopinka, J. in *R. v. La, supra*, commencing at para. 16. Those principles derived from *R. v. Stinchcombe (No.1)*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1; *R. v. Egger*, [1993] 2 S.C.R. 451; 82 C.C.C. (3d) 193; *R. v. Stinchcombe (No. 2), supra; R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. O'Connor, supra*; and, *R. v. Carosella, supra*, and further developed in *La*, are:
>
> > (1) The Crown has an obligation to disclose all relevant information in its possession.
> >
> > (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
> >
> > (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
> >
> > (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
> >
> > (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.

> (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 *Charter* rights.
>
> (7) In addition to a breach of s. 7 of the *Charter*, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.
>
> (8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in O'Connor.
>
> (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
>
> (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.

[143] The criteria set out in R. v. *O'Connor,* [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1 is the following:

> 74 ... Where the accused seeks to establish that the non-disclosure by the Crown violates s. 7 of the *Charter*, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the *Charter* in this respect. I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned

actions on the fairness of the accused's trial. Once a violation is made out, a just and appropriate remedy must be found. (Emphasis in Original)

(iii) The Appropriate Remedy to a s. 7 Violation for Non-disclosure

75 Where there has been a violation of a right under the *Charter*, s. 24(1) confers upon a court of competent jurisdiction the power to confer "such remedy as the court considers appropriate and just in the circumstances". Professor Paciocco, *supra*, at p. 341, has recommended that a stay of proceedings will only be appropriate when two criteria are fulfilled:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice.

I adopt these guidelines, and note that they apply equally with respect to prejudice to the accused or to the integrity of the judicial system.

76 As I have stated, non-disclosure will generally violate s. 7 only if it impairs the accused's right to full answer and defence. Although it is not a precondition to a disclosure order that there be a *Charter* violation, a disclosure order can be a remedy under s. 24(1) of the *Charter*. Thus, where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate.

77 There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy through reasonable means the prejudice to the accused's right to make full answer and defence. In such cases, the drastic remedy of a stay of proceedings may be necessary. Although I will return to this matter in my discussion on the disclosure of records held by third parties, we must recall that, under certain circumstances, the defence will be unable to lay the foundation for disclosure of a certain item until the trial has actually begun and witnesses have already been called. In those instances, it may be necessary to take measures such as permitting the defence to recall certain witnesses for examination or cross-examination, adjournments to permit the defence to subpoena additional witnesses or even, in extreme circumstances, declaring a mistrial. A stay of proceedings is a last resort, to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted. (Emphasis in Original)

78 When choosing a remedy for a non-disclosure that has violated s. 7, the court should also consider whether the Crown's breach of its disclosure obligations has also violated fundamental principles underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. If so, it should be asked whether this prejudice is remediable. Consideration must be given to the seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence. Although some of the most salient considerations are discussed immediately below, that discussion is by no means exhaustive.

79 Among the most relevant considerations are the conduct and intention of the Crown. For instance, non-disclosure due to a refusal to comply with a court order will be regarded more seriously than non-disclosure attributable to inefficiency or oversight. It must be noted, however, that while a finding of flagrant and intentional Crown misconduct may make it significantly more likely that a stay of proceedings will be warranted, it does not follow that a demonstration of *mala fides* on the part of the Crown is a necessary precondition to such a finding. As Wilson J. observed for the Court in *Keyowski, supra*, at p. 659:

> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine.... Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's [conduct] amounts to an abuse of process.

80 Another pertinent consideration will be the number and nature of adjournments attributable to the Crown's conduct, including adjournments attributable to its failure to disclose in a timely manner. Every adjournment and/or additional hearing caused by the Crown's breach of its obligation to disclose may have physical, psychological and economic consequences upon the accused, particularly if the accused is incarcerated pending trial. In all fairness, however, the Crown may also seek to establish by evidence that the accused is in the majority group of persons who benefit from a delay in the proceedings because they do not want an early trial: *Morin, supra*, at pp. 802-3.

81 Finally, in determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused. Consideration should be given to less drastic remedies than a stay of proceedings (see for example *R. v. Burlingham*, [1995] 2 S.C.R. 206, where, although I agreed with the majority that the Crown's conduct in

> disregarding the plea bargain made with the accused did not amount to one of the "clearest of cases" requiring a stay of proceedings, I would have nonetheless found a violation of the accused's rights under s. 7 and substituted a conviction for the lesser included offence which was the object of the plea bargain).
>
> 82 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.
>
> (iv) Summary
>
> 83 Where life, liberty or security of the person is engaged in a judicial proceeding, and it is proved on a balance of probabilities that the Crown's failure to make proper disclosure to the defence has impaired the accused's ability to make full answer and defence, a violation of s. 7 will have been made out. In such circumstances, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings will be appropriate.
>
> [Emphasis in Original]

[144] In *R v. Anderson*, 2013 SKCA 92, 300 C.C.C. (3d) 296 the accused was convicted of drug trafficking and criminal organization offences. The convictions were the result of a lengthy and resource-intensive police operation. The accused appealed on numerous grounds. One of these grounds included the fact that the lead investigating officer had lost 5 of 7 notebooks and other intelligence reports after being transferred from Saskatchewan to British Columbia. (para. 28)

[145] The trial judge held there was no suggestion the notes were deliberately destroyed. They were simply misplaced due to human error. He held that the notebooks had not been lost due to unacceptable negligence. (para. 46)

[146] Justice Ottenbreit writing for the Court of Appeal dismissed this ground of appeal. Justice Ottenbreit stated:

> 106 The trial judge appropriately cited the governing law respecting analysis of this issue; *R. v. Bradford* (2001), 151 C.C.C. (3d) 363 (Ont. C.A.). Laskin J.A. in *R. v. Sheng*, 2010 ONCA 296, 254 C.C.C. (3d) 153, has more recently restated the governing law:
>
> > 32 The Crown's duty to disclose relevant evidence includes the obligation to preserve relevant evidence. However, as Sopinka J. noted in his majority judgment in *R. v. La*, [1997] 2 S.C.R. 680, "despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost." The loss or destruction of relevant evidence that was once in the Crown's possession or control thus does not automatically equate to a breach of the Crown's disclosure obligation. In *La*, Sopinka J. sets out the legal framework for analyzing when lost or destroyed evidence gives rise to a breach of s. 7 of the *Charter* and when it justifies a stay of proceedings.
> >
> > ...
> >
> > 35 Where the Crown satisfactorily explains the loss or destruction of the evidence, it has met its disclosure obligation. Section 7 of the *Charter* has not been breached. Still, "in extraordinary circumstances" the accused may be entitled to a stay if the accused can show that the lost or destroyed evidence is "so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial."
>
> 107 Whether a piece of missing evidence will result in irreparable harm to the accused's ability to make full answer and defence depends on the evidence lost and the circumstances of the case.
>
> 108 This point is made in *R. v. Forster*, 2005 SKCA 107, 2005 SKCA 107, 201 C.C.C. (3d) 290, 269 Sask. R. 275, where a stay of proceedings was ordered when the lead investigator took his notes and transferred them onto a computer disc, edited them and then destroyed his original notes. In

> coming to its conclusion, this Court was persuaded by the number of uses that the destroyed notes could have been put to and the officer discarding parts of his notes that he thought were insignificant resulted in the disc having a different substance than the original notes. The Court held that the prejudice to the accused as a result of the loss was significant enough to justify a stay. The facts of the case before us are different.
>
> 109 Mr. Anderson argues that the trial judge's finding that the notebooks were not lost through unacceptable negligence is unsupported by the evidence. I do not agree. The trial judge determined that there was no hint that the notebooks were deliberately destroyed for any nefarious purpose. He finds they were misplaced due to human error. These are factual determinations which support his conclusion there was no unacceptable negligence. Looking at the evidence on this issue as a whole, he could justifiably come to that conclusion.
>
> 110 Absent a finding of unacceptable negligence, there was no basis for an immediate stay unless Mr. Anderson established actual prejudice to his right to make full answer and defence sufficient to impair his right to a fair trial (see: *R. v. Bradford*, 2001 151 C.C.C. (3d) 363 (Ont. C.A.), at para. 8).

(2) The Crown's duty to disclose

[147] Disclosure is a duty of the prosecution which includes Crown counsel, the police and other state investigative agencies. In *R. v. Stinchcombe*, *supra* the Supreme Court of Canada set the parameters of the disclosure obligation. The Crown is to disclose all relevant information in its possession to permit an accused to make full answer and defence. The threshold test of relevance is low generally. If there is a reasonable possibility that information may assist an accused in any aspect of exercising his right to make full answer and defence, the information is relevant (*Stinchombe* paras. 21 and 22).

B. Analysis

(1) Was there a breach of the accused's section 7 rights?

[148] Cst. Harris intentionally muted the microphone for approximately 49 of the 69 minutes preceding Mr. [redacted] arrest. Primarily this involved conversations with other police officers germane to the ongoing investigation of Mr. [redacted]. Cst. Harris unintentionally neglected to record the conversation with Mr. [redacted] when he withdrew his consent to the search. Conversations with Mr. [redacted] by other officers also were not recorded.

[149] Cst. Harris' actions were in direct contravention of the written RCMP policy. Cst. Harris chose to deliberately contravene this written policy. Cst. Harris was an experienced police officer and knew of his obligation and the Crown's obligation for disclosure. I find that Cst. Harris' actions in relation to muting the audio recording were done in bad faith and were done to frustrate the Crown's obligation to provide disclosure of these very conversations.

[150] According to Cpl. Halbauer, 90% of the conversations which were not recorded involved a discussion of the investigation. The Crown has conceded that the police conducted a warrantless search, and the onus is on it to establish the admissibility of the items seized. This of necessity involves a careful assessment of issues like reasonable suspicion, reasonable grounds for detention, and reasonable and probable grounds to arrest.

[151] As stated by counsel for the accused in the addendum to his brief of law at paragraph 20:

> [20] This Honourable Court is tasked with the responsibility of determining a series of extremely complex questions including hunch vs reasonable suspicion and hunch or reasonable suspension[sic] v. reasonable grounds. Cst. Harris effectively destroyed the best evidence available to assist this Honourable Court in deciding this case. In my respectful opinion the egregious nature of the intentional evidence suppressing conduct of Cst. Harris cannot be overstated. Furthermore, according to Cst. Harris, this practice of audio destruction is commonplace by members of his investigative unit.

If the audio recording had been made and preserved it would clearly be relevant and disclosable by the Crown. The police officers who were present and involved in the conversations which have not been preserved do not have extensive notes of the information which would otherwise have been available, had the audio not been muted. In the words of Justice Sherstobitoff in *R. v. Forster,* 2005 SKCA 107, 201 C.C.C. (3d) 290 at paragraph 19 the conversations were "reasonably capable of being used by the accused in meeting the case of the Crown ".

[152] In this case, similar to *Forster, supra*, the recordings of the conversations could have been used by the defence to test the credibility of the officers.

[153] This case differs from others where evidence is accidentally lost or destroyed. I have little difficulty in finding that the accused's s. 7 rights were violated in this case by the actions of Cst. Harris. And in keeping with the discussion in *R. v. B. (F.C.), supra* I find that the actions of Cst. Harris were done deliberately to frustrate the Crown's

disclosure obligations. They were not only a breach of the accused's s. 7 rights, but an abuse of process.

(2) Remedy

[154] A stay of proceedings is to be granted in only the clearest of cases. Cst. Harris turned off the audio recording on a selective basis. Some conversations were recorded and others not. Cst. Harris' evidence on whether he decided to detain Mr. [redacted], and when he decided to detain Mr[redacted] is not consistent. The conversations with Cpl. Halbauer and Cpl. Walkden may have shed some light on this issue. The officers disagreed on whether or not there were grounds for arrest. Cst. Harris did not believe he had grounds for arrest. Cpl. Walkden clearly articulated in his *viva voce* testimony the basis on which he believed he had reasonable grounds to arrest Mr. [redacted]. Cpl. Walkden was not as articulate when he informed Mr. [redacted] of his conclusions. These comments bear repeating:

> [para. 70, *supra*]
>
> ... "based on looking at the back seat modifications after market consistent with people concealing narcotics and based on the whole traffic stop, right now I believe there may be narcotics behind the seat". Cpl Walkden asked Mr. [redacted] if he understood that and Mr. [redacted] replied that he did. And then Cpl. Walkden said "because I believe that, I don't have to believe it within reason. Ok. All I have to do is believe it from my training and experience. Ok? Right now, because of that I am placing you under arrest for trafficking in narcotics. Do you understand that? Ok."

No doubt all of this would have been a fruitful area for cross-examination by counsel for the accused to test the credibility of the officers in question.

[155] Cst. Harris deprived the accused and the court of critical discussions about topics including: the investigation, the grounds to search, the grounds to deploy the sniffer dog, the failure of the dog to indicate the presence of contraband, and the observations that were being made. (Defence memorandum of law (par. 14)).

[156] The suppression of the audio evidence meets both prongs of the *O'Connor* test in relation to the accused's rights under s. 7, and also in relation to the finding of an abuse of process.

[157] The prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated through the conduct of the trial. The suppressed evidence has a direct impact on the proceedings. Cst. Harris cannot recall all of the details of the suppressed conversations. The defence cannot cross-examine to assess credibility, or to assess the grounds for Cst. Harris' actions. The topics that would have been discussed in the suppressed audio relate to major issues in the case. Their destruction is significant, and will have a continuing adverse effect on these proceedings.

[158] Short of a stay of proceedings, there is no other remedy capable of removing the prejudice. The prejudice is not curable by a further disclosure order. In *R v. Forster, supra* at para. 33 Justice Sherstobitoff noted:

> [33] The difficulty in this case is that the material in issue has been destroyed. It cannot be recreated. Since it could have been of use to the defence, the defence has been prejudiced by its loss. Accordingly, both branches of the test are met. The prejudice caused by the destruction will be manifested through the trial and its outcome. Perhaps most importantly, no other remedy is capable of removing that prejudice. *Carosella* is the only judgment dealing with evidence deliberately destroyed. The remedy granted was a stay. Accordingly, it was within the discretion of the judge to find, as she did, that there was "no other practical remedy available" and to grant a stay.

[159] As stated previously, the suppression of the audio evidence not only constituted a violation of the accused's rights pursuant to s. 7 of the *Charter*, it also constituted an abuse of process.

[160] The deliberate suppression or destruction of the evidence for the purpose of frustrating the legal process is extremely serious. In *R v. O'Connor, supra* at para. 79 Justice L'Heureux-Dubé noted that a finding of *male fides* on the part of the Crown is not a necessary precondition to the granting of a stay, but may make the granting of a stay significantly more likely.

[161] Cst. Harris specifically suppressed the evidence in order to frustrate the Crown's disclosure obligation. Such conduct is extremely egregious. Society relies on police to enforce the law in a lawful manner. Deliberate conduct which constitutes bad faith on the part of the police will warrant a stay. In *R. v. Carosella,* [1997] 1 S.C.R. 80, 112 C.C.C. (3d) 289, Sopinka held at para 56:

> ...[T]he complete absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of the administration of justice...The justice system functions best and instils

> public confidence in its decision where its processes are able to make available all relevant evidence which is not excluded by some overriding public policy. Confidence in the system would be undermined if the administration of justice condoned conduct designed to defeat the processes of the court...Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced or admitted is for the courts. It is this feature of this appeal in particular that distinguishes this case from lost evidence cases generally.

[162] Cst. Harris has denied the accused the opportunity for a fair trial by his deliberate actions. In the circumstances here, the appropriate remedy is a stay of proceedings.

SECTION 7, 8, 9, 10 OF THE *CHARTER*

[163] In the alternative Mr. [redacted] states that his rights as guaranteed under ss. 7, 8, 9, and 10 of the *Charter* have been violated. He seeks exclusion of all evidence and derivative evidence acquired by the police during the course of the investigation giving rise to the prosecution including, but not limited to: any and all evidence obtained in the arrest and search of Mr. [redacted], and the vehicle he was driving and any and all statements made by him. In the interests of completing the record, I will deal with these issues as well.

A. The Legislation

[164] Sections 7, 8, 9, and 10 of the *Charter* provide as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> **8.** Everyone has the right to be secure against unreasonable search or seizure.
>
> **9.** Everyone has the right not to be arbitrarily detained or imprisoned.
>
> **10.** Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right; and
>
> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

B. The Law

[165] I will briefly review the law applicable to the evidence in this case.

Section 8 of the *Charter*

1. General

[166] In *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34 Justice Fish reiterated longstanding principles related to s. 8:

> [34] Section 8 of the *Charter* guarantees the right of everyone in Canada to be secure against unreasonable search or seizure. An inspection is a search, and a taking is a seizure, where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access (*R. v. Tessling*, 2004 SCC 67), 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 18; *R. v. Evans*, [1996] 1 S.C.R. 8, at para. 11; *R. v. Borden*, [1994] 3 S.C.R. 145, at p. 160).
>
> ...
>
> [39] Whether Mr. Cole had a reasonable expectation of privacy depends on the "totality of the circumstances" (*R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45).

> [40] The "totality of the circumstances" test is one of substance, not of form. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances (*Tessling*, at para. 32; *Patrick*, at para. 27). ...

2. Warrantless Searches - Authorized by Law

[167] In *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408 Justice Moldaver reaffirmed the principle from *R v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1at p. 278 that a warrantless search "will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search was carried out is reasonable.

a. Statutory Authorization

[168] In relation to warrantless searches authorized by statute, Justice Binnie noted in *R v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851:

> [3] Clearly random checks of vehicles for highway purposes must be limited to their intended purpose and cannot be turned into "an unfounded general inquisition or an unreasonable search: *R. v. Mellenthin*, [1992] 3 S.C.R. 615, at p. 624.
>
> ...
>
> [23] Random roadside stops must be limited to their intended purposes. A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over", *per* Cory J., in *Mellenthin*, at p. 629. It thus becomes necessary to examine the authority claimed by the police at each step from the original demand to the appellants to pull their truck over on the Trans-Canada Highway to the discovery of the cash and subsequently the marijuana a

> couple of hours later as well as the follow-up "inventory search" the next morning, to determine at what point, if at all, the police infringed the rights of the appellants under s. 8 or s. 9 of the *Charter*. A roadside stop is not a static event. Information as it emerges may entitle the police to proceed further, or, as the case may be, end their enquiries and allow the vehicle to resume its journey.

b. Common Law Authorization

i. Search incident to investigative detention:

[169] In *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 Justice Iacobucci held that an officer can conduct a pat-down search of an accused who is subject to an investigative detention if the officer has reasonable grounds to believe his safety is at risk.

[170] In *R v. Turpin*, 2012 SKCA 50, 284 C.C.C. (3d) 296 Richards, J.A. (as he then was) held that a search conducted incident to an investigative detention is limited to a pat-down of the accused for the purpose of safety. It does not extend to a vehicle search for evidence of an offence (paras 94-95).

(ii) Consent/waiver:

[171] In order for an accused to waive the protection of s. 8 any consent to a search must be voluntary and informed (*R. v. Cole, supra* at para 78)

[172] Justice Doherty of the Ontario Court of Appeal in *R. v Wills* (1992), 70 C.C.C. (3d) 529, [1992] O.J. No. 294 (QL) (Ont. C.A.) set out the requirements for a consent search as follows at p. 546.

In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:

(i) there was a consent, express or implied;

(ii) the giver of the consent had the authority to give the consent in question;

(iii) the consent was voluntary in the sense that that word is used in *Goldman, supra*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;

(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

(vi) the giver of the consent was aware of the potential consequences of giving the consent.

The awareness of the consequences requirement needs further elaboration. In *Smith, supra*, at pp. 322-3, McLachlin J. considered the meaning of the awareness of the consequences requirement in the context of an alleged waiver of an accused's s. 10(*b*) rights. She held that the phrase required that the accused have a general understanding of the jeopardy in which he found himself, and an appreciation of the consequence of deciding for or against exercising his s. 10(*b*) rights.

A similar approach should be applied where s. 8 rights are at stake. The person asked for his or her consent must appreciate in a general way what his or her position is vis-à-vis the ongoing police investigation. Is that person an accused, a suspect, or a target of the investigation, or is he or she regarded merely as an "innocent bystander" whose help is requested by the police? If the person whose consent is requested is an accused, suspect or target, does that person understand in a general way the nature of the charge or potential charge which he or she may face?

[173] Consent is described in part in the following way in *R. v. Goldman,* [1980] 1 S.C.R. 976, 51 C.C.C. (2d) 1 at p. 1005:

> ...If the consent he gives is the one he intended to give and if he gives it as a result of his own decision and not under external coercion the fact that his motives for so doing are selfish and even reprehensible by certain standards will not vitiate it. In my opinion, on the evidence adduced in this case, the consent was a valid consent and was legally effective for its intended purpose, that is, the procuring of admissible evidence for use in Goldmans trial.

[174] The *Wills* test has been adopted by the Saskatchewan Court of Appeal in a number of cases such as *Canada (Attorney General) v. Mouland*, 2007 SKCA 105, [2007] 12 W.W.R. 24, *R. v. Rutten*, 2006 SKCA 17, 205 C.C.C. (3d) 504 at para 35, *R. v. Sewell*, 2003 SKCA 52, 175 C.C.C. (3d) 242 at para. 17, *R. v. Perello*, 2005 SKCA 8, 193 C.C.C. (3d) 151 and *R. v. Luc,* 2004 SKCA 117, 188 C.C.C. (3d) 436 at para 31.

(iii) Dog-sniff search:

[175] In *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 and *R. v A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569 the majority of the Supreme Court endorsed a common law power to engage in a warrantless dog-sniff search of individuals who the police have a "reasonable suspicion" are involved in narcotics offences. The Saskatchewan Court of Appeal has considered the validity of dog-sniff searches on multiple occasions. The validity of a sniff search often turns on whether the officer had the reasonable suspicion required to conduct the search. If reasonable suspicion is lacking, the search is not justified by the common law sniff-search power and therefore violates s. 8.

[176] The concept of reasonable suspicion (which also functions as the standard justifying an investigative detention) was discussed by Binnie, J. in *Kang-Brown*:

[75] The reasonable suspicion standard is not a new juridical standard called into existence for the purposes of this case. Suspicion is an expectation that the targeted individual is possibly engaged in some criminal activity. A reasonable suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. As observed by P. Sankoff and S. Perrault, Suspicious Searches: What's so Reasonable About Them? (1999), 24 C.R. (5th) 123:

> [T]he fundamental distinction between mere suspicion and reasonable suspicion lies in the fact that in the latter case, a sincerely held subjective belief is insufficient. Instead, to justify such a search, the suspicion must be supported by factual elements which can be adduced in evidence and permit an independent judicial assessment.
>
> . . .
>
> What distinguishes reasonable suspicion from the higher standard of reasonable and probable grounds" is merely the degree of probability demonstrating that a person is involved in criminal activity, not the existence of objectively ascertainable facts which, in both cases, must exist to support the search. [pp. 125-26]

Writing about "reasonable suspicion in the context of the entrapment defence, Lamer J. in *R. v. Mack*, [1988] 2 S.C.R. 903, thought it unwise to elaborate "in the abstract (p. 965). See also R. v. Cahill (1992), 13 C.R. (4th) 327 (B.C.C.A.), at p. 339. However, in *Alabama v. White*, 496 U.S. 325 (1990), the U.S. Supreme Court contrasted reasonable suspicion with reasonable grounds of belief (or, what the U.S. lawyers call probable cause"):

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. [p. 330]

iv. Search incident to arrest:

[177] There are three conditions precedent for a valid search incident to arrest. First, the arrest must itself be valid. The arresting officer must have had reasonable and probable grounds to make the arrest. If the officer did not have reasonable and probable grounds, the arrest was invalid. A search conducted incident to an invalid arrest will violate s. 8. (*R. v. Loewen*, 2011 SCC 21, [2011] 2 S.C.R. 167)

[178] Second the search must be conducted in a reasonable manner. Finally, the search must be incident to arrest. A search incident to arrest can include searching the accused's vehicle to uncover evidence of the offence. *R. v. Stillman*, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321 at para 33-40; *R. v. Caslake*, [1998] 1 S.C.R. 51, 121 C.C.C. (3d) 97, *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, *R. v. Nolet, supra* at para 49.)

[179] In *R. v. Shinkewski*, 2012 SKCA 63, 289 C.C.C. (3d) 145 police officers received a tip from a reliable informant that a drug shipment would be arriving at a specific home at a specific time. Officers observed a car, which fit the description provided by the informant, arriving at the home at the relevant time.

[180] The officers observed additional vehicles, including that of the accused, pull into the driveway of the home shortly after the arrival of the alleged drug courier. The accused was pulled over and arrested. His vehicle was searched incident to arrest and four pounds of narcotics were discovered.

[181] The trial judge found that the officers did not have reasonable and probable grounds to arrest the accused. Caldwell, J.A. allowed the appeal. He held there were reasonable and probable grounds to believe the accused was in possession of a controlled substance. He noted:

> 9 Searches incidental to arrest are warrantless searches. A warrantless search is *prima facie* unreasonable and the Crown bears the onus of demonstrating, on a balance of probabilities, that a warrantless search was reasonable (*R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631 (S.C.C.), at para. 32). The Crown can discharge this onus if, on the facts, the search was authorized by law, the law itself is reasonable and the police carried out the search in a reasonable manner (*R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.), at p. 278). However, the police power to search *incidental to*

> *arrest* is "an established exception to the general rules that warrantless searches are *prima facie* unreasonable" (*R. v. Golden*, 2001 SCC 83,[2001] 3 S.C.R. 679 (S.C.C.), at para. 84). As such, the reasonableness of the search of Mr. Shinkewski's vehicle turned on whether the police had arrested Mr. Shinkewski in accordance with a lawful exercise of police power.

[182] In discussing the reasonable grounds required for an officer to make an arrest under s. 495(1)(a) of the *Criminal Code*, Justice Caldwell held that:

> 12 The first question, whether an arresting officer had satisfied the standard of reasonable grounds to believe the subject of an arrest had committed or was about to commit an indictable offence, is a question of law reviewable on the standard of correctness (*R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851 (S.C.C.); *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527 (S.C.C.); and *R. v. Feeney*, [1997] 2 S.C.R. 13 (S.C.C.)). The standard of correctness allows this Court to substitute its own opinion for that of the trial judge where the judge has, in this Court's opinion, incorrectly identified the law or come to the wrong legal conclusion (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.)).
>
> 13 The legal standard of "reasonable grounds to believe" has been the subject of considerable judicial interpretation. I do not propose to review it all; however, I make the following observations from the jurisprudence:
>
> (a) an arresting officer must subjectively hold reasonable grounds to arrest and those grounds must be justifiable from an objective point of view – in other words, a reasonable person placed in the position of the arresting officer must be able to conclude there were indeed reasonable grounds for the arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.);
>
> (b) an arresting officer is not required to establish the commission of an indictable offence on a balance of probabilities (*Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (S.C.C.) or a *prima facie* case for conviction (*R. v. Storrey*) before making the arrest; but an arresting officer must act on something more than a "reasonable suspicion" or a hunch (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 (S.C.C.), at para 91; *R. v. Mann*,

2004 SCC 52, [2004] 3 S.C.R. 59 (S.C.C.); *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.));

(c) an arresting officer must consider all incriminating and exonerating information which the circumstances reasonably permit, but may disregard information which the officer has reason to believe may be unreliable: *R. v. Storrey*;

(d) a reviewing court must view the evidence available to an arresting officer cumulatively, not in a piecemeal fashion: *R. v. Savage*, 2011 SKCA 65, 371 Sask. R. 283 (Sask. C.A.); *R. v. Nguyen*, 2010 ABCA 146, 477 A.R. 395 (Alta. C.A.); and *R. v. Storrey*; and

(e) "... the standard must be interpreted contextually, having regard to the circumstances in their entirety, including the timing involved, the events leading up to the arrest both immediate and over time, and the dynamics at play in the arrest": *R. v. Nguyen*, at para. 18; and, context includes the experience and training of the arresting officer: *R. v. Nolet*, at para 48; *R.* v. *Whyte*, 2011 ONCA 24, 266 C.C.C. (3d) 5 (Ont. C.A.), at para 31; and *R. v. Luong*, 2010 BCCA 158, 286 B.C.A.C. 53 (B.C.C.A.), at para. 19.

Justice Caldwell further noted that:

16 First, the standard of reasonable grounds to believe does not require that an arresting officer ensure there has been "informed consideration" of all the information available at the time of arrest before the officer may lawfully effect an arrest. The standard simply requires the arresting officer to consider all incriminating and exonerating information *which the circumstances reasonably permit* (*R. v. Storrey*). ...

19 As to judicial review of the sergeants conclusion, *R. v. Storrey* directs a court to conduct its assessment of the objective reasonableness of the grounds for arrest from the retrospective viewpoint of a reasonable person *placed in the position of the arresting officer*. Where the circumstances of arrest do not reasonably permit the arresting officer to inquire into the veracity of the information which formed the basis of the grounds for arrest, the law similarly does not permit judicial consideration of any evidentiary shortcomings which might come to light or be discovered post-arrest. An otherwise lawful arrest is not invalidated by the

> *ex post facto* discovery of deficiencies or defects in the information upon which the police have relied to effect the arrest unless, in the circumstances at play in the arrest situation, the police could reasonably have made inquiries which would have led to the discovery of the deficiencies or defects. For this reason, I find that the trial judge erred in principle by considering an irrelevant factor (*i.e.*, in this case, the actual reliability and currency of information was not known to the arresting officer at the time of arrest) in his assessment of the reasonableness of the grounds for arresting Mr. Shinkewski.
>
> (Emphasis in Original]

[183] Justice Caldwell then determined that the arresting officer had reasonable and probable grounds based on the following indicia:

> 20 I turn now to determine the principle issue in this appeal: Whether there were reasonable grounds to believe Mr. Shinkewski had committed an indictable offence. In this respect, the Crown and Mr. Shinkewski both accept that Sergeant McDonald articulated the following limited grounds for ordering Mr. Shinkewski's arrest:
>
> (a) information from a reliable source informing of a forthcoming delivery of cocaine and marihuana to a specific individual at a specific residence at a specific time by a courier arriving from a specific city;
>
> (b) the arrival of a vehicle consistent with the courier vehicle described by the informant at the identified residence on the day predicted, suggesting that the anticipated drug delivery had occurred;
>
> (c) shortly thereafter, the arrival at the target residence of a number of vehicles, including one registered to Mr. Shinkewski, each of which remained for only a short period of time; behaviour which, in Sergeant McDonald's experience as a drug investigator, was consistent with individuals picking up or purchasing drugs; and
>
> (d) Mr. Shinkewski had been named in three separate tips as someone involved in marihuana trafficking.
>
> 21 While the list is short, the standard of "reasonable grounds to believe" is not met by the number of grounds articulated by the arresting officer; rather, it is the cumulative weight of the grounds articulated which, on an objective basis and when considered in context, must tilt the balance

> from "mere suspicion" to a "reasonable suspicion" and then to "reasonable grounds to believe" an individual has or is about to commit an indictable offence. And here, as I will explain, there was sufficient objective support for Sergeant McDonald's subjective belief that the operator of Mr. Shinkewski's vehicle had committed an indictable offence.

[184] More recently in *R v. MacKenzie*, 2013 SCC 50, [2013] 12 W.W.R. 209, the Supreme Court had occasion to consider a sniff search by a drug-detection dog of a motor vehicle parked on the side of a public highway. Mr. MacKenzie had been pulled over for a regulatory infraction.

[185] Justice Moldaver noted (at para. 31) that the Supreme Court has held that motor vehicles are places where individuals have a reasonable but "reduced" expectation of privacy. *R. v. Belnavis* , [1997] 3 S.C.R. 341, 118 C.C.C. (3d) 405, at para. 38; also *R. v. Wise*, [1992] 1 S.C.R. 527, 70 C.C.C. (3d) 193 at p. 534)

[186] Justice Moldaver concluded that the police were entitled to enlist the aid of a sniffer dog for crime prevention on the basis of reasonable suspicion.

[187] Justice Moldaver then considered the concept of "reasonable suspicion" and summarized the principles set forth by Karakatsanis, J. in *R v. Chehil*, 2013 SCC 49, 301 C.C.C. (3d) 157 at paras. 71-74:

> [71] Reasonable suspicion must be assessed against the totality of the circumstances. Characteristics that apply broadly to innocent people and "no-win" behaviour — he looked at me, he did not look at me — cannot on their own, support a finding of reasonable suspicion, although they may take on some value when they form part of a constellation of factors.
>
> [72] Exculpatory, common, neutral, or equivocal information should not be discarded when assessing a constellation of factors. However, the

> test for reasonable suspicion will not be stymied when the factors which give rise to it are supportive of an innocent explanation. We are looking here at possibilities, not probabilities. Are the facts objectively indicative of the *possibility* of criminal behaviour in light of the totality of the circumstances? If so, the objective component of the test will have been met. If not, the inquiry is at an end.
>
> [73] Assessing whether a particular constellation of facts gives rise to a reasonable suspicion should not — indeed must not — devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.
>
> [74] Parenthetically, I note that there are several ways of describing what amounts to the same thing. Reasonable suspicion means "reasonable grounds to suspect" as distinguished from "reasonable grounds to believe" (*Kang-Brown*, at paras. 21 and 25, *per* Binnie J., and at para. 164, *per* Deschamps J.). To the extent one speaks of a "reasonable belief" in the context of reasonable suspicion, it is a reasonable belief that an individual *might* be connected to a particular offence, as opposed to a reasonable belief that an individual *is* connected to the offence. As Karakatsanis J. observes in *Chehil*, the bottom line is that while both concepts must be grounded in objective facts that stand up to independent scrutiny, "reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime (para. 27).

[188] It is important to note that a "mere hunch" based on officer training and experience cannot constitute reasonable suspicion (*Mann, supra* at paras. 30, 35, 40, 41). However, this does not mean that officer training and experience has no role to play in determining the existence of reasonable suspicion. In *R. v. Yeh*, 2009 SKCA 112, 248 C.C.C. (3d) 125 Justice Richards (as he then was) held that:

> [53] Constable Wilson's assessment of the situation involving Mr. Yeh must be considered against the background of the now established notion that the experience and training of a police officer should be taken into account when the reasonableness of a suspicion is assessed. This is because a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police. See: *R. v. Mouland*, 2007 SKCA 105 at para. 26, 77 W.C.B. (2d) 109. This

> said, it is also clear that, when necessary, the courts must be prepared to look carefully at what is held out to be "experience" or "training" in order to ensure that the integrity of the reasonable suspicion concept is maintained.

Section 9 of the *Charter*

1. Arrest

[189] An unlawful arrest violates s. 9 of the *Charter*. An arrest under s. 495(1)(a) of the *Criminal Code* is unlawful if the officer lacked reasonable and probable grounds to make the arrest (*Loewen, supra*). Therefore, much of the jurisprudence applicable to the validity of the search incident to arrest (*Shinkewski, supra, Turpin, supra*) is applicable to the determination of whether the actual arrest violated s. 9.

2. Detention

[190] The concept of detention is considerably more nebulous than that of arrest. In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 Chief Justice McLachlin and Justice Charron set out the analytical framework for assessing an arbitrary detention claim. The first step is to assess whether the accused was subject to a 'detention'.

> [44] In summary, we conclude as follows:
>
> 1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
> (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[191] The Supreme Court has consistently held that in a vehicle stop police assume control of the driver's movements through a demand or direction and the stop thereby constitutes a detention within the meaning of s. 9, *R. v. Hufsky*, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398.

[192] Once it is determined that the accused was detained, the analysis shifts to consider whether the detention was arbitrary. In *Grant, supra* McLachlin, C.J.C. and Charron, J. held that:

> [54] The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a persons liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: "This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law" (*Charkaoui v. Canada (Citizenship*

> *and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 88). Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.
>
> [55] Earlier suggestions that an unlawful detention was not necessarily arbitrary (see *R. v. Duguay* (1985), 18 C.C.C. (3d) 289 (Ont. C.A.)) have been overtaken by *Mann*, in which this Court confirmed the existence of a common law police power of investigative detention. The concern in the earlier cases was that an arrest made on grounds falling just short of the "reasonable and probable grounds" required for arrest should not automatically be considered arbitrary in the sense of being baseless or capricious. *Mann*, in confirming that a brief investigative detention based on "reasonable suspicion" was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.
>
> [56] This approach mirrors the framework developed for assessing unreasonable searches and seizures under s. 8 of the *Charter*. Under *R. v. Collins*, [1987] 1 S.C.R. 265, and subsequent cases dealing with s. 8, a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner. Similarly, it should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary. We add that, as with other rights, the s. 9 prohibition of arbitrary detention may be limited under s. 1 by such measures "prescribed by law as can be demonstrably justified in a free and democratic society": see *R. v. Hufsky*, [1988] 1 S.C.R. 621, and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

a. Detentions authorized at common law

[193] Following *Grant, supra*, a detention must be authorized by law in order to pass s. 9 muster. However, the Supreme Court has subsequently created a very broad power of detention at common law.

[194] In *R v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, Justice Abella writing for the majority, endorsed a common law police power to detain whenever detention is "reasonably necessary" in "the totality of circumstances". Justice Abella noted:

> [20] ...Thus, a detention which is found to be lawful at common law is, necessarily, not arbitrary under s. 9 of the *Charter*. A search done incidentally to that lawful detention will, similarly, not be found to infringe s. 8 if the search is carried out in a reasonable manner and there are reasonable grounds to believe that police or public safety issues exist.
>
> ...
>
> [22] The key question in this appeal, therefore, is whether the police were acting within the scope of their common law police powers when they detained Clayton and Farmer. These common law powers were described by Doherty J.A. in his reasons at paras. 35-37 with great clarity, requiring no further refinement here:
>
> > The powers and duties of constables at common law were described in *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.) at 661:
> >
> > In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.
>
> ...
>
> [30] The justification for a police officer's decision to detain, as developed in *Dedman* and most recently interpreted in *Mann*, will depend on the "totality of the circumstances" underlying the officers suspicion that the detention of a particular individual is "reasonably necessary. If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. As explained in *Mann*, searches will only be permitted where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk.

> [31] The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

[195] *Clayton, supra* was endorsed by the Supreme Court in *Aucoin, supra*. Justice Moldaver confirmed that *Clayton* established a general common law power to detain where it is reasonably necessary in the totality of the circumstances. (*Aucoin* at para. 36). A *Clayton, supra*, detention is distinct from a *Mann* investigative detention.

[196] In *Aucoin* the officer detained the accused in the back of his cruiser because he feared the accused would slip away while the officer did paperwork related to the accused's violation of provincial regulatory offences. Justice Moldaver held that the detention had not been reasonably necessary. The s. 9 rights of the accused had been violated.

b. Detention authorized by statute

[197] In *Nolet, supra*, the accused were travelling east-bound across Saskatchewan on the Trans-Canada Highway in a commercial truck. The accused were stopped at a RCMP "spot check" conducted pursuant to *The Highways and Transportation Act, 1997*, S.S. 1997, c. H-3.01. Searches of the vehicle resulted in the seizure of money and drugs. The trial judge found violations of the *Charter*. The Saskatchewan Court of Appeal reversed and the Supreme Court dismissed the accused's appeal. Justice Binnie noted:

> [3] Clearly random checks of vehicles for highway purposes must be limited to their intended purpose and cannot be turned into "an unfounded general inquisition or an unreasonable search": *R. v. Mellenthin*, [1992] 3 S.C.R. 615, at p. 624.
>
> ...
>
> [23] Random roadside stops must be limited to their intended purposes. "A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over", *per* Cory J., in *Mellenthin*, at p. 629. It thus becomes necessary to examine the authority claimed by the police at each step from the original demand to the appellants to pull their truck over on the Trans-Canada Highway to the discovery of the cash and subsequently the marijuana a couple of hours later as well as the follow-up "inventory search" the next morning, to determine at what point, if at all, the police infringed the rights of the appellants under s. 8 or s. 9 of the *Charter*. A roadside stop is not a static event. Information as it emerges may entitle the police to proceed further, or, as the case may be, end their enquiries and allow the vehicle to resume its journey.

3. Investigative detention

[198] In *R. v. Mann, supra* Justice Iacobucci affirmed Doherty, J.A.'s ruling in *R. v. Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (Ont. C.A.) that the police have a common law power to briefly detain individuals in what is known as an "investigative detention".

[199] The officer must have reasonable grounds to suspect that the individual to be detained was or is connected with a recent or ongoing criminal offence. The detention must be reasonably necessary in the totality of circumstances. (*Mann, supra* at para. 34)

[200] Justice Iacobucci noted that an investigative detention should be brief in duration. Furthermore, the detention does not impose an obligation on the suspect to answer questions (*Mann, supra* at para. 45)

Section 10(a)

[201] The analysis in *Grant, supra* of the definition of "detention" is relevant in the context of s. 10. In *R. v. Latimer*, [1997] 1 S.C.R. 217, 112 C.C.C. (3d) 193, Chief Justice Lamer held that:

> [28] Section 10(*a*) of the *Charter* provides the right to be informed promptly of the reasons for one's arrest or detention. The purpose of this provision is to ensure that a person "understand generally the jeopardy" in which he or she finds himself or herself: *R. v. Smith*, [1991] 1 S.C.R. 714, at p. 728. There are two reasons why the *Charter* lays down this requirement: first, because it would be a gross interference with individual liberty for persons to have to submit to arrest without knowing the reasons for that arrest, and second, because it would be difficult to exercise the right to counsel protected by s. 10(*b*) in a meaningful way if one were not aware of the extent of ones jeopardy: *R. v. Evans*, *supra*, at pp. 886-87.

Section 10(b)

1. General

[202] Section 10(*b*) contains an informational component and an implementational component. In *R. v. Bartle*, [1994] 3 S.C.R. 173, 92 C.C.C. (3d) 289, Chief Justice Lamer categorized these components as follows at pps. 191-192:

> This Court has said on numerous previous occasions that s. 10(*b*) of the *Charter* imposes the following duties on state authorities who arrest or detain a person:
>
> > (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
> >
> > (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
> >
> > (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

2. The informational component

[203] In *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460 Chief Justice McLachlin and Justice Charron held that the police duty to inform an individual of his or her s. 10(b) rights is triggered at the outset of an investigative detention. (*Suberu, supra* para. 2)

[204] The police are required to inform the accused of the right to counsel "without delay". McLachlin, C.J.C. and Charron, J. held that "[t]he immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the *Charter*". (*Suberu, supra* para. 2)

[205] However, as noted in *Grant, supra*, not every interaction with the police constitutes a detention. In *Suberu, supra*, McLachlin, C.J.C. and Charron, J. point out the necessary corollary:

> [5] Even when an encounter clearly results in a detention, for example when the person is ultimately arrested and taken in police custody, it cannot simply be assumed that there was a detention from the beginning

> of the interaction. Given the immediacy of the s. 10(*b*) obligation to inform a detainee of his or her right to counsel, it is important to determine if and when an encounter between the police and an individual effectively crystallizes in a detention. It will depend on the circumstances. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed.

3. The implementational component

[206] In *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429 Chief Justice McLachlin and Justice Charron held that the implementational duties under s. 10(b) are not triggered until the accused indicates a desire to exercise his or her right to counsel.

DISCUSSION

1. Validity of original stop

[207] Mr. [redacted] was not ostensibly in breach of any provision of *The Traffic Safety Act*. Mr. [redacted]s was driving at an appropriate speed in the appropriate lane of the highway. The equipment on the vehicle appeared to be fine and the vehicle was being driven in a lawful manner.

[208] When asked in direct examination what his purpose was for stopping the vehicle, Cst. Harris testified that he was enforcing *The Traffic Safety Act* and he wanted to make sure the driver had a proper driver's licence, that his vehicle registration was valid, that he was not fatigued and that he was sober.

[209] When asked in cross-examination why he stopped the vehicle Cst. Harris confirmed there were three reasons: the fact that the driver was sitting low in his seat; the fact that the driver did not acknowledge him when he drove by; and the fact that the vehicle had a Manitoba licence plate. Then Cst. Harris indicated he also wanted to check the operator's driver's license and his sobriety.

[210] When Cst. Harris approached the driver's window he was able to satisfy himself that the driver did not appear to be under the influence of alcohol or drugs. The driver appeared to be alert and the driver provided him with the documents he sought including a valid driver's license and registration for the vehicle. In terms of the suggestion that the driver was sitting low in his seat, Cst. Harris did not raise this issue with Mr. [redacted] and the video surveillance camera depicted Mr. [redacted] head being in the middle of and above the driver's head rest when the vehicle was stopped.

[211] The initial traffic stop was justified pursuant to the general authority afforded to police under *The Traffic Safety Act*. Reference may be made on this issue to *R. v. Mouland (L.L.)*, 2007 SKCA 105, 304 Sask. R. 129, at paras. 5 and 15:

> [5] The respondent conceded that the initial stop and detention for the purpose of checking his drivers licence, vehicle registration, sobriety and mechanical fitness of the vehicle was lawful pursuant to the general authority afforded the police under *The Highway Traffic Act*, S.S. 1986, c. H-3.1 and *R. v. Duncanson* (1991), 12 C.R. (4th) 86, 93 Sask. R. 193 (C.A.) and *R. v. Ladouceur*, (2002), 165 C.C.C. (3d) 321. These decisions held that an arbitrary stop, without suspicion of wrongdoing, as authorized by the *Act* is justified under s. 1 of the *Charter* as a reasonable limit on the respondent's *Charter* rights prescribed by law. Thus, the first question was answered in the affirmative.
>
> ...

> [15] However, the courts have made it clear that where an arbitrary stop is held to be justified under s. 1 of the *Charter*, the stop is authorized for the limited purpose of protecting highway safety, including checking for sobriety, licenses, ownership, insurance and mechanical fitness. If the police go beyond this limited purpose, and embark upon an unfounded general inquisition or an unreasonable search, the stop loses the protection afforded by s. 1, for it can no longer meet the requirement set out in *R. v. Oakes*, [1986] 1 S.C.R. 103; 65 N.R. 87; 14 O.A.C. 335, that it infringes the right of the individual as little as possible in order to achieve the accepted purpose.

[212] If Cst. Harris were engaged in random traffic stops to check for drugs, his actions would be unconstitutional and amount to a serious abuse of the powers society has entrusted to the police. Cst. Harris denied that is what he was doing or did in this case. I accept Cst. Harris' testimony on this issue. He was stationed in the RTU and his responsibilities as part of that unit included enforcing *The Traffic Safety Act* and investigating other *Criminal Code* offences.

[213] I find the initial stop was valid.

2. Did Cst. Harris have any basis to further detain Mr. [redacted] at the conclusion of the highway traffic stop?

[214] *The Traffic Safety Act* stop of necessity involves a detention for a limited purpose. It is important at this stage to examine the authority claimed by the police at each stage of the proceedings. A traffic stop is not a static event and may change in character as things develop. (See *Nolet* at para. 23).

[215] This leads to an analysis of the "objectively discernible facts" to permit the court to make a finding as to whether these facts amount to reasonable suspicion. Cst.

Harris testified that the following matters lead to his reasonable suspicion: Mr. [redacted] appeared to be extremely nervous. His hands were shaking. He had difficulty retrieving his documents because his hands were shaking. Even taking into consideration the fact that members of the public may be nervous when stopped by the police, Mr. [redacted] visible expression of nerves exceeded that which might generally be expected and the signs of nervousness did not appear to be subsiding.

[216] Cst. Harris testified that he has stopped numerous vehicles in the course of his police work and he acknowledged some of the drivers he has stopped tend to be nervous, but this subsides after a short time. Cst. Harris testified that from his training and experience, Mr. [redacted] hands were shaking a little bit out of the ordinary, more than he would generally see. Cst. Harris testified that as a result of his training and experience, these obvious nerves caused his awareness to be heightened that something might be going on.

[217] In addition Mr [redacted] was driving a car owned by a third party. Mr. [redacted] was driving from Calgary, which according to the police is a known distribution centre for drugs to Winnipeg which can be a hub for the import of narcotics. Drugs tend to travel from west to east. Cst. Harris indicated the source of his knowledge on the above issues came from his training and experience and from discussions with his colleagues who have quite extensive experience. The training included attendance at the Pipeline course which Cst. Harris described as a course "intended to enhance the officer's ability to look beyond the traffic stop to other things which might be developing or right in front of your face during the traffic stop."

[218] When Cst. Harris checked on Mr. [redacted] history he discovered that Mr. [redacted] had served 3 years in custody as a result of drug offences in Manitoba approximately 10 years earlier.

[219] In *R v. Mann, supra* the court held that the police are entitled to detain a person for investigative purposes where they have reasonable grounds to suspect that the individual is connected to particular criminal activity and that such a detention is reasonably necessary in the circumstances (para. 45).

[220] In *MacKenzie, supra*, Justice Moldaver clarified the term "reasonable grounds to detain" as described in *Mann, supra*. According to Justice Moldaver this phrase means...

> [38] ... In the context of detention, "reasonable grounds" means reasonable grounds to suspect that an individual is involved in a particular criminal activity, which is synonymous with reasonable suspicion.

[221] This is a matter of possibilities.

> [41] ... The hallmark of reasonable suspicion, as distinguished from mere suspicion, is that "a sincerely held subjective belief is insufficient" to support the former (*Kang-Brown,* at para. 75, *per* Binnie J., citing P. Sankoff and S. Perrault, "Suspicious Searches: What's so Reasonable About Them:" (1999), 24 C.R. (5th) 123, at p. 125). Rather as Karakatsanis, J. observes in *Chehil*, reasonable suspicion must be grounded in "objectively discernible facts, which can then be subjected to independent judicial scrutiny" (para, 26).

[222] In trying to assess whether Cst. Harris' subjective belief was objectively reasonable it is important to consider the principles expressed by Karakatsanis, J. in

Chehil and summarized by Moldaver, J. in *MacKenzie* quoted *supra* at para. 181. It may be useful to repeat those principles here:

> 71 Reasonable suspicion must be assessed against the totality of the circumstances. Characteristics that apply broadly to innocent people and "no-win" behaviour — he looked at me, he did not look at me — cannot on their own, support a finding of reasonable suspicion, although they may take on some value when they form part of a constellation of factors.
>
> 72 Exculpatory, common, neutral, or equivocal information should not be discarded when assessing a constellation of factors. However, the test for reasonable suspicion will not be stymied when the factors which give rise to it are supportive of an innocent explanation. We are looking here at possibilities, not probabilities. Are the facts objectively indicative of the *possibility* of criminal behaviour in light of the totality of the circumstances? If so, the objective component of the test will have been met. If not, the inquiry is at an end.
>
> 73 Assessing whether a particular constellation of facts gives rise to a reasonable suspicion should not — indeed must not — devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.
>
> 74 Parenthetically, I note that there are several ways of describing what amounts to the same thing. Reasonable suspicion means "reasonable grounds to suspect" as distinguished from "reasonable grounds to believe" (*Kang-Brown*, at paras. 21 and 25, *per* Binnie J., and at para. 164, *per* Deschamps J.). To the extent one speaks of a "reasonable belief" in the context of reasonable suspicion, it is a reasonable belief that an individual *might* be connected to a particular offence, as opposed to a reasonable belief that an individual *is* connected to the offence. As Karakatsanis J. observes in *Chehil*, the bottom line is that while both concepts must be grounded in objective facts that stand up to independent scrutiny, "reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime" (para. 27).

[223] Although this might be "close to the line" as suggested by the Court of Appeal in *MacKenzie, supra* I am satisfied that Cst. Harris' subjective belief that Mr. [redacted] might be involved in a drug related offence was objectively substantiated.

Accordingly, Cst. Harris had a reasonable suspicion that Mr. [redacted] was engaged in a drug-related offence.

[224] Karakatsanis, J. in *Chehil* at para. 32 indicated that the "factors that give rise to a reasonable suspicion may also support completely innocent explanations" because the "reasonable suspicion standard addresses the possibility of uncovering criminality, and not a probability of doing so".

3. When did *The Traffic Safety Act* detention cease and when did Cst. Harris detain Mr. [redacted] as a result of his continued drug investigation?

[225] Cst. Harris' evidence was less than clear on the issue of the timing of the detention. It is here that the audio recording would have been particularly useful. After he had spoken to Mr. [redacted] and checked his documentation it would appear that the reason for *The Traffic Safety Act* detention would and should have come to an end. The vehicle was being operated lawfully on the highway. The driver was not apparently under the influence of any alcohol or drug. The driver responded to Cst. Harris' inquiries. Mr. [redacted] had a valid driver's licence and the registration of the vehicle was in order.

[226] Cst. Harris testified that he called Cpl. Walkden and discussed the circumstances. At that point Cst. Harris testified he told Cpl. Walkden he believed he had enough to detain Mr. [redacted] for an investigative detention. Initially Cst. Harris testified that he had not fully decided to detain Mr. [redacted] but when reminded of his evidence at the preliminary hearing he confirmed he had decided to detain Mr. [redacted] Cst. Harris already had all the information that he relied on to form his reasonable suspicion.

[227] Cst. Harris spoke to Mr. [redacted] again. He acknowledged he was now involved in a drug investigation, but he did not tell Mr. [redacted] of this and he did not give Mr. [redacted] his rights to counsel or advise him of his right to remain silent.

[228] When Cst. Harris spoke to Cpl. Halbauer again, he told Cpl. Halbauer he "thought" he was going to detain Mr. [redacted].

[229] After this conversation with Cpl. Halbauer, Cst.Harris went back to Mr. [redacted]' vehicle and testified he ended the traffic stop. He returned Mr. [redacted]' drivers licence and registration. He thanked Mr. [redacted] and told him everything was okay. Cst. Harris said he started to walk away from Mr. [redacted] vehicle, but after two or three steps walked back and asked if he would answer a couple more questions. When Mr [redacted] agreed Cst. Harris asked him to step out of the vehicle to deal with these questions.

[230] Cst. Harris testified that if Mr. [redacted] had refused to answer his additional questions he would have permitted him to drive away. As I have already indicated I do not accept this statement as credible.

[231] I find that the traffic stop ended just prior to Cst. Harris speaking to Cpl. Walkden. By the time Cst. Harris spoke to Cpl. Walkden he had decided to detain Mr. [redacted] for a drug investigation and that detention had commenced in that Mr [redacted] was not free to leave.

[232] Any suggestion by Cst. Harris that Mr. [redacted] was not detained or that he would be permitted to leave is not credible. I am not suggesting nor do I find that Cst.

Harris is deliberately intending to mislead the court. However, he did not take notes and he ensured that there was no audio recording. Where Cst. Harris' evidence at trial differed from the evidence at the preliminary hearing, he has consistently adopted the evidence from the preliminary hearing. He has not dealt with the issue of detention with any precision. He has testified that he believed he had enough evidence for a detention, that he had decided to detain, that he thought he would detain and that he would have let Mr. [redacted] leave. This is all internally inconsistent.

4. Did the accused give a valid consent to search and subsequently withdraw that consent?

[233] Mr. [redacted] was finally told he was being detained. Mr [redacted] was given his rights to counsel and his *Charter* rights. Mr. [redacted] declined to consult with a lawyer. Cst. Harris sought and received Mr. [redacted] permission to search the vehicle.

[234] The question to be addressed at this stage is whether Mr. [redacted] consented to what would otherwise be an unauthorized search. In reviewing the elements set out in *Wills, supra*, I am satisfied that the Crown has established on a balance of probabilities that Mr. [redacted] verbally consented to the search. He had been told that Cst. Harris wanted to search because he had a suspicion there might be drugs in the vehicle. Mr. [redacted] said, "yeh, sure, go ahead" and pointed to the vehicle. As Mr. [redacted] was the driver and sole occupant he had authority to give the consent in question. The consent was voluntary in the sense that it was free from coercion. Cst. Harris told Mr. [redacted] he was conducting the search with his consent and it was his choice to stop the search at any point. Mr. [redacted] was clearly aware of the nature of the police conduct to which he was being asked to consent. Although Mr. [redacted] was not told directly that he had the right to refuse to

permit the police to search, he was told that it was his choice to stop the search at any time — so I am prepared to infer that he would have known he could refuse to permit the police to commence the search when he was clearly told he could stop it at any time. As the police had told Mr. [redacted] that consent to the search was being requested because they believed there might be drugs in the vehicle, the potential consequences would have been apparent to Mr. [redacted].

[235] During the search of the vehicle the police made some observations which lead them to believe that Mr. [redacted] vehicle had been modified in some respects. A sniff search by a highly trained and generally highly accurate police dog, Nugget, failed to produce a "hit" by the dog.

[236] I find that Mr. [redacted] withdrew his consent to the continuation of the search.

5. Did reasonable and probable grounds exist for the arrest of Mr. [redacted]?

[237] When Mr. [redacted] withdrew his consent to search, he was placed under arrest by Cpl. Walkden and the search continued as incidental to his arrest. The reasonable and probable grounds standard is a more demanding standard than the reasonable suspicion standard.

[238] Once again, it would have been most helpful to have the audio recording available at this point in the analysis.

[239] Cst. Harris who was the lead investigating officer testified that he did not believe he had reasonable and probable grounds to arrest Mr. [redacted] and that he communicated this to Cpl. Walkden. Cpl. Walkden said the following to Mr. [redacted]: "based on looking at the back seat modifications after market consistent with people concealing narcotics and based on the whole traffic stop, right now I believe there may be narcotics behind the seat". Cpl. Walkden asked Mr. [redacted] if he understood that and Mr. [redacted] replied that he did. And then Cpl. Walkden said "because I believe that, I don't have to believe it within reason. Ok. All I have to do is believe it from my training and experience. Ok? Right now, because of that I am placing you under arrest for trafficking in narcotics". Do you understand that? Ok. ?

[240] Cpl. Walkden was an extremely experienced police officer. His previous experience in investigations and as a trainer and facilitator on the Pipeline Course have previously been outlined. Cpl. Walkden outlined with some clarity the basis upon which he formed his reasonable and probable grounds to arrest Mr. [redacted]. These grounds included the grounds which lead Cst. Harris to form a reasonable suspicion that Mr. [redacted] was involved in a drug related offence. In addition, Cpl. Walkden formed the opinion from his search of the vehicle and from discussions with the manufacturer, that there were after market modifications to the vehicle. He reasonably believed that there was a compartment which could be used for the concealment of contraband. He believed there was a void behind the back seat in the lower area by the top of the trunk. This area sounded hollow when it was tapped. He observed the spray foam insulation, and the different coloured paint.

[241] Cpl. Walkden was of the view that the timing of when Mr. [redacted] withdrew his consent to the search was significant, in that it happened at about the time the police were concentrating on the portion of the vehicle where they believed the hidden compartment to be. Cpl. Walkden also attached some significance to the fact that Mr. [redacted] had overall been co-operative in this lengthy stop. Cpl. Walkden was of the view that someone who was innocent would not have been quite so patient.

[242] Balanced against these grounds is the fact that the drug dog Nugget had not detected any drugs.

[243] In reviewing the summary from the jurisprudence provided by Caldwell, J.A., in *Shinkewski, supra* I am satisfied that Cpl. Walkden subjectively held reasonable grounds to arrest Mr. [redacted]. Cpl. Walkden did not express himself as clearly and concisely to Mr. [redacted] as he did in his evidence, but I find he did hold the requisite subjective belief.

[244] These grounds are objectively justifiable from the position of a reasonable person placed in the position of the arresting officer.

[245] Accordingly I find reasonable and probable grounds existed for the arrest of Mr. [redacted].

5. Was the search incident to arrest lawful?

[246] I have found the arrest was valid. No argument has been presented by the accused to suggest that the search was not conducted in a reasonable manner. This included the search at the side of the highway and the subsequent search at the autobody shop in Swift Current. The jurisprudence provides that a search incident to an arrest can include the search of a motor vehicle to uncover evidence of the offence. (See *R. v. Stillman, supra* at para. 33-40; *R. v. Caslake, supra*; *R v. Golden, supra* ; and *R. v. Nolet, supra* at para. 49).

[247] I find the search incident to the arrest of Mr [redacted] to be lawful.

6. Were the accused's section 10 rights violated?

[248] I find that Cst. Harris did violate Mr. [redacted] s. 10 rights when he did not immediately upon his detention inform Mr. [redacted] of the reasons for his detention and of his right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel. This duty is triggered at the outset of an investigative detention.

7. Should the evidence be excluded as a result of these *Charter* violations?

[249] In *R v. Grant, supra* the Supreme Court held that evidence ought to be excluded as a result of a *Charter* violation only after the court has balanced the effect of admitting the evidence on society's confidence in the justice system. This analysis is to

be done having regard to: (1) the seriousness of the *Charter* infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits.

[250] On balance and considering the above factors, I would not exclude the evidence based on Cst. Harris' failure to provide the accused with his *Charter* rights after detention. Society has a strong interest in the adjudication of drug cases on their merits. The impact of the breach in this case was minimal in that Mr. [redacted] had already provided all of the information prior to the *Charter* breach. The information was repeated by him, but nothing essentially new was obtained by Cst. Harris.

J.
E.J. GUNN