

Action No.: 161211529Q1
E-File No.: CCQ19 [REDACTED]
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

HER MAJESTY THE QUEEN

v.

[REDACTED]

Accused

TRIAL
(Excerpt)

Calgary, Alberta
June 18, 2019

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

3 _____

4

5 June 18, 2019 Afternoon Session

6

7 The Honourable Court of Queen's Bench
8 Madam Justice Phillips of Alberta

9

10 J. Olson For the Crown

11 P. Fagan, Q.C. For the Accused

12 K. Bradley Court Clerk

13 J. Peterson Court Clerk

14 _____

15

16 THE COURT CLERK: Order in court.

17

18 THE COURT: Good afternoon.

19

20 MR. FAGAN: Good afternoon, My Lady.

21

22 **Ruling (Voir Dire)**

23

24 THE COURT: You may be seated. Sorry for the delay here.
25 May take me a bit of time, so, [REDACTED] if you want to sit, that's fine --

26

27 THE ACCUSED: Thank you.

28

29 THE COURT: -- as I read my decision here, okay?

30

31 All right. The accused, [REDACTED] is charged with a single count of possession of
32 cannabis marihuana for the purpose of trafficking, contrary to Section 5(2) of the
33 *Controlled Drugs and Substances Act*, SC 1996, c. 19.

34

35 On October 17, 2016, [REDACTED] was travelling westbound in a rental vehicle on the
36 TransCanada Highway. Constable MacPhail was conducting traffic enforcement at Seven
37 Mile Hill, watching for *Traffic Safety Act* offences, when he observed a black SUV
38 tailgating another vehicle, following too closely. Constable MacPhail pulled the vehicle
39 over and engaged in a brief discussion with the driver. Constable MacPhail made a
40 number of observations that he felt gave rise to a reasonable suspicion to order a
41 perimeter search using a drug sniffer dog. This resulted in the seizure of approximately

1 10 kilograms of cannabis marihuana, (i.e., 30 pounds of marihuana).

2
3 A *Charter* application was brought by ██████████ on the basis there was a violation of his
4 Section 8, 9, or 10 *Charter* rights. ██████████ asked this Court to consider granting him a
5 remedy under Section 24 and asked that all evidence be excluded pursuant to Section
6 24(2) of the *Charter*.

7
8 I heard evidence from Constable MacPhail during the course of a *voir dire* on December
9 10, 2018, and oral argument on May 31, 2019. He was the sole witness in this matter;
10 further at the *voir dire*, I reviewed a video of the interaction between Constable MacPhail
11 and the accused on October 17, 2016.

12
13 Constable MacPhail has been with the Royal Canadian Mounted Police for 13 years. He
14 is currently posted in the Airdrie Crime Reduction Unit within K Division with the
15 RCMP. At the time of the alleged offence on October 17, 2016, he was with the
16 Cochrane Roving Traffic Unit of K Division Traffic Services. He was part of a team of
17 officers that works in an area of higher volume of traffic services on our highways
18 including the TransCanada Highway. The traffic unit enforces the Alberta *Traffic Safety*
19 *Act*, RSA, 2000, c T-6, conducting traffic enforcement, as well as looking for any
20 criminality, (i.e., drug trafficking, currency trafficking, weapons, impaired drivers, stolen
21 property,) for example.

22
23 Constable MacPhail outlined his extensive training during direct examination. He has
24 taken many courses including the Pipeline Jetway course, which teaches police officers to
25 look for criminality inside vehicles. He has also taken the Desert Snow Phase 1, 2, and 3
26 advanced passenger vehicle interdiction courses in the United States, a week-long course
27 put on by police officers in the United States to teach law enforcement in North America
28 on the similar style of police techniques when it comes to conducting traffic stops. He
29 also attended the week-long National Interdiction Conference in Toronto, Ontario, which
30 dealt with a type of specialized skill set that they have within the unit that he's assigned
31 to. He attended the week-long 2013 Western Canada Guns and Gangs Symposium which
32 dealt with the trends for the moving of contraband within the system of organized crime.
33 In November 2015, he attended the three- to five-day National Interdiction Conference of
34 the Canadian Association of Chiefs of Police, which dealt with this issue of interception
35 and detection of travelling criminals commonly known as interdiction.

36
37 Constable MacPhail is currently a national Pipeline instructor, so he teaches police
38 officers at the national level to effectively utilize his skill sets that are taught within the
39 RCMP and municipal agencies for the interception and detection of travelling criminals.
40 "Pipeline" is the title of the program that officers are taught when it comes to conducting
41 a traffic stop and the appropriate procedures to follow after the police officer has

1 conducted the traffic stop. Constable MacPhail has conducted more than 10,000 traffic
2 stops during the course of his career, and he has been a lead police officer and investigator
3 in excess of 200 drug trafficking files where there are large amounts of contraband seized.
4 Clearly, he is very experienced in this area of interdiction and not a neophyte, to say the
5 least.
6

7 On October 17, 2016, Constable MacPhail was conducting stationary traffic enforcement
8 and monitoring eastbound traffic on the TransCanada Highway at the Seven Mile Hill.
9 More specifically, he was monitoring traffic and watching for offences. He said he
10 observed a black SUV pass in front of him, and he subsequently stopped it for tailgating
11 another vehicle. Constable MacPhail described how he engaged the stop. He pulled out
12 after the vehicle, and activated his emergency lights on his police vehicle. The accused's
13 vehicle pulled over without issue onto the highway shoulder and put his four-way flashers
14 on. Constable MacPhail observed the vehicle had an Alberta license plate. He exited his
15 police vehicle and saw that the vehicle was occupied by a lone male, who was dressed
16 nicely. During the course of the traffic stop, the Constable advised the accused the reason
17 for the stop, and that he was not going to issue any violation ticket. He determined a
18 warning was sufficient.
19

20 Constable MacPhail testified at that the time he stopped the accused, he believed that an
21 infraction under the *Traffic Safety Act* had occurred and that he was following too closely.
22 He said that it is not an uncommon reason to stop motorists for this in the Bow Valley. It
23 was one of the regular reasons why he conducts traffic stops in the area. He said that, (as
24 read)
25

26 To be fair, already a lot of tourists and a lot of people, they don't know
27 how to operate a motor vehicle in Canada appropriately due to their
28 country of origin.
29

30 Constable MacPhail testified that it was significant that the accused's vehicle was a rental
31 vehicle. He said that he was aware that rental vehicles are commonly used to move illicit
32 contraband up and down the highways due to the fact that they allow for a condition of
33 anonymity. For example, if they get pulled over and are subsequently arrested for moving
34 contraband, the accused will not be subjected to losing their personal vehicle. Also, if
35 they check the license plate on a rental vehicle, they are unable to see if the driver has any
36 outstanding warrants if the vehicle doesn't belong to them or whether they are under
37 surveillance.
38

39 Prior to the traffic stop, Constable MacPhail said that he cannot remember any
40 distinguishing features of the accused. Once he stopped the vehicle, it was his practice to
41 complete a license plate check to see if the driver had a valid driver's license, (i.e., no

1 suspension nor disqualification based on MEP nor warrant for arrest), and to determine if
2 there were any outstanding hits related to the driver. By "hits", he meant whether the
3 rental vehicle had been stolen, for example.

4
5 After he completed the license plate check, which he says he cannot recall if it was done
6 prior to him actually engaging the accused's vehicle to pull over or was checked post him
7 stopping the vehicle, he exited the police vehicle. Constable MacPhail then completed a
8 passenger-side approach, which he always does, and then told the accused driver the
9 reason for the stop. He told the accused driver that he "needed to give some distance
10 between him and the vehicle in front of him."

11
12 The Constable asked the driver for his driver's license and noted he was the only one in
13 the vehicle. He recalls telling the driver that he was not going to get a ticket. He did,
14 however, want to look at his driver's license, his documentation relating to the vehicle,
15 and engaged him in conversation with regards to the destination he was travelling from
16 and to as he was dressed nicely. The Constable assumed that the accused driver was
17 coming from a conference in Banff because they get a lot of commuters travelling this
18 highway that would go to Banff from Calgary or from Edmonton for the day.

19
20 From the video I observed, Constable MacPhail initially asked if the accused was "out
21 here for business" and "a conference," and the accused replied "yeah" to both. Constable
22 MacPhail then asked where his conference was, and the accused said, (as read)

23
24 Oh, no, I was in Vancouver.

25
26 The accused told Constable MacPhail that he was coming from Vancouver. When asked
27 how long he was in Vancouver for, the accused replied, (as read)

28
29 Uh, just a day.

30
31 Constable MacPhail then asked if the accused went to Vancouver for the day, and the
32 accused replied, (as read)

33
34 Yeah, I work for Air Canada. I went to visit my girlfriend.

35
36 The accused then advised that he works as a station attendant. Constable MacPhail
37 testified that the accused then immediately showed him his Red Pass, a high-security
38 airport clearance pass that allows people access to restricted areas of the Calgary
39 International Airport. Constable MacPhail explained that since this Red Pass comes with
40 security clearance as well as heavy background checks, that from his training and
41 experience, the showing of the Red Pass by the accused driver was an indication that the

1 (as read)

2
3 Person is trying to tell us that they are a good person or they're not an
4 individual that would be involved in any sort of criminality due to the
5 fact that they have got the high level of security clearance.
6

7 And thus the Constable guessed that the accused showed him the Red Pass to try to end
8 the traffic stop. Constable MacPhail said that he engaged in conversation with the
9 accused for a number of reasons. It allows officers to interact with the driver to assess
10 their level of faculties, their sobriety, and their level of fatigue. It also allows officers to
11 determine whether the driver is of sound mind to be operating a motor vehicle, to be able
12 to let the driver know the reason for the stop, and to determine if there are any concerns
13 officers should have with respect to anything the driver may or may not be involved in. In
14 short, he said that (as read)

15
16 It's important that the police have some sort of professional conduct or
17 rapport with the monitoring public as opposed to being robots and just
18 demanding driver's licenses and walking away.
19

20 Constable MacPhail observed that while speaking with the accused at the window, he was
21 nervous. He could hear a noticeable tremor in the accused's voice. The accused's hands
22 shook when he passed him the documents. As well, the accused offered him his Red Pass
23 voluntarily. The Constable did not ask to see it. To Constable MacPhail, the level of the
24 accused's nervousness and comparison to individuals that he stopped in the past was
25 excessive in nature to cause him to draw his attention to it. He explained that one would
26 have thought the accused's level of nervousness would have decreased and that he would
27 have been relieved that he was not going to get a ticket. Furthermore, he observed the
28 accused fumbling for his Air Canada Red Pass and his hands having a tremor to it and the
29 shake to his voice. According to the Constable, it was not one specific thing for his
30 nervousness but everything that he was observing.
31

32 Given that the accused was an Air Canada employee, entitled to a heavily discounted
33 corporate rate for flying stand-by, Constable MacPhail found it to make (as read)

34
35 Little or no financial sense for a person to fly all the way to the lower
36 mainland in B.C. the day prior to visit a girlfriend and now to rent an
37 SUV and drive it back to Calgary.
38

39 The rental car agreement showed that the accused had rented the vehicle at the Vancouver
40 Airport in Richmond, B.C. the day before. To Constable MacPhail, all of this made no
41 sense, time-wise nor financially, as the one-way dropoff fee for a larger vehicle like an

1 SUV is usually significantly higher.
2

3 The Constable testified that he took the "totality of what he was seeing there," and either
4 on the way up or on the way back to the police vehicle initially, (he can't remember
5 which), he saw a large duffel bag, partially covered, in the very back of the SUV from
6 looking inside. According to Constable MacPhail, he was looking in the back for a
7 multitude of reasons: (as read)

8
9 For officer safety to see if there's a weapon, and to see if there's anyone
10 laying down.
11

12 The Constable then says he is very certain it was on the way back to the police cruiser that
13 he had an opportunity to look at it through the rear passenger side window of the SUV,
14 and then when he looped around the SUV, he could see it in the back. The video would
15 appear to confirm that. He noted the windows were tinted, but he was able to look in to
16 see if there was anything that would cause him concern, which in this case the cause of
17 concern was the large duffel bag. Even though the duffel bag was covered partially by a
18 cover, the Constable said, (as read)

19
20 There was still enough that he was able to see that it was a bag.
21

22 He noted that over the years at the point in his career he has stopped hundreds of people
23 or has assisted or been the lead on files where large hockey bags and duffel bags are used
24 to move commercial grade marihuana. To Constable MacPhail, the bag was significant in
25 size that it caused him to believe that it may have contraband in it.
26

27 The Constable confirmed that when he was speaking with the accused at the open
28 passenger side window, at no time did he put his head into the vehicle. He could not
29 remember if he used any visual assistive aids like a flashlight. From the video it appeared
30 he had none. Constable MacPhail says that at that point, as he is walking back to his
31 police vehicle, given his observations and taking in the totality of everything that he had
32 observed, he had a "reasonable suspicion" to believe that the accused driver is "most
33 likely in possession of a controlled substance." Also, he suspected that it was going to be
34 large amounts of marihuana, or it could have been something else based on his experience
35 and training. At that point Constable MacPhail recognized that the traffic stop had moved
36 from a TSA investigation to a CDSA drug investigation.
37

38 Constable MacPhail had an opportunity to review the rental contract, which was in a
39 different name than the driver's license name, which he later satisfied himself that it was
40 one and the same person, being the accused driver.
41

1 While in his police vehicle, we can see from the video off of the dash cam that Constable
2 MacPhail is speaking to himself and saying certain things. He says that it is his practice
3 with respect to the dash cam to narrate his observations for court purposes, to document
4 his observations, as well as to help refresh his memory should the matter proceed to trial
5 or any sort of *voir dire* or preliminary inquiry.
6

7 After forming reasonable suspicion, Constable MacPhail completed checks on the police
8 computer, which he did in his police vehicle. The checks were negative, no outstanding
9 warrants, and no criminal record. There was nothing in the police database, which caused
10 him any concern or anything further to further his reasonable suspicion or any possible
11 reasonable and probable grounds further than what he had already observed. Specifically,
12 these checks did not impact upon his grounds, which he had already developed just prior.
13

14 Once Constable MacPhail developed a reasonable suspicion that the accused was in
15 possession of a controlled substance, he radioed his partner, Constable David Ling, a
16 special narcotics canine handler, to attend the traffic stop, to conduct a police sniffer dog
17 search, and detain the accused for a drug investigation. Constable MacPhail explained
18 that by calling for the sniffer dog, it allows the police to move the investigation forward to
19 either reasonable and probable grounds for arrest for possession of a controlled substance,
20 or if there's a negative indication by the sniffer dog, that would end the CDSA drug
21 investigation portion and cause the TSA investigation to engage. If the latter were the
22 case, the officer could still issue a violation ticket or send the violator on their way with
23 the warning that had been established.
24

25 At that stage the Constable said he did not have reasonable and probable grounds to
26 search the accused's vehicle, so that is why the sniffer dog was engaged. Constable Ling
27 deployed his sniffer dog which conducted a perimeter search of the accused's vehicle, and
28 the dog hit for cannabis marihuana. As a consequence of the dog hitting, Constable Ling
29 was of the opinion that there were drugs in the accused's vehicle. Constable Ling
30 informed Constable MacPhail of this, who then determined that he had grounds to arrest
31 the accused and subsequently did arrest the accused and Chartered and cautioned him.
32 Constable Ling assisted in the search of the accused's vehicle, and as a result of the
33 search, they found approximately 30 pounds, (i.e., 10 kilograms) of cannabis marihuana
34 in the accused's duffel bag.
35

36 During the course of the video, Constable MacPhail can be heard reading the accused his
37 *Charter* rights and caution. He gave the accused his right to counsel four times, and the
38 accused responded "yes" each time. He provided those rights to the accused after he
39 developed a reasonable suspicion, twice when he was detained in the course of his drug
40 investigation, once when he was charged and arrested for possession of a controlled
41 substance, and the last time when he was being arrested for possession for the purpose of

1 trafficking. However, one can see from the video and from what Constable MacPhail
2 testified to that the accused was never provided with a cell phone or given an opportunity
3 to actually call a lawyer during his detention. Constable MacPhail testified that he could
4 not effect the accused's right to counsel right away because the in-dash car camera
5 recording did not give the accused the requisite privacy for his phone call. Additionally,
6 Constable MacPhail said that he could not provide the accused with a phone roadside for
7 reasons of officer safety and evidence preservation. Finally, it did not make sense to take
8 the accused to the RCMP detachment prior to the police dog conducting a perimeter
9 search. Constable MacPhail indicated "he'd love to drop everything "and get the accused
10 to a phone room" but then stated "there were manpower issues."

11
12 Now concerning the initial stop. Defence claims that the detention begins at the moment
13 of the traffic stop and that the traffic stop was transformed into a drug detention shortly
14 after Constable MacPhail indicated that no traffic citation would issue. The Crown
15 argues under the *Traffic Safety Act*, a police officer is allowed under Section 166 of the
16 *Act* to stop a driver and request information from the driver and any passengers in the
17 vehicle. A police officer who stops a vehicle for a traffic violation may take further steps
18 if he or she observes something in the course of that initial detention that gives him or her
19 reasonable grounds to suspect another offence. *R. v. Fleury*, 2014 ABQB 199.

20
21 The Supreme Court has ruled that random or arbitrary vehicle stops can be justified under
22 Section 2 of the *Charter* provided that the stop is for a purpose relating to driving a car.
23 For example, a vehicle can be stopped so police can check insurance and registration:
24 [*Fleury*, *R. v. Dhuna*, 2009 ABCA 103, and *R. v. Ladouceur*, [1990] 1 SCR 1257]
25

26 On October 17, 2016, Constable MacPhail was conducting stationary traffic enforcement
27 and monitoring eastbound traffic on the TransCanada Highway at the Seven Mile Hill.
28 More specifically, he was monitoring traffic and watching for offences. As he said, he
29 observed a black-coloured SUV pass in front of him, and he subsequently stopped it for
30 tailgating or following too closely to another vehicle. Constable MacPhail describes how
31 he engaged the stop. He pulled out after the vehicle, and activated his emergency lights
32 on his police vehicle. The accused's vehicle pulled over without issue onto the highway's
33 shoulder and put its four-way flashers on. Constable MacPhail observed the vehicle had
34 an Alberta license plate. He learned through his usual checks it was a rental vehicle. He
35 exited his police vehicle and saw that the vehicle was occupied by a lone male who was
36 nicely dressed, (i.e., the accused). During the course of the traffic stop, the Constable
37 advised the accused the reason for the traffic stop and that he was not going to issue any
38 violation ticket. He determined a warning was sufficient.
39

40 I find that the reason given by Constable MacPhail justified pulling over the accused's
41 vehicle; following a vehicle too closely or tailgating, is a justifiable traffic violation. That

1 being an offence, Constable MacPhail was permitted to stop the accused's vehicle. I find
2 the initial stop was valid.

3
4 Now dealing with roadside questioning and answers and did Constable MacPhail violate
5 the accused's *Charter* rights by engaging him in conversation. The defence submits that
6 the accused's rights were violated at the outset of the investigation and that the questions
7 were consistent with his pipeline convoy training as a means of acquiring grounds to
8 search a vehicle. During the questioning, the accused was not free to go, and Constable
9 MacPhail did not advise the accused that he was questioning him in furtherance of a drug
10 investigation. Furthermore, he did not advise him of his right to counsel. The right to be
11 informed promptly of the reason for one's detention as per Section 10(a); the right to be
12 informed of one's Section 10(b) rights; and the corollary right to silence were breached.
13 In summary, the defence argues Constable MacPhail went beyond the authority of a
14 traffic stop and questioned the accused in relation to a drug investigation. In that regard,
15 Constable MacPhail had no grounds or authority to detain, question, and investigate the
16 accused in furtherance of a drug investigation, and, therefore, the accused asserts a
17 violation of his Section 8 and 9 *Charter* rights.

18
19 Furthermore, in all of this roadside questioning and answering, the defence questions the
20 credibility of Constable MacPhail and suggests at paragraph 69 of his written argument
21 that in (as read)

22
23 Nearly every reported Pipeline case, the police provide an "innocent
24 explanation" for engaging drivers in questioning that is a fiction to
25 obscure their intent.

26
27 The Crown submits that Constable MacPhail did not breach the accused's *Charter* rights
28 in engaging him at a brief conversation at the roadside. Police are permitted to engage in
29 limited questioning of drivers. The conversation between Constable MacPhail and the
30 accused related to issues of traffic safety or arose directly from the accused's answers.
31 The conversation was short, less than one minute, and was legally permitted in its
32 entirety.

33
34 In *R. v. Zolmer*, 2018 ABQB 38, 2019 ABCA 93, Constable Brault initiated a traffic stop
35 on Mr. Zolmer that evolved into a drug investigation after a short conversation with him.
36 Mr. Zolmer argued that Constable Brault's inquiries concerning his travels were outside
37 the perimeters of a traffic stop, and, as such, breached Mr. Zolmer's *Charter* rights. More
38 specifically, he argued that Constable Brault's objective from the start of the traffic stop
39 was to seek grounds to detain him for drug interdiction and that the Constable's objective
40 contaminated the conversation with him. Mr. Zolmer argued that this resulted in a series
41 of Sections 7, 8, 9, and 10 *Charter* breaches that necessitated the exclusion of evidence.

1
2 The Court of Appeal rejected Mr. Zolmer's argument and upheld the trial judge's findings
3 and found that such a line of questioning was in fact relevant to Constable Brault
4 determining if the driver was fatigued or confused, or the like. The trial judge noted that
5 other Alberta Court of Appeal cases have reached the same proposition. And this is at
6 *Zolmer* at paragraph 34: (as read)
7

8 Recent Alberta Court of Appeal cases where a police officer's suspicion
9 based in part on information provided by the accused in a conversation
10 with the officer was found to be objectively reasonable, and where the
11 constitutional propriety of the officer engaging the accused in the
12 conversation was not questioned, include *R v. Navales*, 2014 ABCA 70
13 (Alta. C.A.), *R v. Wunderlich*, 2014 ABCA 248 (Alta. C.A.), and *R v.*
14 *Danielson*, 2017 ABCA 422 (Alta. C.A.). *R v. Pearson*, 2012 ABCA 239
15 (Alta. C.A.) is to the same effect, though in that case Hunt, J.A. held that
16 when the conversation moved to matters not related to the reason for the
17 traffic stop, the officer had entered upon a criminal investigation, and
18 breached the accused's *Charter* ss. 8, 9, 10 (a), and 10(b) rights.
19 McDonald and O'Ferrall, J.J.A. did not agree with her analysis.
20

21 The Court of Appeal in *Zolmer* confirmed the trial judge's findings that the totality of the
22 circumstances met the reasonable suspicion threshold established in *R. v. MacKenzie*,
23 2013 SCC 50.
24

25 Constable MacPhail recalls telling the accused that he was not going to get a ticket. The
26 Constable determined a warning to the accused that he was falling too closely or
27 tailgating another vehicle was sufficient. He did, however, want to look at the accused's
28 driver's license, his documentation relating to the vehicle, and engaged him in
29 conversation with regards to the destination he was travelling from and to as he was
30 dressed nicely. Constable MacPhail was asked in direct examination and explained his
31 reasons for engaging the accused in a brief conversation (as read):
32

33 Q. And the conversation that you engaged in with the accused, what was
34 the purpose in doing that?

35 A. During the course of -- obviously there's a multitude of reasons.
36 Number one is it allows us to interact with the driver. It assesses level
37 of faculties. I guess his sobriety, his level of fatigue, his level of, I
38 guess, sound mind to be operating a motor vehicle, to be able to let them
39 know the reason for the stop, and to -- obviously to see if there's any sort
40 of concerns that we should have with respect to anything that they may
41 or may not be involved in. Plus I think it's important that police have

1 some sort of professional conduct or rapport with the motoring public as
2 opposed to being robots and just demanding driver's licenses and
3 walking away.
4

5 Constable MacPhail was also asked why his assessment of sobriety and fatigue factored
6 into his discussion with the drivers that he stops. He replied that police officers have to
7 assess the level of cognitive function of the driver to be able to operate a motor vehicle,
8 for obviously they don't want people driving vehicles if they are lost, confused, exhausted,
9 fatigued, and/or impaired by drugs or alcohol.
10

11 During cross-examination the accused's counsel suggested that the reason Constable
12 MacPhail engaged in conversation with the accused was to form grounds to detain him (as
13 read):
14

15 Q. And that is why you engaged him in a Q and A?

16 A. No, I -- there -- it's not just cut and dry, counsel. I just explained
17 earlier that we also talk to these violators and motoring public not only
18 with the answers that they give us but also to establish rapport as well as
19 to establish their -- sound mind and whether or not they're able to
20 operate a vehicle. If he said nothing and he was confused and lost,
21 which I've had happen from engaging people, that's what I'm going to
22 ascertain from interacting with them.

23 Q. Did he look confused and lost to you?

24 A. I didn't know that until I engaged him in the conversation.
25

26 The initial conversation in here did not involve any form of entry or examination by
27 Constable MacPhail of the accused's property. There was no search of anything in respect
28 of which the accused had a reasonable expectation of privacy. In this case, I am satisfied
29 and so find that the conversation between Constable MacPhail and the accused was
30 reasonably connected to information provided by the accused with respect to travel plans
31 or flowed logically or was information the accused provided voluntarily. The
32 conversation was appropriate routine police interaction with a driver during a traffic stop.
33 It was short in duration, required the production of only a few documents from the
34 accused, and inconvenienced the accused minimally. Constable MacPhail did not breach
35 the accused's *Charter* rights by engaging him in the conversation. The conversation fell
36 within the ambit of Constable MacPhail's authority to stop, and, as such, there were no
37 *Charter* violations arising from the conversation between Constable MacPhail and the
38 accused. In the result, the observations and discussion with the accused made by
39 Constable MacPhail at this point are admissible.
40

41 Did Constable MacPhail have a reasonable suspicion to deploy a sniffer dog? The issue

1 that arises is whether Constable MacPhail had a reasonable suspicion of drug activity to
2 permit him to deploy a sniffer dog on the vehicle operated by Mr. Duong. The use of the
3 sniffer dog constituted a search. The search was warrantless and therefore presumptively
4 unreasonable. The onus is on the Crown to prove that the search was reasonable on a
5 balance of probabilities; *R. v. Kang-Brown*, 2008 SCC 18. However, accused persons
6 have a lesser expectation of privacy in the contents of a vehicle than in their home, office,
7 or person; *R. v. Caslake*, [1998] 1 SCR 51 at para 34.

8
9 The reasonable suspicion standard was revisited in *MacKenzie* and *R. v. Chehil*, 2013
10 SCC 49, where the Supreme Court of Canada extensively reviewed the law pertaining to
11 investigatory detention and sniffer dogs. Both cases deal with what is necessary to allow
12 a sniffer dog to be deployed in the absence of judicial authorization. A reasonable
13 suspicion is necessary. Justice Nason explains in *Fleury* at paragraph 33 (as read)

14
15 The *Chehil* and *MacKenzie* cases deal with what is necessary to allow a
16 dog to be deployed to use its sense of smell to do a sniff search without
17 prior judicial authorization. A reasonable suspicion is necessary. It is a
18 fact based determination, and the constellation of factors is to be
19 assessed against the totality of circumstances. It cannot be a generalized
20 suspicion that would capture too many innocent people. Based on the
21 totality of circumstances, the question is whether the specific
22 characteristics of the suspect, the contextual factors and the offence
23 suspected, are sufficient to reach the threshold of reasonable suspicion.
24 The Crown has the onus to show that a reasonable person, standing in
25 the shoes of the police officer, would have held a reasonable suspicion
26 of criminal activity. Hunches or intuition grounded on the officer's
27 experience will not suffice.

28
29 In *MacKenzie* at paragraph 74 the Supreme Court described reasonable suspicion as a low
30 threshold (as read):

31
32 Parenthetically, I note that there are several ways of describing what
33 amounts to the same thing. Reasonable suspicion means “reasonable
34 grounds to suspect” as distinguished from “reasonable grounds to
35 believe” (*Kang-Brown*, at paras. 21 and 25, per Binnie J., and at para.
36 164, per Deschamps J.). To the extent one speaks of a “reasonable
37 belief” in the context of reasonable suspicion, it is a reasonable belief
38 that an individual might be connected to a particular offence, as opposed
39 to a reasonable belief that an individual is connected to the offence. As
40 Karakatsanis J. observes in *Chehil*, the bottom line is that while both
41 concepts must be grounded in objective facts that stand up to

1 independent scrutiny, "reasonable suspicion is a lower standard, as it
 2 engages the reasonable possibility, rather than probability, of crime"
 3 (para. 27).
 4

5 I note in *MacKenzie*, the Supreme Court split five to four on the outcome. The majority
 6 held that erratic driving, extreme nervousness, travel on a known drug route, contradictory
 7 answers of travel routes, and physical signs consistent with marihuana use was a
 8 sufficient constellation of objective factors to meet the reasonable suspicion test but were
 9 noted to be "close to the line."
 10

11 Here defence counsel distinguished this case from *MacKenzie* and *Chehil* and also
 12 pointed to *R. v. Santos*, 2014 SKQB 5. In *Santos*, the police observed the accused drive
 13 by in a vehicle with out-of-province plates. He was also seated abnormally low in his
 14 seat. The accused did not make eye contact with the police. The police testified that they
 15 conducted a traffic stop to check driver sobriety. When the police approached the vehicle
 16 and spoke to the driver, there were no indications of impairment and nothing unusual in
 17 the interior of his vehicle. The Court, however, found that the following indicia did meet
 18 the threshold of "reasonable suspicion" but characterized the grounds as "close to the
 19 line":
 20

- 21 1. Extreme nervousness that did not subside.
- 22 2. Shaking hands.
- 23 3. Operating a vehicle owned by a third party.
- 24 4. Travel route consistent with drug transport.
- 25 5. Prior drug conviction for which he had served three years federal
 26 incarceration.
 27

28 Defence counsel submits if *MacKenzie* and *Santos* are "close to the line," then the case at
 29 bar is well below it.
 30

31 Now applying the law to the facts of this situation. The constellation of factors put
 32 forward by Constable MacPhail which gave rise to him having reasonable suspicion to
 33 deploy the sniffer dog were:
 34

- 35 1. The accused provided a "nonsensical" reason to travel to Vancouver
 36 for the day and then drive a rental car back to Calgary;.
- 37 2. The accused was driving a rental car from the lower mainland, a
 38 known drug source location, back to Calgary.
- 39 3. The accused was excessively nervous.
- 40 4. The accused, without asking, voluntarily presented him with an Air
 41 Canada Red Pass, and

1 5. The accused had an excessive amount of luggage for what appeared to
2 be a one-day trip.
3

4 In *MacKenzie* at paragraph 62, the Supreme Court cautioned that the objective assessment
5 of grounds must be considered in the context of an arresting officer's training and
6 experience (as read):
7

8 Officer training and experience can play an important role in assessing
9 whether the reasonable suspicion standard has been met. Police officers
10 are trained to detect criminal activity. That is their job. They do it every
11 day. And because of that, "a factor or consideration which have no
12 significance to a lay person can sometimes be quite consequential in the
13 hands of the police" (*Yeh*, at para. 53). Sights, sounds, movement, body
14 language, patterns of behaviour, and the like are part of an officer's
15 stock and trade and courts should consider this when assessing whether
16 their evidence, in any given case, passes the reasonable suspicion
17 threshold.
18

19 I note that Constable MacPhail relied on his eight years of experience as part of the
20 Roving Traffic Unit in his interaction with the accused that gave rise to his reasonable
21 suspicion. As outlined in his evidence, he also had extensive training in this area. His
22 evidence in relation to his training suggested that he had experienced over thousands of
23 traffic stops and with roadside drug investigations. In fact, as earlier noted, Constable
24 MacPhail had conducted more than 10,000 traffic stops and had been the lead investigator
25 of more than 200 drug trafficking files with large amounts of contraband seized. He's also
26 taken many courses that give him a heightened awareness to make these observations.
27

28 The objective assessment by the Court must be considered in the context of the arresting
29 officer's training, experience. Further, I note Constable MacPhail's experience and
30 training went entirely unchallenged by the accused. I concur with the Crown, that suffice
31 it to say, Constable MacPhail is a very highly experienced police officer.
32

33 As pointed out in paragraph 65 in *MacKenzie* (as read)
34

35 ...while it is critical that the line between a hunch and reasonable
36 suspicion be maintained to prevent the police from engaging in
37 indiscriminate or discriminatory practices, it is equally vital that police
38 be allowed to carry out their duties without undue skepticism or the
39 requirement that their every move be placed under a scanning electron
40 microscope.
41

1 Now turning to the numerous factors that Constable MacPhail took into account, which
2 he was presented with during the course of his interaction with the accused that gave rise
3 to reasonable suspicion. The first one being, the accused was excessively nervous. The
4 Crown submitted that the accused was clearly nervous. On the video the accused speaks
5 somewhat rapidly and makes mistakes in what he is saying. The Crown says a tremor can
6 also be detected. Under cross-examination, Constable MacPhail testified (as read)
7

8 Q. And what difficulties does he have retaining a license? Does he drop
9 it?

10 A. No, but he's nervous. His hands are trembling while he's holding his
11 wallet and fumbling trying to access it.
12

13 The defence disagrees and notes that the interactions between the accused and Constable
14 MacPhail are clear and can be heard on the audio/video recording. At no time was the
15 accused's voice shaking. His voice was stable and consistent.
16

17 When Constable MacPhail was challenged on cross-examination in his testimony
18 regarding the shaking hands, it was revealed that the only time the accused had trembling
19 hands was when he was holding his wallet and fumbling, trying to access it. The defence
20 submits that a degree of nervousness can be expected of someone who is faced with an
21 armed police officer who is leaning into your window.
22

23 When I review the factors put forward by Constable MacPhail, I agree that the accused
24 does speak somewhat rapidly when initially in conversation with Constable MacPhail.
25 However, I cannot detect nervousness on the accused's voice from the video. It is difficult
26 to hear with precision as there is significant audio interference from the highway traffic.
27

28 Secondly, the accused's story was "nonsensical", and he was driving a one-way rental
29 vehicle. The accused told Constable MacPhail that he had gone to Vancouver for one day
30 to visit his girlfriend. He had also advised Constable MacPhail that he was an Air Canada
31 employee. According to Constable MacPhail, it made no sense why someone like the
32 accused, who was an Air Canada employee, would go to Vancouver, only to return in a
33 one-way rental vehicle. Since the accused was an Air Canada employee, entitled to a
34 corporate discount rate, to Constable MacPhail, it would have been cheaper and involved
35 less time to fly back than to rent a car and drive back from Vancouver to Calgary.
36 Further, Constable MacPhail noted that drug traffickers often use rental vehicles in order
37 to have their own vehicles avoid being seized by the police if arrested.
38

39 Defence counsel submits that Constable MacPhail did not ask the accused when he
40 arrived in Vancouver or how long he stayed. Defence argues travel from Vancouver to
41 Calgary should be considered to be a neutral factor. Further, defence counsel makes

1 much of the fact that the accused did not say that he only visited Vancouver, so he may
2 have been elsewhere in the lower mainland.
3

4 I agree with the Crown that this only invites speculation. As noted earlier, the accused
5 did not testify nor call any evidence in his *voir dire*. The only evidence we have is that
6 the accused told Constable MacPhail that he went to Vancouver "for the day." I find that
7 the reason given for going to Vancouver for one day and then driving back to Calgary in a
8 rental car picked up at the Vancouver Airport the day before was not logical. Initially, the
9 accused agreed that he attended a conference but then quickly stated that he was coming
10 from Vancouver. As noted, he explained that he worked for Air Canada and had gone to
11 visit a girlfriend for a day. Constable MacPhail thought this explanation did not make
12 sense, (i.e., that an Air Canada employee would go to Vancouver for a day and return via
13 a rental car). I agree, for while the Court does not have evidence on how the accused got
14 to Vancouver, the implication from his "one-day" response to Constable MacPhail is that
15 he flew to Vancouver the day prior to visit his girlfriend. Also since the accused picked
16 up his one-way rental vehicle at the Vancouver Airport the day before, I find that I can
17 infer that the accused did not drive from Calgary to Vancouver either.
18

19 Furthermore, since the accused was driving a rental vehicle, this is significant. As noted
20 by Constable MacPhail, drug traffickers often utilize rental vehicles in order to avoid
21 having their vehicles seized by police if they are arrested. I find these factors weigh in
22 favour of reasonable suspicion when considered in the total context of Constable
23 MacPhail's interaction with the accused.
24

25 Thirdly, the accused had an excessive amount of luggage for a one-day trip. Defence
26 submits that Constable MacPhail's highly speculative belief that there was too much
27 luggage for the trip may have been premised on the belief that this was a one-day trip.
28 Defence argues that even if Constable MacPhail's belief of the trip was founded, this is a
29 neutral factor as it is a characteristic that applies broadly to innocent people and is not
30 capable of supporting a logical inference of criminal behaviour based on the record.
31

32 I find that the presence of a large bag in the back of the accused's vehicle weighs in favour
33 of a reasonable suspicion because it is an excessive amount of luggage for one day of
34 travel. It would be unusual to travel with such a large bag for one day. While there are a
35 number of other possible reasons why someone would need such a large bag, none were
36 provided by the accused. This was also a factor weighing in favour of reasonable
37 suspicion.
38

39 I also note that innocent explanations for individual factors that give rise to reasonable
40 suspicion do not prevent reasonable suspicion. In *MacKenzie*, the court explained at
41 paragraph 72 (as read)

1
2 Exculpatory, common, neutral, or equivocal information should not be
3 discarded when assessing a constellation of factors. However, the test
4 for reasonable suspicion will not be stymied when the factors which give
5 rise to it are supportive of an innocent explanation. We are looking here
6 at possibilities, not probabilities. Are the facts objectively indicative of
7 the possibility of criminal behaviour in light of the totality of the
8 circumstances? If so, the objective component of the test will have been
9 met. If not, the inquiry is at an end.
10

11 The fourth factor. The accused presented Constable MacPhail with an Air Canada "Red
12 Pass."
13

14 Defence counsel submits that the absence of a criminal record combined with a Red Pass
15 may undermine reasonable suspicion. Constable MacPhail used the absence of a criminal
16 record to support reasonable suspicion. Constable MacPhail testified that drug traffickers
17 use people without a criminal record to transport drugs and said that the production of a
18 Red Pass by the accused was an attempt to put an end to the traffic stop.
19

20 In my view, the fact that the accused had no criminal record cannot support reasonable
21 suspicion. Despite Constable MacPhail's testimony on this point, I do not find that the
22 absence of a criminal record suspicious. However, the fact that the accused voluntarily
23 and without asking from the Constable showed the Constable his Red Pass for proof of
24 the fact that he was an Air Canada employee is highly unusual. The accused had been
25 told he was not going to receive a traffic ticket. The Red Pass is a security clearance
26 document, and there was no logical reason for showing the Red Pass to the Constable
27 other than to illustrate that the accused could be trusted. Furthermore, in considering this
28 factor of the Red Pass, I acknowledge that special attention should be paid to it, especially
29 in the context of Constable MacPhail's training and experience. Constable MacPhail
30 testified that no one had ever shown a document like that to him in the over 10,000 traffic
31 stops that he has been involved in. Given all of this, I find the production of the Red Pass
32 weighs strongly in favour of reasonable suspicion, especially considering the
33 circumstances it was shown to Constable MacPhail; a situation where the accused was not
34 being issued a ticket.
35

36 Then, fifthly, the lower mainland is a drug source location.
37

38 The accused, ██████████, was driving from Vancouver, which is the lower mainland of
39 British Columbia. Constable MacPhail was well-aware that the lower mainland, unlike
40 other areas, is a known drug source location. He was aware of this through his extensive
41 training and experience, on Alberta highways, including the TransCanada Highway where

1 this offence took place. I have no difficulty in taking notice of the fact that the lower
2 mainland has been recognized by the Courts in numerous drug cases increasingly as a
3 drug source location, where drugs come from the far east are then transported to the west.
4

5 Defence counsel also makes much of the fact that there was an absence of other possible
6 factors that would have supported a finding, of reasonable suspicion. For example, the
7 defence points to the absence of air fresheners, cash, multiple cell phones, drug
8 paraphernalia, and/or a smell of marihuana. In my view, the absence of factors is
9 irrelevant. I must review the evidence that is before me in this case and then assess the
10 "totality of the circumstances" to determine whether the police have reasonable grounds
11 to suspect.
12

13 After reviewing the foregoing constellation of factors and taking into account Constable
14 MacPhail's experience and training, I find that Constable MacPhail had reasonable
15 suspicion that the accused was in possession of drugs. Constable MacPhail considered
16 these facts together and in their totality. His grounds are objectively reasonable and
17 discernible from the facts. Though none of the factors on their own would give rise to
18 reasonable suspicion, when the circumstances are considered together, they do give rise to
19 reasonable suspicion to take the next steps and deploy the sniffer dog on only the outside
20 of the accused's vehicle.
21

22 Now dealing with the credibility of Constable MacPhail.
23

24 The defence challenges the credibility of Constable MacPhail, suggesting that he was
25 evasive at times. In particular, the defence challenges Constable MacPhail's opinion
26 regarding the nervousness of the accused during his interactions with the accused at the
27 roadside. The defence submits that the Constable's opinion that the accused was
28 excessively nervous "is at best an exaggeration and at worst a fabrication." As noted
29 earlier, I could not detect the nervousness in the accused's voice from the video.
30 However, that is not because I do not believe that is what Constable MacPhail saw and
31 heard. It was the noise of the highway traffic that made it difficult to hear precisely
32 whether the accused's voice had an influx, tremor, or shake to it.
33

34 After considering the whole of the evidence, I found Constable MacPhail to be a credible
35 and careful witness. He was thorough in detail and he remained consistent throughout
36 both in direct and cross-examination. He admitted without hesitation that although he
37 read the accused his *Charter* rights and caution four times, the accused was never
38 provided an opportunity to call a lawyer when he had responded "yes" each time. He did
39 not sugar-coat this in any way, but it suggested it was more of a manpower issue that
40 prevented him from actually providing the accused with an opportunity to call a lawyer.
41

1 Constable MacPhail answered all of the defence questions thoroughly. Defence counsel
2 suggests that Constable MacPhail testified that his reasonable suspicion was in part based
3 on the assumption that there would be an unduly expensive dropoff fee to rent a vehicle
4 from one location and to drop it off at another. Defence counsel submits that the
5 assumption turned out to be false because the rental fee, in the defence's view, turned out
6 to be a paltry \$74.29. The defence then makes much of the fact that when challenged on
7 this, Constable MacPhail stated that is large for a policeman's salary.
8

9 I find the fact that Constable MacPhail did not agree with defence counsel that this
10 dropoff fee was an insignificant amount does not mean that he was evasive. A witness
11 does not have to agree to anything put to him by counsel in cross-examination. Also, I
12 find that Constable MacPhail's primary purpose in having possession of the rental contract
13 was to check to be sure that the person, who had claimed to be the driver and renter of the
14 vehicle was in fact the accused, [REDACTED] and that the vehicle was not stolen. He did in
15 fact clarify that with the accused as the rental contract was in a different name than the
16 driver's license name. I find his mind, understandably, was not directed to the amount of
17 the dropoff fee at that time. The assumption that Constable MacPhail made that it did not
18 make sense financially and time-wise to travel to Vancouver for the day and then drive a
19 rental car back when the accused was an Air Canada employee entitled to a flight
20 discount rate, was logical and reasonable under the circumstances.
21

22 Despite the aggressive and somewhat hostile tone that the cross-examination took on his
23 evidence at page 80, lines 19 and 20 of the transcript, Constable MacPhail remained calm
24 and composed. He acknowledged on cross-examination that he used the answers to the
25 questions that he posed to the accused as the grounds to detain him. And then he
26 subsequently clarified the question and answer was not just "cut and dry" and explained
27 why they speak with traffic violators and the motoring public who are pulled over
28 roadside, which is to establish a rapport with them and to determine whether they are of
29 sound mind and capable of operating a motor vehicle.
30

31 I find there was nothing of concern with respect to the questions Constable MacPhail
32 asked of the accused, [REDACTED] roadside. There was no conscriptive questioning nor
33 bad faith on the part of Constable MacPhail. Constable MacPhail's evidence was
34 internally consistent, and where there were deviations with the video from the in-car
35 camera, they were minor. The defence called no evidence to counter Constable
36 MacPhail's evidence, and, therefore, I find no reason to question his credibility.
37

38 Then dealing with: What weight is to be given to the accused's assertion that a fiction
39 perpetrated by the police exists.
40

41 In paragraph 69 of the accused's written brief, he argues that in (as read)

1
2 Nearly every reported Pipeline case, the police provide an innocent
3 explanation for engaging drivers in questioning that is a fiction to
4 obscure their intent.
5

6 I do not find this to be the case and agree with the Crown that this is an inflammatory
7 assertion on the part of the defence. Frankly, this assertion brings into question the
8 actions of every police officer who is involved in traffic and contraband interdiction and
9 in particular, those who are commonly referred to as Pipeline investigators in the Roving
10 Traffic Unit. Such a sweeping generalization and commentary is unfair, and, to my mind,
11 disrespectful of police officers, who for the most part are carrying out their duties in
12 accordance with the law. Furthermore, the case law supports these kind of traffic stops
13 and Q and A with the driving public. The accused presented no evidence to support this
14 proposition nor was any case law provided in support with respect to Q and A's during
15 traffic stops.
16

17 Indeed, Constable MacPhail was challenged extensively in cross-examination on his
18 reasons for questioning the accused, and he was very clear that his reasons were related
19 solely to traffic safety, which I accept. The accused has submitted that Constable
20 MacPhail is a drug investigator, who at the time acted under the guise of a traffic
21 enforcement officer. However, from Constable MacPhail's evidence, the opposite would
22 appear to be true. By conducting over 10,000 traffic stops and 200 drug investigations, it
23 means that if every one of Constable MacPhail's drug investigations resulted from a traffic
24 stop, then only 2 percent of Constable MacPhail's traffic stops have resulted in drug
25 investigations. Clearly, these statistics significantly impair the accused's assertion that
26 Constable MacPhail is a drug investigator acting under the guise of a traffic enforcement
27 officer.
28

29 Now, dealing with the right to counsel.
30

31 There are two components to a *Charter* s. 10(b) right: the informational duty and the
32 implementation duty. These two components were explained in *R. v. Luong*, 2000 ABCA
33 301, in which Berger J.A. states as follows (as read)
34

35 For the assistance of trial judges charged with the onerous task of
36 adjudicating such issues, we offer the following guidance:
37

38 1. The onus is upon the person asserting a violation of his or her *Charter*
39 right to establish that the right as guaranteed by the *Charter* has been
40 infringed or denied.
41

1 2. Section 10(b) imposes both informational and implementational
2 duties on state authorities who arrest or detain a person.
3

4 3. The informational duty is to inform the detainee of his or her right to
5 retain and instruct counsel without delay and of the existence and
6 availability of Legal Aid and duty counsel.
7

8 4. The implementational duties are two-fold and arise upon the detainee
9 indicating a desire to exercise his or her right to counsel.
10

11 5. The first implementational duty is "to provide the detainee with a
12 reasonable opportunity to exercise the right (except in urgent and
13 dangerous circumstances)". *R. v. Bartle* (1994), 92 C.C.C. (3d) 289
14 (S.C.C.), at 301.
15

16 6. The second implementational duty is "to refrain from eliciting
17 evidence from the detainee until he or she has had that reasonable
18 opportunity (again, except in cases of urgency or danger)". *R. v. Bartle*,
19 *supra*, at 301.
20

21 7. A trial judge must first determine whether or not, in all of the
22 circumstances, the police provided the detainee with a reasonable
23 opportunity to exercise the right to counsel; the Crown has the burden of
24 establishing that the detainee who invoked the right to counsel was
25 provided with a reasonable opportunity to exercise the right.
26

27 8. If the trial judge concludes that the first implementation duty was
28 breached, an infringement is made out.
29

30 ...
31

32 During the course of the video, Constable MacPhail can be heard giving the accused his
33 rights to counsel several times, and the accused responded "yes." He provided those
34 rights to the accused a total of four times, again twice when he was detained in the course
35 of his drug investigation; once when he was charged and arrested for possession of a
36 controlled substance; and the last time when he was being charged and arrested for the
37 purpose of trafficking.
38

39 However, as noted earlier, one can see from the video that the accused was never
40 provided with a cell phone or given an opportunity to actually call a lawyer during his
41 detention. It is also clear that he replied "yes" whenever asked if he would like to contact

1 a lawyer. Despite the fact that ██████ expressed a desire to contact a lawyer more
2 than once, he was not given the opportunity to exercise this right. In fact, he was not
3 advised when or how this contact with a lawyer would occur.
4

5 During direct examination Constable MacPhail testified that he did not provide the
6 accused with a phone to call his lawyer because it is an officer safety concern to be
7 providing an individual with a cell phone roadside during the course of a serious criminal
8 investigation. He explained that there is a possibility where people involved with
9 significant amounts of contraband will travel together in pairs to look out for contraband
10 or keep an eye on it, "as well as guns and weapons of opportunity relating to persons they
11 are travelling with". In other words, it is unsafe to use a cell phone at the roadside, which
12 I accept to be the case. Furthermore, Constable MacPhail explained that there was no
13 expectation of privacy in the back of an unmarked police vehicle. There is an audio/video
14 recording device that cannot be turned off. He explained why the accused is not taken
15 back to the detachment during direct examination (as read):
16

17 As for facilitating any sort of right to have an officer from the
18 detachment area come and pick him up to take him to a detachment to
19 facilitate a legal phone call roadside, at that point we had formulated
20 reasonable suspicion, which I provided him his Section 10(b) rights.
21 And as opposed to carting him to the detention and booking him into
22 cells to utilize the phone when a very quick narcotics canine deployment
23 can occur and either confirm or deny my reasonable suspicion, we leave
24 him roadside. We're not facilitating or trying to canvass any sort of
25 information out of him at that point. And subsequently upon the actual
26 formal arrest, unless something had changed for his jeopardy, it would
27 have been my intention to release him roadside on documentation as he
28 had no criminal record, and public interest, repetition, and everything
29 else for court would have been satisfied. So taking him back to the
30 office would have delayed his release significantly.
31

32 He was asked by defence why he would repeatedly tell the accused that he has a right to
33 contact counsel when he knows that "you're not going to give that to him." And here's his
34 answer (as read):
35

36 I would love to be able to drop everything and/or with the manpower
37 issues we have, get him to a phone room. What happens if the dog
38 doesn't indicate? We have carted him all the way and taken him all the
39 way to the office. He could have been out of there a lot sooner. Just
40 with the investigation going the way it is, it sometimes is way quicker to
41 run the dog and then get him out of there as fast as possible. If things

1 changed where we felt the needs to go before a phone room or a lawyer,
2 then we'll take him there. But my intention based on everything was to
3 release him roadside anyways, to get him out of there as fast as -- to
4 protect his rights, to get him released, processed and gone so he can
5 facilitate all his legals once he's released.
6

7 As noted by this evidence, Constable MacPhail confirmed that the accused, ██████████
8 was never provided with access to a lawyer. In short, I am satisfied that once the accused
9 was placed under arrest for possession for the purpose of trafficking cannabis marihuana,
10 which is the charge before me, he was again provided with his right to counsel and
11 cautioned. No conscriptive evidence was taken from the accused. The accused was
12 advised of the reason for his detention at all times. When Constable MacPhail developed
13 a reasonable suspicion, he advised the accused that he was being detained for a drug
14 investigation. Additionally, he was advised of the reason for his arrest when Constable
15 MacPhail developed reasonable grounds that the accused committed an offence.
16

17 Providing access to counsel on a busy highway can be difficult. Furthermore, there are
18 privacy issues involved. The accused would not be able to have a private conversation
19 with his lawyer, if the call took place in the police vehicle. However, the practice of not
20 permitting an accused to call counsel when he has a right to do so, is problematic. ██████████
21 ██████████ could have been given the option of being transported to the detachment to make
22 his telephone call to his lawyer, but he was not offered that option.
23

24 I find that the accused's Section 10(b) implementational rights on his arrest were violated.
25 Specifically, when the accused was detained and arrested relative to a drug investigation,
26 he unequivocally asserted his right to counsel on four occasions. The accused was not
27 provided an opportunity to contact counsel forthwith, and this constitutes a violation of
28 the accused's Section 10(b) *Charter* rights.
29

30 Next question, should all evidence be excluded pursuant to Section 24(2) of the *Charter*?
31

32 On the 10(b) *Charter* breach, the accused, ██████████ argues that when he was detained
33 and arrested relative to a drug investigation, he unequivocally asserted his right to
34 counsel. He was not provided an opportunity to counsel forthwith, and thus this
35 constitutes a violation of his Section 10(b) *Charter* rights which he says under the revised
36 test set out in *R. v. Grant*, 2009 SCC 32 at paragraphs 71 to 72 must result in the
37 exclusion of the evidence.
38

39 The Crown disagrees and says that should I find a breach of Section 10(b), which as noted
40 I have, that it was merely a technical breach, that nothing flowed from it such as further
41 statements from the accused, and that it was of little, if any, impact on the accused as he

1 was only detained roadside for approximately 17 minutes and thereafter released so that
2 he could go on his way and contact his lawyer. The Crown further argues that to take him
3 back to the detachment so that he could phone his lawyer in privacy would have meant
4 that ██████████ would have been detained longer than 17 minutes.
5

6 Constable MacPhail sincerely believed, which I accept, as he said on page 113 of the
7 transcript (as read):
8

9 But my intention based on everything was to release him roadside
10 anyways, to get him out of there fast, as to protect his rights, get him
11 released, processed, and gone so he can facilitate all of those legals once
12 he is released.
13

14 As pointed out in paragraph 26 of *R. v. Keror*, 2017 ABCA 273 (as read):
15

16 A detainee is vulnerable from the moment of arrest. As a result, the
17 police have an obligation to facilitate access to a lawyer at the first
18 reasonable opportunity, and the Crown bears the onus of establishing
19 that any delay was reasonable: *R v Taylor*, 2014 SCC 50 at para 24
20 [2014] 2 SCR 495.
21

22 Clearly, in this case the Crown has failed to meet that onus as the accused, ██████████
23 was never offered the opportunity at any time during his detention. It is apparent from the
24 response of Constable MacPhail that there were "manpower issues" in getting ██████████
25 to a phone room. By the time of the accused's detention, officer security was not the
26 concern. Constable MacPhail, unlike in *R. v. Paulishyn*, 2017 ABQB 61, did not have a
27 third officer available to take ██████████ back to the RCMP detachment so that he could
28 phone his counsel of choice. Is that sufficient for the police to abrogate itself from the
29 obligation of the police to an accused under Section 10(b) of the *Charter*, and, if so, does
30 that conduct warrant exclusion of the evidence obtained by Constable MacPhail pursuant
31 to Section 24(2) of the *Charter*?
32

33 I find that ██████████ right to counsel cannot be abrogated in this way, and that his
34 application to exclude the evidence is granted pursuant to Section 24(2) of the *Charter* for
35 the following reasons.
36

37 As we know from the case law, evidence obtained in contravention of a *Charter* right
38 does not mean that it is automatically excluded. The Court must determine where there
39 has been a breach of a *Charter* right, whether the admission of the controlled substance in
40 the proceedings would bring the administration of justice into disrepute.
41

1 To conduct this analysis, the Court (as set in *Grant* at paragraph 71) must weigh the
2 following three factors:

- 3
- 4 1. The seriousness of the *Charter*-infringing state conduct, (and the
5 admission may send the message the justice system condones serious
6 state misconduct.)
 - 7 2. The impact of the breach on the *Charter*-protected interests of the
8 accused. (Here, admission may send the message that individual rights
9 count for little.);
 - 10 And 3. Society's interest in the adjudication of the case on its merits.

11
12 Dealing first with the seriousness of the *Charter* breach, I refer to the case of *Paulishyn*.

13
14 In this case, Mr. Paulishyn was stopped by a police officer doing a routine traffic stop
15 near Lake Louise, Alberta. The RCMP deployed a police detention dog who detected the
16 odour of a controlled substance. The police arrested Mr. Paulishyn and searched the
17 vehicle. During the search the police discovered 78 pounds of cannabis marihuana. Due
18 to the large quantity of marihuana that was found, Mr. Paulishyn was transported back to
19 the RCMP. During his detention roadside, Mr. Paulishyn expressed his desire twice to
20 contact counsel but was not given the opportunity to do so roadside. When it was initially
21 thought he would be released roadside, he was advised he could contact a lawyer at his
22 leisure after he was released from custody. Once at the police detachment, he was given
23 the opportunity to contact counsel.

24
25 Justice Yamauchi at paragraphs 147 and 149 of *Paulishyn* expressed his concern and
26 indicated that the "*Charter* 10 beach was more serious." At paragraph 147 of that case he
27 stated (as read):

28
29 This Court has more concern about the *Charter* s 10(b) rights. There was
30 ample time to allow Mr. Paulishyn to be taken to the Lake Louise
31 detachment either by Cpl. Kane or Cpl. Maetche, or even by Cst.
32 MacPhail. It seems that the officers were more interested in completing
33 their investigation than providing Mr. Paulishyn his right to contact
34 counsel. The evidence was secured, and neither Cpl. Kane nor Cpl.
35 Maetche provided this Court with any evidence that they felt that officer
36 safety was a concern.

37
38 Unlike in *Paulishyn*, where he was ultimately given an opportunity to contact a lawyer in
39 a telephone room back at the RCMP detachment, Mr. Duong was not offered that option
40 at all during his 17-minute detention. Understandably, Constable MacPhail thought he
41 was doing what was best under the circumstances given his limited manpower, resources,

1 and, as he said, taking ██████████ back to the detachment to make a phone call to his
2 lawyer "would have delayed his release significantly."
3

4 I find, however, there were no exceptional circumstances in this case that warranted the
5 RCMP in not affording ██████████ the opportunity to contact his lawyer during the period
6 of his detention. As pointed out in paragraphs 110 to 113 of *Paulishyn* and in particular
7 113 (as read):
8

9 In *R v Tieu*, 2017 ABQB 344 (Alta. QB) at para 63, Tilleman J said the
10 following:
11

12 The exigent circumstance exception to facilitating a person's s.
13 10(b) rights is not and must not become a common or default
14 approach used by police on a regular basis. The justification is
15 necessarily narrow and will only excuse a breach of section 10(b)
16 in genuinely extraordinary circumstances. To find otherwise
17 would effectively condone police behaviour that blatantly
18 disregards the *Charter* rights of accused persons, while also
19 undermining those situations in which extraordinary
20 circumstances are actually present and a delay is properly
21 justified.
22

23 In this case, although the breach on ██████████ rights did not result in any demonstrated
24 causal effect on the end result, since no further evidence was obtained from him while he
25 was detained in the police cruiser, I do not see any exceptional or exigent circumstances
26 such as officer or public safety to deny the accused, ██████████ the opportunity to call a
27 lawyer in a private location. The marihuana was not going anywhere.
28

29 I recognize that under *R. v. Taylor*, 2014 SCC 50 at paragraph 27, that the police have no
30 legal duty to provide their own cell phone to an arrested or detained individual.
31 Constable MacPhail was correct in not offering his own cell phone to ██████████
32 However, he was obligated to make the necessary arrangements to have ██████████
33 transported to the detachment to contact his lawyer pursuant to Section 10(b), and he did
34 not do that.
35

36 To be told by the police that you have a right to counsel and that you will be afforded the
37 opportunity to exercise that right while you are detained and then to not be given an
38 explanation by the police as to why your right is not being facilitated, I find disconcerting
39 to this Court and I would think to most of the Canadian public. Although I have found no
40 *Charter* breaches under Sections 8 and 9, nevertheless, I find this "common or default
41 approach" used by the RCMP in this case seriously undermines public confidence and the

1 rule of law and favours exclusion of the evidence.
2

3 Now turning to the impact on ██████████ Charter-protected rights. I recognize that
4 there is less impact here because this was a traffic stop on a highway. However, as the
5 case law points out, a highway is not a Charter-free zone. And every motorist on the
6 highway has a rightful expectation of liberty and privacy, and if detained and arrested, as
7 ██████████ was, to a right to counsel pursuant to Section 10(b).
8

9 *R. v. Bartle*, [1994] 3 SCR 173, at 191 states the following (as read):
10

11 The purpose of the right to counsel guaranteed by s. 10(b) of the *Charter*
12 is to provide detainees with an opportunity to be informed of their rights
13 and obligations under the law and, most importantly, to obtain advice on
14 how to exercise those rights and fulfil those obligations: *R. v.*
15 *Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43. This opportunity is
16 made available because, when an individual is detained by state
17 authorities, he or she is put in a position of disadvantage relative to the
18 state. Not only has this person suffered a deprivation of liberty, but also
19 this person may be at risk of incriminating him- or herself. Accordingly,
20 a person who is "detained" within the meaning of s. 10 of the *Charter* is
21 in immediate need of legal advice in order to protect his or her right
22 against self-incrimination and to assist him or her in regaining his or her
23 liberty: *Brydges*, at p. 206; *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp.
24 176-77; and *Prosper*. Under s. 10(b), a detainee is entitled as of right to
25 seek such legal advice "without delay" and upon request. As this Court
26 suggested in *R. v. Clarkson*, [1986] 1 S.C.R. 383, at p. 394, the right to
27 counsel protected by s. 10(b) is designed to ensure that persons who are
28 arrested or detained are treated fairly in the criminal process.
29

30 I recognize that neither Constable MacPhail nor Constable Ling sought or did obtain a
31 statement from ██████████ while he was detained, and that is to be commended.
32 Nevertheless, he was not provided his Charter 10(b) right at all. The impact to ██████████
33 ██████████ was not trivial. As found by Justice Yamauchi at paragraph 158 of *Paulishyn*, I
34 too find that given the importance of ██████████ Charter-protected rights under Section
35 10(b) as articulated in *Bartle*, this favours the exclusion of the evidence.
36

37 Now, turning to the third factor, society's interest in an adjudication on the merits.
38

39 At this stage the Courts look to consider factors such as the reliability of the evidence and
40 the importance of that evidence to the Crown's case. *R. v. Harrison*, 2009 SCC 34, at
41 paragraph 34. Here, there is no doubt that the evidence is reliable. The defence has

1 admitted that the nature of the substance that was seized from a bag in the trunk of [REDACTED]
2 [REDACTED] vehicle on or about October 17, 2016, was 60 one-half pound bags of marihuana,
3 totalling a weight of 30 pounds, (i.e., being over 3 kilograms.)
4

5 I accept that society has an interest in adjudicating this case on its merits since the amount
6 of marihuana that was seized from [REDACTED] vehicle is not an insignificant amount.
7 Without the evidence obtained from the search of [REDACTED] vehicle, it is evident the
8 Crown will not be able to make out its case.
9

10 In *Grant* at paragraph 83 the Supreme Court stated (as read):
11

12 The exclusion of highly reliable evidence may impact more negatively
13 on the repute of the administration of justice where the remedy
14 effectively guts the prosecution.
15

16 Here, since the seized marihuana is physical evidence and there are no reliability issues
17 with this evidence, I find this line of inquiry favours admission of the evidence.
18

19 Now, turning to the conclusion on the balancing of the *Grant* factors.
20

21 As pointed out in paragraph 165 of *Paulishyn* (as read):
22

23 This [*Grant*] analysis requires the court to examine the quality of the
24 evidence against the means by which the evidence was obtained. This is
25 not a scientific exercise. In fact, even if a court finds that the state
26 misconduct or the impact on the accused is serious, it must still balance
27 all the factors; one factor alone does not determine the *Charter* s. 24(2)
28 inquiry: *Sandhu* at paras 69-70.
29

30 Given my foregoing reasons, I have concluded the Section 10(b) *Charter* breach was
31 serious. Its impact on [REDACTED] was not trivial. Balancing all of this, such factors
32 outweigh society's interest in the adjudication of this case on its merits. In short, this is a
33 case where the evidence should be excluded, for to admit it would bring the
34 administration of justice into disrepute by causing the reasonable member of the public to
35 question the integrity of the justice system. The public must have confidence that when
36 they are offered the right to speak with a lawyer without delay when they are detained,
37 and they wish to exercise that right, that the police will facilitate that right, without delay,
38 as they are obligated to do. The fact the police have manpower issues, which I
39 acknowledge is beyond their control, or, in their view, deem it more expedient to release
40 an accused roadside, is not a reasonable excuse. That approach renders Section 10(b)
41 meaningless and only serves to undermine the intended protection given to the accused

1 under Section 10(b).

2
3 As a result of the foregoing, this Court concludes that the evidence is excluded as [REDACTED]
4 [REDACTED] has requested.

5
6 Sorry it took so long. All right. What is the Crown's wish here, since I have excluded all
7 of the evidence?

8
9 MR. OLSON: The Crown has no further evidence to call, Your
10 Honour.

11
12 MR. FAGAN: I -- I take it procedurally my friend's application
13 is to have any evidence that would be admissible admitted in the trial proper.

14
15 THE COURT: Yes.

16
17 MR. FAGAN: And I would not oppose that. The defence is
18 not calling evidence, and the defence moves for a dismissal.

19
20 **Reasons for Judgment**

21
22 THE COURT: Yes. And based on what you have just
23 represented, I agree, there is no evidence here, and, therefore, the matter's dismissed. And
24 you are found not guilty. You may go.

25
26 THE ACCUSED: Thank you, Ma'am.

27
28 MR. FAGAN: Thank you, My Lady.

29
30 THE COURT: I apologize for the delay and -- and the time that
31 this took to give. If anybody wants a copy of the transcript, the only thing I reserve the
32 right to if I have misspoken on nothing substantive, but if I have misspoken, and also in
33 terms of inserting the citations for the cases, okay?

34
35 MR. FAGAN: Understood. Do you have an extra copy here
36 today?

37
38 THE COURT: You know, I -- I don't, and I made some
39 changes.

40
41 MR. FAGAN: All right. Should we --

1
2 THE COURT: I would have normally issued it in written form,
3 but there's an issue as to secretarial assistants, so --
4
5 MR. FAGAN: That's what I hear.
6
7 THE COURT: Yes.
8
9 MR. FAGAN: So my friend and I in perhaps a week, ten days
10 contact your assistant?
11
12 THE COURT: Yes. I'm -- I'm going to be away, just so that
13 you know, until the end of July, after this week. So I might not be able to take a look at
14 the copy of the transcript to proof it, all right? I'm assuming there's not any rush.
15
16 MR. FAGAN: No, and I'm actually going myself from July the
17 6th until --
18
19 THE COURT: Okay.
20
21 MR. FAGAN: -- August the 14th, I discovered 48 hours ago, so
22 I --
23
24 THE COURT: Oh, okay.
25
26 MR. FAGAN: -- am looking forward to that as well.
27
28 THE COURT: All right. Thanks very much.
29
30 MR. FAGAN: Thank you.
31
32 THE COURT: I thank you --
33
34 MR. OLSON: Thank you, My Lady.
35
36 THE COURT: -- for your patience.
37
38 THE COURT CLERK: Order in court.
39
40 THE COURT: Thank you.
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PROCEEDINGS CONCLUDED

1 Certificate of Record

2
3 I, Kyra Bradley, certify that this recording is the record of the evidence in the proceedings
4 in the Court of Queen's Bench, held in Courtroom 1102 at Calgary, Alberta, on the 18th
5 day of June 2019, and that myself and Jesse Peterson were the court officials in charge of
6 the sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

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I, Jill Williams, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Jill Williams, Transcriber
Order Number: AL-JO-1003-7367
Dated: August 19, 2019