

*Case Name:*

**R. v. Calderon**

**Between**

**Her Majesty the Queen, respondent, and  
Ponce Franklin Ernesto Calderon and Michael Stalas,  
appellants**

[2004] O.J. No. 3474

188 C.C.C. (3d) 481

23 C.R. (6th) 1

122 C.R.R. (2d) 304

63 W.C.B. (2d) 4

Docket Nos. C38499 and C38500

Ontario Court of Appeal  
Toronto, Ontario

**Weiler, Laskin and Feldman JJ.A.**

Heard: February 4, 2004.

Judgment: August 23, 2004.

(106 paras.)

*Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against arbitrary detention or imprisonment -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Criminal law - - Controlled drugs and substances -- Possession or trafficking -- Compelling appearance, detention and release -- Detention, grounds -- Powers of search and seizure -- Search -- Scope of power.*

The appellants, Calderon and Stalas, appealed their convictions of possession for the purpose of trafficking. The appellants were stopped for driving 10 km over the speed limit late at night on a

deserted highway. They were in an expensive rented car. The appellants were not given a speeding ticket and were never told they had been stopped for speeding. The officers acknowledged that they were more interested in investigating for drug trafficking than for speeding. On the back seat, the officers saw several indicators that the appellants might be drug couriers including cell phones, a pager, a map, fast food wrappers and two duffle bags. They searched the vehicle without consent or a warrant and did not inform the appellants of their right to counsel. Marijuana was found in the trunk. The trial judge held there was no violation of the appellants' ss. 8, 9 and 10(b) Charter rights and admitted the evidence.

HELD: Appeal allowed and acquittals entered. The items the officers believed were indicators of drug trafficking were neutral and unreliable and did not amount to reasonable grounds for detention. There was no articulable cause to detain the appellants and their right not to be arbitrarily detained was violated. The appellants' right to be free from unreasonable search and seizure was also breached. The appellants had a reasonably high expectation of privacy in their car and the police did not have reasonable and probable grounds to search the trunk. The search was not incidental to an arrest because the officers had no reason to arrest the appellants prior to the search. There was no justification for the warrantless search. The officers also failed to inform the appellants of their right to counsel before conducting the search. There were three constitutional rights breached and those breaches had serious consequences for the appellants. No urgency or necessity existed and the violations were not merely inadvertent or of a technical nature. The police had other investigative techniques available and could have avoided the Charter violations. Due to the seriousness of the breach, the evidence ought to have been excluded.

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, ss. 8, 9, 10(b), 24(2).

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 216.

**Appeal From:**

On appeal from the conviction entered on June 10, 2002 by Justice Stanley R. Kurisko of the Superior Court of Justice, sitting without a jury, and the sentence imposed by Justice Kurisko dated June 24, 2002.

**Counsel:**

David Rose, for the appellant Michael Stalas.

Joseph Neuberger, for the appellant Ponce Franklin Ernesto Calderon.

John North, for the respondent.

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Reasons for judgment were delivered by Weiler J.A. Separate reasons were delivered by Laskin and Feldman JJ.A.

WEILER J.A. (dissenting):--

## OVERVIEW

**1** The appellants appeal from their conviction on one count of possession for the purpose of trafficking. The result at trial turned on the rulings made by the trial judge concerning alleged infringements of the appellants' Charter rights to be free from unreasonable search and seizure under s. 8, not to be arbitrarily detained under s. 9, and their right to be informed of the right to counsel upon detention under s. 10(b).

**2** At the hearing of this appeal, the Crown conceded that the appellants' rights under ss. 8 and 10(b) had been infringed and that the trial judge erred in holding that they had not been infringed. The first issue on this appeal is, therefore, whether the trial judge also erred in holding that the appellants' rights under s. 9 were not infringed. The second issue is whether the trial judge erred in holding, in the alternative, that even if the appellants' Charter rights were infringed, the admission of the evidence would not bring the administration of justice into disrepute under s. 24(2) of the Charter. I have concluded that although the police had articulable cause or reasonable grounds to suspect that they might be implicated in a crime and to detain the appellants for further investigation, the police acted unjustifiably in obtaining Calderon's consent to search his vehicle without giving him his right to counsel. Consequently, the appellants' Charter rights under s. 9 were also infringed. Despite the violation of the appellants' rights under ss. 8, 9 and 10(b), I would nevertheless hold that the trial judge did not err in admitting the evidence under s. 24(2) of the Charter.

## THE CIRCUMSTANCES GIVING RISE TO THIS APPEAL

**3** On September 22, 2000, shortly after 3:00 a.m. on a lonely stretch of Trans Canada Highway 17 in the Township of Nipigon, Ontario, two OPP officers observed two persons in a white Lincoln Town car, bearing B.C. licence plates, traveling eastbound at a rate that was 10 kilometres per hour over the speed limit. The officers conducted a "CPIC" search on the car's licence plate and determined that it was a rental car. Cst. Osborne was of the opinion that the car did not fit into the surroundings based on what he had learned on his drug interdiction course. Drug couriers quite often will rent a vehicle so that if they are caught, it is not their vehicle they are losing. Also this type of vehicle had very large trunk space. The officers stopped the driver of the car for speeding but did not issue a ticket. Instead, after the appellants' car was pulled over, Cst. Osborne asked the driver, Stalas, to provide him with his driver's licence, and the registration and insurance for the car. The officers observed in plain view, two cellular telephones, (one in the glove box when it was

opened to obtain the registration and one between the two front seats); a pager on the belt of the passenger; road maps; fast food wrappers on the floor of the car; and a large amount of luggage in the back seat of the car instead of the trunk. The additional observations caused the officers to suspect the appellants were drug couriers. Cst. Osborne asked Stalas to step out of his car and spoke to him at the rear of the car. Stalas told Cst. Osborne that he was from Quebec and that he was traveling from B.C. to Quebec. Cst. Osborne also asked Stalas if he would agree to allow the police to look inside the car and advised him that if he did consent anything illegal that was found could result in a criminal charge. He also told him he could withdraw his consent at any time. Stalas told Cst. Osborne he knew his rights and refused to consent.

4 From looking at the car rental agreement, Cst. Osborne became aware that the car was rented to the passenger Calderon and that the rental car was only authorized for use in British Columbia. Cst. Osborne asked Calderon if he had any guns, or drugs or tobacco in the car. Calderon said no. Cst. Osborne then asked Calderon if he could search the interior of the car, advising him also that he could withdraw his consent at any time and that if anything illegal was found he could be charged. Calderon consented to a search of the car. Cst. Osborne asked him to step out. As Calderon stepped out of the car, Cst. Osborne detected a strong odour of fresh unburnt marijuana emanating from the car. At this point he concluded that, with all the indicators plus the smell of marijuana, he had reasonable and probable grounds to arrest the appellants. Stalas called out to Calderon not to let the police search the car and Calderon then withdrew his consent to the search.

5 Cst. Osborne testified that the reason he continued to search the vehicle after Calderon withdrew his consent was because at this stage he had reasonable grounds to believe that there was marijuana in the vehicle.

6 In the interior, above the visor on the driver's side Cst. Osborne saw an expense log, showing the cost for plane tickets, meals and 3 hotel receipts showing an arrival date of September 15th and a departure date of September 18th. When he searched the duffle bags in the back seat, an additional cell phone was found in one of them. That search took approximately five minutes. The smell of fresh marijuana was constant. He pulled the trunk release button. Inside the trunk he found over 22 pounds of cannabis marijuana worth over \$200,000. At 3:19 a.m., or approximately 10 minutes after the officers had initially stopped the appellants, the officers placed them under arrest and advised them of their right to counsel.

7 The appellants provided the officers with the names of lawyers they wished to speak to. The appellants were taken to the nearby O.P.P. detachment. At some time before 4:10 a.m. the police attempted to contact the lawyers at the number provided by the appellants without success. Both appellants gave the police the name and telephone number of another lawyer from Quebec and the police also made efforts to contact this lawyer without success. At 4:17 a.m. Osborne left a message for duty counsel after the appellants expressed a wish to speak to duty counsel. At 4:56 a.m. duty counsel returned the call and spoke to Stalas. Calderon then expressed a desire to speak to a French-speaking duty counsel.

**8** At trial, the appellants did not testify at the voir dire and called no evidence in support of their application to have the marijuana excluded because their Charter rights had been violated.

**9** The trial judge concluded that there were no violations of the appellants' Charter rights. The trial judge also concluded that even if there had been a Charter violation, the 22 pounds of marijuana should not be excluded from evidence under s. 24(2). In particular, the trial judge held at paras. 62 to 70 of his reasons, that the police officers' decision to stop the Lincoln for speeding was legitimately connected to a highway safety concern. He further held that viewing the facts and circumstances as a whole, the officers had articulable cause for suspecting there might be drugs in the car and that, as a result, the appellants' detention was not an arbitrary one within the meaning of s. 9 of the Charter.

#### WERE THE APPELLANTS ARBITRARILY DETAINED?

**10** The appellants' position is that the trial judge erred when he held that Cst. Osborne had articulable cause for suspecting there might be drugs in the car and that they were unlawfully stopped and arbitrarily detained contrary to s. 9 of the Charter.

**11** In the recently released decision of the Supreme Court of Canada, *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52, Iacobucci J., speaking for the majority, states at para. 33 that he prefers the use of the term "reasonable grounds to detain" as a guide to determine whether an investigative detention is arbitrary. Because this appeal was argued prior to the decision in *Mann*, and the trial judge used the term "articulable cause" to determine the reasonableness of an investigative detention, I will use that term in these reasons.

**12** Articulable cause, as defined by Doherty J.A. in *R. v. Simpson* (1993), 12 O.R. (3d) 182, at p. 202, requires "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation." If the police had articulable cause to briefly detain a suspect for purposes beyond highway safety, he further held that the investigative detention may or may not be justified depending on whether the police officer acted within the scope of his duties at common law or a duty imposed by statute, and depending on whether the officer unjustifiably used his powers in carrying out his duties in accordance with the test set out in *R. v. Waterfield*, [1963] 3 All E.R. 659. See *R. v. Simpson*, supra, at 203-204.

**13** Similarly, in *Mann*, supra, Iacobucci J. held that police officers do not possess a general power of detention for investigative purposes but may detain individuals when there are reasonable grounds to suspect that they are connected to a crime and that detention is reasonably necessary. At para. 34, Iacobucci J. stated:

The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going

criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must be further assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the Waterfield test.

**14** A hunch based entirely on intuition cannot suffice to detain an individual for investigation no matter how accurate that hunch might prove to be: *Simpson*, supra at 202. See also *R. v. Storrey* (1990), 53 C.C.C. (3d) 316 at 324 (S.C.C.). While the smell of marijuana alone is highly subjective and incapable of objective review by a court, the circumstances under which the smell was detected are subject to review. A smell combined with other circumstances can provide grounds to arrest: *R. v. Polashek* (1999), 134 C.C.C. (3d) 187 at 194-195 (Ont. C.A.).

**15** The appellants submit that many of Cst. Osborne's observations were neutral indicators and could be found in almost anyone's vehicle on any given day. Cst. Osborne also testified that this was his first drug arrest and that some of the same type of criteria on 10 or 20 other motorists he had pulled over had yielded negative results. The appellant submits that Cst. Osborne was acting on an inexperienced hunch. Further, because Cst. Osborne observed that the Lincoln "was an expensive vehicle to be renting for what the driver and the passenger looked to me", the appellants submit he fell into the trap of using his subjective discriminatory opinion as opposed to objective criteria to detain the appellants.

**16** The trial judge found that stopping the car for speeding was legitimately connected to highway safety concerns and, relying on *Browne v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.), held that the fact that Cst. Osborne suspected the possibility that drugs were being transported did not taint the lawfulness of the stop.

**17** In *Browne*, supra, Doherty J.A. addressed the issue of whether stopping a motor vehicle for purposes in addition to those relating to highway safety, such as investigating crime or police intelligence, tainted the stop under s. 216 of the Highway Traffic Act, R.S.O. 1990, c. H.8, and rendered the stop unlawful. He held that, so long as the additional purposes were not in themselves improper, the lawfulness of the stop was not tainted. Thus, Cst. Osborne's motive of investigating possible drug smuggling activity in addition to highway safety concerns did not taint the lawfulness of the stop.

**18** In this case, while each of the indicators was susceptible of innocent explanation, the trial judge concluded that the totality of circumstances was suspicious and that the officers had articulable cause to briefly detain the occupants of the car for further investigation respecting illegal drugs. In particular, the trial judge referred to Cst. Osborne's observation of the two duffle bags

inside the car, when there was a large trunk, as a factually objective and clearly expressed ground. Having regard to the comments of Iacobucci J. in *Mann*, supra, at para. 49, respecting the requirement to give due deference to the trial judge's finding concerning the reasonableness of an investigative detention and incidental search absent palpable and overriding error, I would uphold the trial judge's conclusion.

**19** I would also hold that Cst. Osborne was entitled to take into consideration the training he had received on the Drug Interdiction Course concerning the modes or patterns of operation of drug traffickers in making his decision to briefly detain the driver and passenger of the car for further investigation apart from the speeding infraction. In *Simpson*, supra at p. 501, Doherty J.A. cited a passage from *U.S. v. Cortez*, 449 U.S. 411 at 417-418 that supports the conclusion that the police are entitled to consider information about the manner of operation of certain kinds of lawbreakers, together with their observations, in arriving at the conclusion that they have articulable cause to detain a person. See also *R. v. G.(C.M.)*, [1996] M.J. No. 428 (Man. C.A.) at 2. Cst. Osborne testified that he had never stopped a car before with so many of the indicators of drug smuggling about which he had received training. The trial judge's rejection of the appellants' submission that Cst. Osborne was acting on an inexperienced hunch was also not unreasonable.

**20** Another observation made by Cst. Osborne was that the Lincoln itself did not fit into the surroundings. That the vehicle in question did not fit the area the officer was patrolling was also one of the factors in *R. v. Jacques* (1996), 110 C.C.C. (3d) 1, a case in which the Supreme Court upheld a stop on the basis of reasonable suspicion or articulable cause, that is, objectively discernible factors, not irrelevant subjective ones.

**21** The trial judge also rejected the appellants' submission that Cst. Osborne's comment about the occupants and the car was indicative of discriminatory bias. He noted that details of Cst. Osborne's comment were not explored or pursued in cross-examination and held that there was no indication of "bias, discrimination or discourtesy during the investigation or after the arrest." The trial judge's conclusion that the allegation of discrimination lacked an evidentiary foundation was well founded.

**22** I would dismiss the appellants' argument that the trial judge erred in finding that the police had articulable cause to briefly detain the driver and passenger of the vehicle for further investigation. Before concluding that there was no arbitrary detention under s. 9 however, I must go on to consider whether the police were acting within the general scope of a duty imposed at common law or by statute and, if so, whether the police unjustifiably used their powers in carrying out that duty.

**23** In conducting his investigation, Cst. Osborne was acting in the course of his duties to investigate crime, one of his duties at common law. In relation to Stalas, Cst. Osborne did not act unjustifiably in asking him to step out of the car. No doubt he wished to speak to Stalas without his passenger Calderon necessarily hearing their exchange. The investigation was at an early stage and, although the police suspected that the appellants were implicated in a crime, they had not yet

decided that a crime had been committed. As noted by Iacobucci J. in Mann, supra, at para. 19, the term "detention" covers a broad range of encounters between police officers and members of the public. As a result,

[T]he police cannot be said to "detain" within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or even "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint.

**24** Since neither Stalas or Calderon testified on the voir dire into whether their Charter rights had been breached, there is no evidence that either believed he was obliged to comply with the police request to get out of the car or felt psychologically compelled to answer any questions. Nor is there any evidence that they were subjected to any physical restraints at this stage.

**25** The question of whether the police acted unjustifiably in relation to Calderon is, however, problematical. Cst. Osborne asked Calderon whether he had guns, tobacco or drugs in the car. With respect to the fact that police must have reasonable grounds to suspect that an individual is connected to a particular crime, I do not read the recent decision of Iacobucci J. in Mann so narrowly as to mean that only one crime can be reasonably suspected, as opposed to, in this case, three crimes. It is not uncommon for the police to find both illegal drugs and another illegal substance in their search, or to find illegal drugs and guns, together.

**26** Calderon did not have to answer the police officer's question but when he replied, "No", Cst. Osborne asked him whether he would consent to the interior of the car being searched. Absent the Crown's concession, it would not have been clear to me in the absence of evidence from Calderon, that at the time Calderon was asked for his consent to search the vehicle, he was detained within the meaning of s. 10(b). Calderon was certainly informed that if he consented to a search and if Cst. Osborne discovered that he was smuggling an illegal substance he would be charged. Clearly, after Calderon got out of the car and the officer smelled the fresh unburnt marijuana that he believed gave him cause to arrest Calderon and Stalas, both would have been detained.

**27** The Crown concedes, however, that when Calderon was asked for his consent to search the vehicle, he should have been given his s. 10(b) right to counsel. The Crown's concession therefore presupposes that Calderon was detained within the meaning of s. 10(b) when the consent to search the vehicle was requested. That being the case, although the police had articulable cause to conduct an investigative detention, and although they had the right at common law to detain the appellants for the purpose of investigating a crime relating to smuggling guns, tobacco or drugs, Cst. Osborne must be taken to have unjustifiably used his powers when he asked and obtained Calderon's consent to search his vehicle without advising him of his right to counsel. The detention of Calderon and, by association, Stalas, became an arbitrary detention at this point because when Calderon was not

given his right to counsel, the Crown concedes in effect the police officer did not act reasonably. I would therefore hold that the trial judge erred in concluding that the appellants' rights under s. 9 of the Charter were not infringed.

#### THE APPELLANT'S RIGHTS UNDER SS. 8 AND 10(B) WERE INFRINGED

**28** The law is clear that a suspect who is detained within the meaning of s. 10(b) of the Charter must be given the right to counsel upon detention: *R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.); *R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.). Cst. Osborne did not give Calderon the right to counsel at the time he requested his consent to search the vehicle. Given the Crown's concession that Calderon was detained within the meaning of s. 10(b) at that time, the Crown conceded that Cst. Osborne violated Calderon's right to counsel.

**29** While it is only in exceptional circumstances that the denial of a right to counsel will trigger a violation of the right to be free from unreasonable search and seizure under s. 8, one of the exceptional circumstances is when there is a detention and the lawfulness of the search is dependent on the detainee's consent: *Therens*, supra; *R. v. Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.). Thus, the Crown also conceded that Cst. Osborne violated Calderon's rights under s. 8.

**30** Here, Cst. Osborne wanted to conduct a search to confirm his suspicion that the appellants were engaged in the illegal transportation of guns, tobacco or drugs. Before Cst. Osborne began his search, however, Stalas shouted to Calderon, and Calderon withdrew his consent to the search. Cst. Osborne testified that he believed at that stage he had reasonable and probable grounds to arrest Calderon because he smelled fresh unburnt marijuana when Calderon opened the car door and continued his search without giving him the right to counsel. The delay involved was about 10 minutes and during this time Calderon was not asked any questions nor did he make any incriminating statements.

**31** This case has a number of similarities to *R. v. Polashek*, supra. In that case, the police lawfully stopped the appellant for a Highway Traffic Act violation. During the course of a brief conversation with the appellant the police officer detected a strong odour of marijuana emanating from the vehicle and told the appellant what he smelled. The appellant said, "No you don't." Based on the smell, the appellant's statement, the area and the time of night, the officer believed that he had grounds to arrest the appellant. He then subjected the appellant's vehicle to a search and in the trunk found bags of marijuana, a scale and rolling tobacco. At this point the appellant was placed under arrest and advised of his s. 10(b) rights. The appellant reserved his right to speak to a lawyer until later. The officer then asked the appellant if he wanted to tell him about the "dope." The appellant replied, "What can I say? You caught me; I'm busted." The trial judge convicted him.

**32** When Polashek appealed his conviction to this court, Rosenberg J.A. held that the trial judge's finding that the officer had reasonable and probable grounds to arrest the appellant was entitled to some deference, that the trial judge had not erred in principle and his finding was not unreasonable. Rosenberg J.A. also held that, because the officer had reasonable and probable grounds to arrest the

appellant, the officer was therefore entitled to search the appellant and the trunk of his car as an incident of a lawful arrest although the search preceded the arrest.

**33** In coming to his conclusion that the warrantless search of Polashek's trunk prior to his being placed under arrest, did not violate his constitutional rights under s. 8, Rosenberg J.A. relied on the Supreme Court's decision in *R. v. Caslake* (1998), 121 C.C.C. (3d) 97. In *Caslake*, supra, Lamer C.J.C. held that a search will be incidental to arrest where there is some reasonable prospect of securing evidence of the offence for which the accused is being arrested. Thus, the arrest of an accused person or the existence of reasonable and probable grounds to arrest a person on a trafficking charge is sufficient circumstantial evidence to justify a search of the person's vehicle as a search incident to the arrest power.

**34** Here, as found by the trial judge, the search of the appellant's trunk similarly fell within the scope of the common law power of a lawful search incident to arrest. Objectively, Cst. Osborne had reasonable and probable grounds to arrest the appellants based on the cumulative effect of the indicia of smuggling he had observed and the odour of marijuana he detected. Cst. Osborne also testified that he believed he had grounds to arrest Calderon. He did not do so because he wanted to try to obtain further evidence and to be "100% sure" of his grounds before making the actual arrest. The fact that he wished to obtain further evidence does not necessarily mean he did not believe he had reasonable grounds to effect an arrest earlier. The trial judge's finding is not unreasonable and is entitled to deference.

**35** After referring to and analysing the Polashek decision for the proposition that the search which led to the finding of marijuana was a lawful and reasonable search incident to arrest, the trial judge stated at para. 86 of his reasons, "The same conclusion applies in this case to the search for the marijuana in the trunk of the Lincoln."

**36** Earlier in his reasons, the trial judge had referred to the Jacques decision, which deals with reasonable suspicion pursuant to a border search, in connection with his analysis of articulable cause. Although the trial judge again referred to the Jacques decision in discussing s. 8 of the Charter, that reference was for the purposes of holding that the factors giving rise to articulable cause that justified the investigative detention were also connected to the later search of the vehicle. The Jacques decision did not govern the trial judge's analysis of reasonable and probable cause. I would hold that the trial judge did not err in principle in holding that the search of the trunk of the car was a lawful search incident to Cst. Osborne's power of arrest.

**37** The search conducted in this case, a search incident to a lawful arrest, is to be distinguished from a search conducted pursuant to an investigative detention. Pursuant to an investigative detention, a police officer has no right to conduct a search unless the officer has reasonable grounds to believe his or her safety or the safety of others is at risk. See *Mann*, supra, at para 45. A search for the purpose of collecting evidence of a potential crime such as occurred when the police reached into Mann's sweater pocket was a serious violation of his rights under s. 8 of the Charter and the

evidence was excluded under s. 24(2). I reiterate the search here was of a different nature: it was a lawful search incident to arrest.

**38** At paras. 35 and 36 of its factum filed in this appeal, the Crown stated:

As the Trial Judge concluded in this case, the police were in possession of reasonable grounds to arrest the Appellants after Constable Osborne detected the odour of marihuana. Constable Osborne obtained reasonable and probable grounds as a result of the smell of the fresh marihuana together with the indicators he previously noted. The Trial Judge was also satisfied that, given Constable Osborne's training and experience, this was a situation where the officer would have had reasonable and probable grounds to arrest based on the smell of the marihuana alone.

The Trial Judge was correct in concluding that the search of the Appellants' car, including the trunk was incidental to the arrest, even though it preceded the arrest.

In oral argument before us, however, the Crown conceded that the search began when Cst. Osborne asked Calderon if he could search the interior of the vehicle, prior to the time he smelled marijuana. Because Cst. Osborne did not advise Calderon of his s. 10(b) right to counsel at that time, the Crown conceded that Calderon's rights under ss. 8 and 10(b) were infringed and went directly to a discussion of s. 24(2). In assessing the seriousness of the breach under s. 24(2) the Crown submitted, as a mitigating factor, that the officers believed that they had the power to arrest the appellants and to search the vehicle and that, accordingly, the breach of the appellants' Charter rights was in no way deliberate.

**39** In Polashek, as here, however, the trial judge failed to address the delay in advising the appellant of his s. 10(b) right to counsel once he had reasonable and probable grounds to arrest him and the case turned on the admissibility of the evidence under s. 24(2).

**SHOULD THE EVIDENCE HAVE BEEN ADMITTED UNDER S. 24(2)?**

**40** In Polashek, supra, Rosenberg J.A. held that the appellant's s. 10(b) right to counsel had been violated. On the record, he could not decide whether the appellant would have made the statement he did, had he been advised of his s. 10(b) right to counsel. The trial judge made no determination under s. 24(2) in the event there was a violation under s. 10(b). Rosenberg J.A. ordered a new trial and left it to the judge at the new trial to decide whether the statement should be excluded.

**41** In this case, we have the benefit of the trial judge's reasons, in the alternative, respecting s. 24(2), wherein he held that if the appellant's Charter rights were violated he would nonetheless admit the evidence under s. 24(2). A trial judge's decision to admit evidence under s. 24(2) is not to

be overturned absent an error in principle or an error relating to rules of law or unless the judge has made an unreasonable finding: *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 64; *R. v. Mellanthen* (1992), 76 C.C.C. (3d) 481 S.C.C. Thus, appellate courts are required to show considerable deference to the trial judge's decision under s. 24(2).

**42** In considering whether the marijuana should have been excluded from evidence in the event of a Charter violation, the trial judge considered, in accordance with *R. v. Collins*, [1987] 1 S.C.R. 265: the effect of the admission of the evidence on the fairness of the trial, the seriousness of the Charter violation, and whether excluding the evidence would bring the administration of justice into disrepute.

**43** In relation to the first factor, trial fairness, the trial judge considered whether the evidence, in accordance with *R. v. Stillman*, *supra*, was conscriptive, meaning that the evidence was the result of the appellant being compelled to participate in the creation or discovery of the evidence through a statement, the use of his body, or the production of body samples, or non-conscriptive. He noted that the violation of the appellants' right to counsel generally renders the evidence obtained inadmissible. He rejected the appellants' submission that the evidence was derived from conscriptive evidence in this case.

**44** In *Stillman*, *supra*, the Supreme Court stated at para. 74:

The admission of evidence which falls into the "non-conscriptive" category will, as stated in *Collins*, rarely operate to render the trial unfair. If the evidence has been classified as non-conscriptive the court should move on to consider the second and third *Collins* factors.

**45** The trial judge held that notwithstanding the breach of s. 10(b), Calderon did not incriminate himself through the use of his body or the production of bodily samples. Moreover, he held that on a balance of probabilities the marijuana would inevitably have been discovered. If the right to counsel had been given and exercised before the appellants were arrested it was likely that the Lincoln would have been driven to the OPP detachment office by a police officer. Indeed, after the appellants were advised of their right to counsel in this case, and prior to them exercising their right to counsel, that is exactly what happened. The driver would have smelt the odour of marijuana and drawn it to the attention of Cst. Osborne, who would then have had probable grounds to search the trunk. Accordingly, the trial judge held that the fairness of the trial would not be affected by the admission of the evidence and went on to consider the second and third factors.

**46** In relation to the second factor, the seriousness of the breach, the trial judge held that the police acted in a courteous manner both before and after the appellants were arrested, asked for permission to search, explained the purpose and ramifications of the search and that the time Cst. Osborne had to act was brief. Referring to an earlier portion of his reasons, the trial judge noted that both officers were candid and honest in their testimony. It would have been easy for Cst. Osborne to testify that he smelled the marijuana before Calderon got out of the car but he had not done so.

Counsel for both defendants made that observation as well. The trial judge concluded that the officers acted in good faith.

**47** After balancing exclusion of the evidence against admission of the evidence, the trial judge held that the admission of the evidence would not result in an unfair trial.

**48** The appellants submit in relation to trial fairness, that the evidence was conscripted and would not likely have been discovered, and that the officers did not act in good faith but acted in flagrant disregard of the appellants' rights.

**49** I would agree with the trial judge that the marijuana found in the trunk of the car was non-conscriptive evidence. The trial judge, who was familiar with local police practices, also stated that, had the right to counsel been given, the car would have been driven to the OPP detachment and the discovery of the odour of marijuana was inevitable. I see no basis for overturning his finding in this regard. If the evidence was conscriptive but discoverable, trial fairness will not be affected: *R. v. Lewis*, supra, at 495. Thus, I would reject the appellants' submission that the fairness of the trial is affected.

**50** In relation to good faith, in requesting Calderon's consent to search the interior of the vehicle Cst. Osborne told him what the consequences would be if anything illegal was discovered and also told him he could withdraw his consent at any time. Thus, he knew the extent of his jeopardy. Given the concession that Calderon was detained when his permission to search the vehicle was requested, the omission of the police to give Calderon his right to counsel at this point was serious. Calderon's consent was, however, withdrawn before the search began. The discovery of the marijuana smell in the interim was happenstance. The delay in advising Calderon and Stalas of their right to counsel once Cst. Osborne smelled the marijuana is also serious, but, as in *Polashek*, the search of the trunk was incidental to their arrest and, unlike the situation in *Polashek*, they made no incriminating statement prior to being advised of their right to counsel. Although the violation of their right to counsel was serious, the consequences of the violation were not.

**51** Cst. Osborne testified that he continued with the search because he believed at that stage he had reasonable and probable grounds to arrest. The trial judge accepted his evidence, and as I have indicated earlier, his finding is not unreasonable. Thus, I would hold that Cst. Osborne was acting in good faith in that he believed at that stage he had a right to conduct the search.

**52** There is no evidence that the police in this case were engaged in any pattern of violation of accused persons' Charter rights.

**53** The trial judge's reasons under s. 24(2) reveal a full and clear understanding of the law. He was in the best position to weigh the evidence and to conclude that the police acted in good faith. The trial judge's assessment of the extent to which the fairness of the trial would be affected by the breach of the appellants' rights reveals no misapprehension of the evidence or failure to consider relevant factors. His exercise of discretion to admit the evidence is deserving of deference. As noted

by the Supreme Court in *R. v. Buhay*, (2003), 174 C.C.C. (3d) 97 at 126 (S.C.C.), trial judges handle issues of this nature on a daily basis and have a much better understanding than appellate courts about the likely effects of their s. 24(2) decisions on the administration of justice in their communities.

**54** The trial judge's conclusion that the admission of the marijuana would not bring the administration of justice into disrepute is not unreasonable having regard to:

- \* the appellants' reduced expectation of privacy in a motor vehicle: *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405 at 424 (S.C.C.);
- \* the lack of any oppressive behaviour by the police, ongoing pattern of disregard for the appellants' rights, or deliberate breach of the appellants' rights: *Belnavis*, supra at 424-425;
- \* the unobtrusiveness of the search: *R. v. Caslake* (1998), 121 C.C.C. (3d) 97 at 112 (S.C.C.);
- \* the short period of investigative detention giving rise to reasonable and probable grounds to effect an arrest and, as found by the trial judge, the search was incident to arrest as in *Polashek*;
- \* the trial judge's finding, which I would uphold, that the evidence in the trunk of the car was non-conscriptive real evidence and would have been discovered in any event.

**55** In conclusion, I am of the opinion that there is no basis on which to disturb the trial judge's decision to admit the evidence under s. 24(2). I would dismiss the appeal.

WEILER J.A.

LASKIN J.A.:--

A. Introduction

**56** After a roadside stop, two Ontario Provincial Police officers seized twenty-two pounds of marijuana from the trunk of the appellants' rented car. The appellants were charged with possession for the purpose of trafficking. They applied to exclude the evidence of the marijuana, alleging violations of their constitutional rights under ss. 8, 9 and 10(b) of the Canadian Charter of Rights and Freedoms. The trial judge found no violation, but ruled that even if the appellants' constitutional rights had been breached, he nonetheless would not exclude the evidence under s. 24(2) of the Charter. He therefore convicted the appellants of the charge.

**57** On appeal, the Crown conceded that in seizing the marijuana, the police breached the appellants' s. 8 and s. 10(b) rights. The Crown, however, maintained that the trial judge's s. 9 and s. 24(2) rulings were correct. My colleague Weiler J.A. - whose reasons I have had the advantage of reading - would dismiss the appeal. Although she concludes that the appellants' s. 9 rights were also

breached, she holds that the trial judge did not err in admitting the evidence under s. 24(2) of the Charter.

**58** I take a different view. I agree that the appellants' s. 9 rights were breached. However, I would set aside the trial judge's s. 24(2) ruling and exclude the seized evidence of marijuana. As I view the record, the trial judge materially discounted the seriousness of the Charter breaches by failing to take into account several factors that heightened its seriousness. As a result, his decision not to exclude the evidence was unreasonable. Therefore, I would allow the appeal and quash the convictions. Because the marijuana should be excluded from the evidence at trial and was essential to the Crown's case, I would enter acquittals.

#### B. Relevant facts

**59** The relevant facts are not in dispute. Officers Osborne and Rome stopped the appellants for driving 10 kilometers over the speed limit in the middle of the night on a deserted stretch of Trans Canada Highway 17 in the township of Nipigon. The appellants were driving a Lincoln Town Car with British Columbia licence plates. The officers found out by a Canadian Police Information Centre search that the car was rented. A few yards from the Nipigon police detachment they pulled the car over. Osborne acknowledged that when he and Rome stopped the car, they were far more interested in investigating whether the appellants were drug couriers than in any speeding infraction. Indeed, the officers did not issue a speeding ticket and never told the appellants that they had been stopped for speeding.

**60** On being stopped, Stalas, who was driving, identified himself to Osborne with a valid Quebec driver's licence. Calderon, who sat in the passenger's seat, identified himself to Rome. Both appellants cooperated throughout their detention.

**61** Osborne used a flashlight to illuminate the interior of the Lincoln. On the back seat he saw what he claimed were several indicators that the appellants might be drug couriers: cell phones, a pager, a road map, some fast food wrappers and two duffel bags. Osborne also thought that the Lincoln seemed too expensive "for what the driver and the passenger looked to me".

**62** After viewing the interior, Osborne asked Stalas to get out of the car. Stalas complied. Osborne admitted that the police were now conducting a drug investigation and that the appellants were now detained. Osborne asked Stalas if he could search the car. Stalas said no. Osborne then went to speak to Calderon and asked him the same question. At first Calderon said yes. As Calderon got out of the car Osborne claimed that he detected an odour of fresh marijuana emanating from the passenger side. However, the other officer, Rome, testified that he never smelled marijuana.

**63** Within a few seconds of agreeing to a search of the car, Calderon withdrew his consent, as he was entitled to do. Although not then having the consent of either appellant, the officers nonetheless persisted in their search. They did not advise the appellants of their right to counsel. They did not consider obtaining a warrant. And they did not consider taking the appellants to the nearby police

detachment.

**64** Osborne and Rome found nothing in the interior of the car. However, after opening the trunk, they discovered marijuana in two sealed duffel bags. They then arrested the appellants, and advised them of their right to counsel.

#### C. Breach of section 10(b) of the Charter

**65** As I have said, in this court the Crown conceded that the police breached the appellants' right on detention to be informed of the right to retain and instruct counsel without delay, contrary to s. 10(b) of the Charter. The Crown's concession was proper.

**66** As the Crown acknowledged, while the police looked for drugs, the appellants were at least physically restrained and, accordingly, "detained". They were thus entitled to their s. 10(b) rights: see *R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.). They were not given these rights until after they were arrested.

#### D. Breach of section 9 of the Charter

**67** Section 9 of the Charter guarantees each individual the right not to be arbitrarily detained. One could realistically conclude that stopping a car for traveling just ten kilometers over the speed limit - 100 kilometers in a 90 kilometer zone - on a deserted stretch of highway in the middle of the night was a pretext and thus contrary to s. 9. Nonetheless, I accept the trial judge's finding that stopping the Lincoln for speeding was legitimately connected to a highway safety concern and that Osborne's suspicion about drugs did not taint the lawfulness of the initial stop.

**68** Whether the police breached s. 9 turns on whether the subsequent investigative detention, to determine if the appellants were drug couriers, could be justified. Weiler J.A. concludes that the initial portion of the investigative detention was justified but acknowledges that it turned arbitrary when the police went ahead and searched the car without giving the appellants their s. 10(b) rights. Although I agree that at that point the appellants' detention was arbitrary, I would go further. In my view, the entire investigative detention was unjustified.

**69** To be justifiable, the police had to have "articulable cause" for the detention, or in the terminology of Iacobucci J., in the recently released Supreme Court of Canada decision *R. v. Mann*, 2004 SCC 52, "reasonable grounds to detain" (para. 33). On an objective assessment of all of the circumstances, the officers had to have reasonable grounds to suspect that the appellants were implicated in the transportation of drugs. The objectivity of the assessment is critical. An officer cannot exercise the power to detain on a hunch, even a hunch born of intuition gained by experience: see also *R. v. Simpson* (1993), 12 O.R. (3d) 182 (C.A.).

**70** The trial judge concluded at para. 70 of his reasons that the police did have articulable cause.

Viewing the facts and circumstances as a whole, rather than isolating each in turn, and bearing in mind that the standard for reasonable suspicion is less demanding than that for reasonable belief and can arise from information that is less reliable than that required to show reasonable belief, I find that when Osborne decided to investigate he was not acting on a hunch. He had articulable cause (reasonable grounds) for suspecting there might be drugs in the Lincoln. Therefore, when Osborne asked Stalas to step out of the car to question him, the resulting detention for investigative purposes was not arbitrary within the meaning of s. 9 of the Charter.

**71** Although the trial judge's finding is entitled to great deference, this court may overturn it, if it reflects a palpable and overriding error and is not supported by the evidence. Respectfully, I think this is one of those cases. It seems to me that the trial judge's finding is undermined by the only relevant evidence on the record, Osborne's own evidence. Osborne testified that in 1997 he took a one-week drug interdiction course in which he was trained on the profiles or "indicators", of suspected drug couriers. He claimed that the items he viewed in the appellants' car together with his observation that the Lincoln seemed too expensive "for what the driver and passenger looked to me" led him to reasonably suspect that the appellants were drug couriers.

**72** However, on cross-examination Osborne admitted that these "indicators" were neutral, that they might be found in any car. In the world we now live in, that is not a surprising admission - fast food, duffel bags, a road map, cell phones, even pagers now form part of many people's lives. Moreover, Osborne conceded that since he had taken the training course he had stopped between ten and twenty cars relying on these indicators and had made no arrests. Rome also took the training course, and relying on these same indicators, he had stopped between fifty and one hundred cars. He, too, had made no arrests. Given the neutrality and apparent unreliability of these indicators, I fail to see how their presence could amount to reasonable grounds for detention.

**73** I give no credence at all to Osborne's observation about the appellants' driving an expensive car. This type of stereotyping recalls the words of Doherty J.A. in *Simpson*, supra at 202:

Such subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria detentions could be based on mere speculation. A guess which proves accurate becomes in hindsight a "hunch".

**74** Overall, on Osborne's own evidence, I consider that the police's investigative detention was not justified and therefore breached the appellants' rights under s. 9 of the Charter. I can do no better than to quote the words of Ryan J.A. in the New Brunswick Court of Appeal in the similar case of *R. v. Cox* (1999), 132 C.C.C. (3d) 256 at para. 12:

The elements of the smuggler's profile here are no more than hunches,

speculation and guesses that do not qualify as "objectively discernible facts". As such, they do not support a reasonable belief that Mr. Cox was implicated in unlawful activity that justified stopping his motor vehicle.

#### E. Breach of section 8 of the Charter

**75** The Crown also conceded that the police breached the appellants' right to be secure against unreasonable search and seizure contrary to s. 8 of the Charter. This, too, was a proper concession.

**76** The officers searched the appellants' car without a warrant. A warrantless search is presumed to be unreasonable. The trial judge, however, found no violation of s. 8 and held at para. 73 that "the totality of the circumstances that gave rise to the detention logically justified searching the Lincoln for drugs, especially the trunk, without a warrant or permission". In my opinion, the trial judge erred in so holding.

**77** To justify the search, the Crown must meet the three-pronged test in *R. v. Collins*, [1987] 1 S.C.R. 265. The first prong requires the Crown to show that the search was authorized by law. The police had no statutory authority for the search. It, therefore, had to rely on the common law or on the consent of the appellants. In my view, neither assisted them.

**78** A warrantless search may be justified in the common law in two ways: (1) by characterizing the search as a search incidental to an investigative detention and (2) by characterizing the search as a search incidental to arrest. Mann at para. 40 confirms that the police do not have an unrestricted power to search incidental to an investigative detention. A search incidental to an investigative detention is justified for "protective" purposes: officers must believe, on reasonable and probable grounds, that their safety or the safety of others is at risk. See also *R. v. Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.). Neither Osborne nor Rome claimed that he searched the appellants' car because his safety or the safety of others was at risk.

**79** Even if there is a broader search power incidental to an investigative detention, in my view it does not extend to a search for the purpose of discovering evidence of a crime. A search for that purpose would not be "reasonably necessary". See Mann at para. 36. As Osborne's sole purpose in searching the trunk was to find drugs, his search cannot be justified as a search incidental to an investigative detention.

**80** In response to an argument by appellants' counsel, the trial judge (at para. 86) also held that the officers' search of the trunk could be justified as a search incidental to arrest. Weiler J.A. uses this holding to minimize the seriousness of what she nonetheless acknowledges was an unconstitutional search. Both the trial judge and Weiler J.A. rely on Rosenberg J.A.'s reasons in *R. v. Polashek* (1999), 134 C.C.C. (3d) 187 (Ont. C.A.), in which he observed that a search preceding an arrest may nonetheless be a search incidental to an arrest if at the time of the search the officer had valid grounds for the arrest and the arrest followed quickly after the search.

**81** Although I acknowledge that the appellants were arrested immediately after the search, the record shows that the police did not have reasonable and probable grounds to arrest them before they searched the trunk of their car. Here I rely on my discussion of the police's breach of s. 9. As I concluded that the police did not satisfy the lower standard of "articulable cause" to detain the appellants, I do not consider that they had objective grounds to arrest the appellants before the search.

**82** Moreover, Osborne's own evidence shows that at the time, he did not subjectively believe that he had reasonable and probable grounds to arrest the appellants. The most Osborne could say was that looking back - in other words, in hindsight - he might have had grounds to arrest the appellants. At the time of the search, however, Osborne was unsure whether he had grounds to make an arrest, and indeed wanted to search the car first. He wanted to be "100 per cent sure on my grounds". This is the key portion of his evidence, which came out in cross-examination:

Q. Okay. And at that point you said looking back, I take it in your mind now looking back at the situation, it's your opinion you might have had grounds to arrest him?

A. Yes.

Q. Okay. But, at that time from your recollection you just wanted to persist in the search and didn't think about arresting him at that time?

A. No, I wanted to be 100% sure on my grounds that there was something there before I made an arrest.

**83** Most compelling, neither the Crown at trial nor the Crown on appeal sought to justify the search as one incidental to an arrest. The trial Crown led no evidence either at the preliminary inquiry or on the voir dire, that Osborne had reasonable and probable grounds - objectively or subjectively - to arrest the appellants before searching the trunk. On appeal, in oral argument the Crown fairly conceded the unconstitutionality of the search. I therefore conclude that the search of the appellants' car cannot be justified as a search incidental to an arrest.

**84** Because the search cannot be justified as a search incidental to an arrest or as a search incidental to an investigative detention, the lawfulness of the search depended on the appellants' consent. The police, however, did not have the appellants' consent to search the trunk. Stalas refused his consent, and although Calderon at first gave his, he quickly withdrew it before the police looked in the trunk.

**85** Moreover, another hurdle fatally undermines any attempt by the police to rely on the appellants' consent. The hurdle is this: the police failed give the appellants their s. 10(b) rights before searching the car. Although a breach of s. 10(b) will not always make a subsequent search unreasonable, the law has been clear since at least the Supreme Court of Canada's decision in *Debot* that where accuseds are detained (as the appellants were here), and the search depends on the accuseds' consent (as it did here), a failure to accord the accuseds their s. 10(b) rights renders the

subsequent search unreasonable. Without being advised of their right to retain and instruct counsel, a consent cannot be truly informed.

**86** For all these reasons, the search of the appellants' car violated their s. 8 rights.

F. Should the evidence be excluded under section 24(2) of the Charter?

**87** Section 24(2) of the Charter states:

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

The many considerations that determine whether the admission of evidence would bring the administration of justice into disrepute have been organized under three categories: the effect of admission on the fairness of the trial; the seriousness of the Charter violation; and the effect of excluding the evidence on the administration of justice.

**88** Under the first category (trial fairness), I accept the trial judge's finding that admitting the evidence would not affect the fairness of the trial. The marijuana existed independently of the constitutional violation. It was "non-conscriptive"; the appellants were not compelled to incriminate themselves by giving a statement, by using their bodies, or by producing bodily samples.

**89** Under the third category (the effect of exclusion), the Supreme Court in Mann reiterated that possession of marijuana for the purpose of trafficking is a serious offence, though not as serious as it would be if the drug were cocaine or heroin. Also, excluding the evidence would affect the administration of justice in the sense that the marijuana was essential to the Crown's case against the appellants.

**90** But as Arbour J. cautioned in *R. v. Buhay* (2003), 174 C.C.C. (3d) 97 at 127 (S.C.C.): "Section 24(2) is not an automatic exclusionary rule ... in my view, neither should it become an automatic inclusionary rule where the evidence is non-conscriptive and essential to the Crown's case" [my emphasis]. See also Mann at para. 57. A trial judge's decision to exclude the evidence must be made after balancing the interests of finding the truth with the integrity of the judicial system. An appellate court's role is to determine whether the trial judge's conclusion that excluding the evidence would bring the administration of justice into disrepute was reasonable. In this case I do not think that the trial judge's conclusion was reasonable.

**91** My quarrel with the trial judge's s. 24(2) ruling turns largely on his assessment of the second category, the seriousness of the breach. In saying this, I recognize that his assessment is entitled to "considerable deference" from a reviewing court, even though his ruling was obiter because he

found no constitutional violation: see Buhay at 118. Still, an appellate court is entitled to intervene when a trial judge fails to take account of several considerations bearing on the seriousness of the breach and as a result, arrives at an unreasonable conclusion. That, in my view, is the case here.

**92** In concluding that the evidence of marijuana should not be excluded, the trial judge minimized the seriousness of the breach. He pointed to two considerations that in his view minimized its seriousness. He found that the two officers acted courteously towards the appellants and that Osborne had acted in good faith when he detained the appellants by relying on the drug courier indicators he had been trained to look for. Even accepting these findings, the trial judge failed to take into account a number of considerations that materially increased the seriousness of the breach. These considerations include the following. a.) More than one constitutional right was breached and the breaches had serious consequences for the appellants.

**93** On my analysis, the police committed not one, not two, but three constitutional violations. In *R. v. Mellenthien*, [1992] 3 S.C.R. 615, Cory J. signalled that the fruits of an unreasonable search, even after a lawful stop, should not be admitted. In *Mann*, Iacobucci J. wrote that even though the police had reasonable grounds to detain the accused and conduct a protective search, their unconstitutional search of the accused's pocket (where they found marijuana) was sufficiently serious to call for the exclusion of the evidence. In the appeal before us, the case for exclusion becomes even stronger when the detention itself is unconstitutional. Indeed, but for the unconstitutionality of the investigative detention, the police would not have discovered the marijuana.

**94** However, even without referring to the s. 9 breach and relying on the Crown's concession alone, the violation of the appellants' rights was "double-barrelled" and serious. The breach of the appellants' s. 10(b) rights at a critical stage of their detention facilitated the subsequent breach of their s. 8 rights: see *R. v. Simpson*, supra. The police's courteousness, though commendable, does not excuse these serious violations, which in turn led to serious consequences for the appellants.

b.) No urgency or necessity existed.

**95** Urgency or necessity might diminish the seriousness of the violations. Neither existed here.

c.) The violations cannot be characterized as merely "inadvertent" or "of a technical nature".

**96** Although the trial judge found that the police acted in good faith, this finding related only to their reliance on the so-called drug courier indicators. The trial judge did not consider that after detaining the appellants to investigate for drugs and before searching their car the police ignored the appellants' s. 10(b) rights. They did so in the face of the clear requirements of the Charter and over a decade of consistent law from the Supreme Court of Canada and this court, that these rights must be given: see *R. v. Debot*, supra, *R. v. Borden* (1994), 92 C.C.C. (3d) 404 (S.C.C.) and *R. v. Lewis* (1998), 122 C.C.C. (3d) 481 (Ont. C.A.). Although the police's misconduct may not support a

finding of deliberate or wilful breach, it does suggest an ignorance of the law, which is hardly consistent with good faith. As the Supreme Court again said in Mann at 55, "good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority".

d.) The police searched the trunk without a warrant and without the appellants' consent.

**97** The police did not try to obtain a warrant to search the car. Without a warrant, Osborne recognized that he needed the appellants' consent. Stalas refused his consent. Although Calderon initially gave his, he quickly withdrew it. Thus, despite each appellant's explicit refusal to consent, the police went ahead and searched the trunk anyway. At trial the Crown led no evidence to justify this warrantless search.

e.) The appellants had a reasonably high expectation of privacy in the trunk of the car.

**98** A person's expectation of privacy in a car, though reasonable, is less than in a person's home or office: *R. v. Belnavis* (1997), 118 C.C.C. (3d) 405 at 424 (S.C.C.). Still, unlike in *Belnavis*, the expectation of privacy in a car's trunk, which is under lock and key, is greater than in the interior of a car, where items are ordinarily in plain view or easily accessible. I draw an analogy to the facts in *Buhay*, where the Supreme Court found that the officer's perception that the right to privacy in a bus depot locker was "given up" was not reasonable.

f.) The police did not have reasonable and probable grounds to search the trunk of the car.

**99** As noted in *Buhay*, whether reasonable and probable grounds exist is relevant to an assessment of the seriousness of the breach. Osborne claimed that once he detected the odour of marijuana together with the other "indicators" of drugs, he had reasonable and probable grounds to continue the search. However, in the part of his reasons dealing with s. 8 of the Charter, the trial judge stopped short of finding that the officers had reasonable and probable grounds to search. Instead he found that they had a reasonable suspicion, and, wrongly relied on the Supreme Court decision in *R. v. Jacques*, [1996] 3 S.C.R. 312, to conclude that this reasonable suspicion justified the search, even without the appellants' consent. The trial judge was wrong to rely on *Jacques* because the statute in question in that case - the Customs Act, R.S.C. 1985, c. 1 (2nd Supp.) - authorized a search on reasonable suspicion of smuggling. By contrast, Osborne and Rome had no statutory authority on which they could rely to search the appellants' car.

**100** Moreover, even accepting that Osborne subjectively believed that he had reasonable and probable grounds to search the trunk, objectively I do not think that he did. In my discussion of s. 9, I dealt with the so-called "indicators" of drug couriers. Osborne conceded that they were "neutral", that they might be found in any car. Moreover, in Osborne's and Rome's own experience, these "indicators" had proved utterly unreliable in identifying suspected drug couriers. Viewing the circumstances objectively, these indicators do not establish reasonable and probable grounds.

**101** That leaves Osborne's detection of the odour of marijuana. This, too, I find unreliable. Rome did not detect any smell of marijuana. Osborne had a mere one-hour course in marijuana back in 1994. He had neither expertise nor experience in detecting its odours, much less in distinguishing between a substance recently removed from the car and one still in the car. As Rosenberg J.A. commented in *R. v. Polashek*, supra at 194 (Ont. C.A.):

The sense of smell is highly subjective and to authorize an arrest solely on that basis puts an unreviewable discretion in the hands of the officer. By their nature, smells are transitory and thus largely incapable of objective verification.

He also noted that there may be cases where officers' training or experience "can convince the trial judge that they possess sufficient expertise that their opinion of present possession can be relied upon" (*Polashek* at 195). This is not one of those cases. Neither the "indicators" nor the smell of marijuana Osborne relied on - individually or collectively - afforded reasonable and probable grounds to search the car.

g.) The police had other investigative techniques available that could have avoided a Charter violation.

**102** The availability of other lawful techniques renders the actual violation more serious: see *R. v. Collins*, supra. Here, even accepting the police's contention that they had articulable cause to justify the detention and reasonable and probable grounds to search the car, they could have taken the appellants to the nearby police detachment, obtained a telewarrant and lawfully searched the car. However, they never even considered this alternative.

**103** The trial judge's failure to take into account these numerous considerations bearing on the seriousness of the breach leaves the court with two alternatives: send the case back to the trial court for a fresh s. 24(2) analysis, or do the analysis ourselves. I prefer the latter course: see *R. v. Cox*, supra, where the New Brunswick Court of Appeal opted to do the same.

**104** In my view, the considerations I have outlined make the breach of the appellants' constitutional rights sufficiently serious that the admission of the evidence of marijuana would bring the administration of justice into disrepute. The trial judge's contrary conclusion is unreasonable. Again, see *Cox* where, on similar facts, the New Brunswick Court of Appeal reached the same decision as I have.

**105** I have one concluding comment. Important to the trial judge's decision to admit the evidence was his observation at para. 108 of his reasons: "With very little time for decision he [Osborne] had two choices: pursue his suspicion or issue a speeding ticket and let the defendants drive away with the drugs he suspected might be in the car." In a case like this, however, the end cannot justify the means. A random stop, even for speeding, does not give the police an open invitation to search every car that they pull over: see *R. v. Mellenthin*, supra.

G. Conclusion

**106** Although admitting the evidence of marijuana would not affect the fairness of the trial because the evidence is not conscriptive, the seriousness of the Charter violations calls for its exclusion. Even though the charges against the appellants are serious and excluding the evidence would undermine the Crown's case, admitting the evidence would adversely affect the administration of justice. I would therefore allow the appeal and set aside each appellant's conviction. Because the evidence of marijuana was essential to the Crown's case, I would enter an acquittal for each appellant.

LASKIN J.A.

FELDMAN J.A. -- I agree.

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