PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. L.C.*, 2014 NSPC 11

Date: 2014-03-28
Docket: 2617117 and 2679280
Registry: Halifax

Between:

R.

v.

C.(L.)

Restriction on Publication: section 110 *YCJA*

DECISION ON CHARTER APPLICATION

Judge: The Honourable Judge Anne S. Derrick

Heard: February 26, 2014 in Halifax, Nova Scotia

Decision: March 28, 2014

Charges Sections 4(1) and 5(2), *Controlled Drugs and Substances Act*

Counsel: Jonathan Langlois-Sadubin, for the Crown
Susanne Litke, and Ashley Schuitema, senior law student, for C.(L.)

By the Court:

Introduction

[1] C.(L.) has been charged with simple possession of cannabis marijuana and possession for the purpose of trafficking in cannabis marijuana and TFMPP. Pills subsequently analyzed to be TFMPP, a Schedule I drug, were seized from C.(L.)'s backpack at the scene of his arrest. The cannabis marijuana was seized from C.(L.)'s underwear as a result of a strip search at the police detachment.

[2] C.(L.) was arrested twice in quick succession sometime after 9 p.m. on July 4, 2013. Both arrests occurred on the street. C.(L.) was first arrested for causing a disturbance and, in the course of being taken into police custody, he was arrested for possession for the purpose of trafficking in a controlled substance. Immediately upon being arrested for possession for the purpose, C.(L.) was subject to a pat search and a search of his backpack. The subsequent strip search was conducted to locate marijuana which the arresting officer testified he believed was somewhere on C.(L.)'s person.

[3] During the time C.(L.) was held at the police detachment, he was not provided the opportunity to call either a lawyer or his mother. The police facilitated a call to his mother at 4 a.m.

[4] The Crown asserts that C. (L.) was lawfully arrested first for causing a disturbance and then for possession for the purpose of trafficking. In the Crown's submission both searches, conducted incident to his drug arrest - the search of C.(L.)'s backpack and the search of his underwear – were also lawful.

[5] The Defence argues that C.(L.)'s arrests were unlawful and that therefore the searches were as well, violating C.(L.)'s section 8 *Charter* rights. Furthermore, the Defence submits that C.(L.)'s section 10(b) *Charter* rights were violated when he was not afforded an opportunity at the police detachment to call a lawyer.

[6] The Defence seeks to have the evidence seized from C.(L.) excluded under section 24(2) of the *Charter*. A stay of proceedings is also being sought on the grounds that the police strip searched C.(L.) in violation of his right to call a lawyer and his mother.

[7] The evidence concerning the arrests came from the police officers involved and C.(L.). There is conflict between the arresting officer, Cst. Smith, and C.(L.)

on key elements of the arrests. This requires me to determine the facts of the arrests on a balance of probabilities. I must first review the evidence of the police officers and C.(L.)

The Police Evidence

[8] On July 4, 2013, Cst. Colby Smith, a member of the Street Crime Enforcement Unit for the Halifax Regional Municipality was viewing Facebook using a profile set up for investigative purposes by another police officer. Readily accessible were the accounts of N.M. and C.(L.) Cst. Smith was familiar with N.M.; he knew him quite well and had dealt with him before. He did not know C.(L.)

[9] While looking at the N.M. and C.(L.) Facebook profiles, Cst. Smith formed the opinion, based on his experience as a street crimes officer, that N.M. and C.(L.) were offering drugs for sale. Subsequent screenshots of what he was viewing (*Exhibit 2*) reveal references on C.(L.)'s Facebook profile to "kush" and "purpstars" accompanied by the notation "HMU", which Cst. Smith interpreted to mean "hit me up". Other entries apparently made by C.(L.) contained phrases such as "get at me" and "Russian hydro." Cst. Smith interpreted "Pink *purp*hmu* in box" as an invitation by C.(L.) for a prospective purchaser to contact him via a

private message on his Facebook account. He saw "get at me" as C.(L.) asking to be contacted by someone interested in the drugs he had for sale.

[10] Cst. Smith testified to having significant experience with drug investigations either as a lead or assisting investigator, obtaining and executing search warrants, handling exhibits, and dealing with confidential informants. He had also seen text messages using language common to the drug trade. Cst. Smith's experience led to him becoming familiar with street "lingo" or slang for drugs and the drug trade.

[11] It was Cst. Smith's opinion that C.(L.)'s Facebook entries indicated he was involved in the drug trade and that the references to "kush" and "purpstars" were references to marijuana and ecstasy respectively. Cst. Smith testified that he understood "Russian hydro" to be a particular strain of marijuana.

[12] Cst. Smith contrasted messages such as "Kush*purpstars*deals*HMU inbox" – which he interpreted as advertising drugs for sale - with a message also found on C.(L.)'s Facebook profile which read: Red studio dre beats, hmu cheap "real beats" and concluded that the latter message offered headphones for sale. He noted in his evidence that in contrast to the "Kush purpstar" postings, the headphones message contained no slang, no asterisks, and no request to "get at me" through the in box private messaging.

[13] Cst. Smith informed the members of his team about the N.M. and C.(L.) Facebook entries. A decision was made by the team to set up surveillance of N.M.'s residence in Lower Sackville. This was done by Csts. Smith, Beehan, and Boucher around 5 p.m. on July 4. All the officers were in plainclothes. They were driving nondescript vehicles.

[14] Cst. Smith testified that the aim of the surveillance was to see any drug deals that might happen. Although the team had been informed about C.(L.)'s Facebook postings, the target of the surveillance was N.M. The team's goal was to arrest N.M. if he was seen transacting a drug deal.

[15] While the N.M. residence was under surveillance, a male that looked similar to N.M. was seen leaving the house with a backpack. He was wearing a bright green T-shirt. The plainclothes officers followed him down the street to another residence but it was determined after a bit that he was not N.M.

[16] Cst. Smith and Cst. Boucher resumed their surveillance of the N.M. home. They observed a tall, thin, white male with blond hair punching a heavy bag in the garage next to the house. Cst. Smith thought it might be N.M. but was too far away to be sure. Just as it started to get a little dark, shortly after 9 p.m., the male who had been punching the heavy bag and the male wearing the bright green T-shirt left

the garage together. The tall thin male was riding a bicycle with the other male walking or jogging beside him. The boys were later identified as C.(L.) and L.S. C.(L.) was riding the bicycle.

[17] Cst. Smith wanted to determine if the bicycle rider was N.M. He decided to do this by leaving the SUV from which he and Cst. Boucher had been conducting their surveillance and walking past the boys. Cst. Boucher remained in the car as Cst. Smith got out. It was Cst. Smith's plan to walk past the two boys as they approached so he would be close enough to determine if the boy on the bicycle was N.M.

[18] According to Cst. Smith's evidence, as he was approaching the boys and about 3 – 4 feet away, L.S. pointed at him and said to C.(L.): "Is this him?" Cst. Smith testified he could see that L.S. was pointing at him and that after L.S. spoke, C.(L.) looked him straight in the face and said: "What the fuck are you looking at?" Cst. Smith was taken off guard. The words were spoken aggressively. Cst. Smith acknowledged he had been looking at the boys, but testified that he had planned on drawing no attention to himself. He wanted to see if the bicycle rider was N.M. and if not, to continue the surveillance on N.M. house. He did not want to "burn the surveillance."

[19] Cst. Smith testified that he was able to determine that the bicycle rider was not N.M. but his plan of simply walking by the boys was not unfolding as he had intended. As the boys passed him, he stopped and turned and saw they were looking back at him. There was now 10 – 15 feet between him and the boys. It was Cst. Smith's evidence he could tell "right away that a fight was going to ensue." On cross-examination he said that as he looked over his shoulder at the boys, they were turning around. He acknowledged that they did not charge at him.

[20] On cross-examination, Cst. Smith said it is possible the boys thought he was being aggressive and that he might have said: "What did you say?" when L.S. first spoke to him. Cst. Smith did not start off the exchange as he had not wanted to blow the cover off the police surveillance.

[21] Cst. Smith testified that he watched as C.(L.) threw his bicycle and his backpack to the ground. The boys both approached him. He thought he was about to be assaulted or bear-sprayed. Cst. Smith could not tell if Cst. Boucher, who had remained in the car, could see him or not. He only had a couple of seconds to think of what to do. He pulled his badge out from under his shirt, told the approaching boys he was a police officer and that they were under arrest for causing a

disturbance. He testified he believes that was an appropriate offence to arrest them for.

[22] The boys stopped their approach. As Cst. Smith went to arrest C.(L.), he saw him jam his hand into his right pocket. Cst. Smith testified that he thought C.(L.) was going for a weapon. He says he tripped C.(L.) and brought him to the ground on his stomach. C.(L.) still had his hand in his pocket. Cst. Smith was finally able to get C.(L.) handcuffed behind his back.

[23] In the course of Cst. Smith gaining control over C.(L.), he says he asked C.(L.) his name and C.(L.) identified himself. When Cst. Smith asked where he had come from C.(L.) answered truthfully that he had come from N.M.'s house.

[24] Cst. Smith testified that as he was taking control of C.(L.) he smelled the odour of unburned, that is, fresh marijuana on him. It was his evidence that he had taken training courses where he had been given the opportunity to smell unburned marijuana in open containers. Altogether, in his investigative role, Cst. Smith has smelled fresh marijuana at least 50 times. Most of what he deals with is fresh marijuana in the form of seizures of the drug and those seizures being held, at least temporarily, at the exhibit room in Cst. Smith's detachment. He characterized the smell of fresh marijuana as unlike anything he has smelled before: a very strong

smell even in small amounts, pungent. He testified that "you can almost taste it" and said it is a smell "you'll never forget." He contrasted the smell with that of burned marijuana which has a "stinky, dirty, acidic smell." Cst. Smith has smelled burned marijuana in various investigative settings at least 25 times – traffic stops, on persons who have just smoked some, and at house parties where drugs have been smoked.

[25] Cst. Smith agreed on cross-examination with the suggestion put to him that a small quantity of bagged marijuana would have less smell than a large unbagged amount. He also agreed it was possible that there would be no smell from bagged marijuana.

[26] Cst. Smith testified that having smelled the unburned marijuana on C.(L.) and taking into account the Facebook postings he had seen earlier, he arrested C.(L.) for possession for the purpose of trafficking. He advised C.(L.) of his rights, including his right as a youth to call his mother, and cautioned him. According to Cst. Smith, C.(L.) did not want to speak to a lawyer but wanted to speak to his mother.

[27] Cst. Smith searched C.(L.)'s clothing after he had arrested him. He says that as he did so, C.(L.) told him: "Don't touch my dick." Cst. Smith kept smelling

fresh marijuana and yet found none in his pockets. All Cst. Smith located on C.(L.) was a cell phone. He believed C.(L.) must have the marijuana in his underwear. As they were outside on a public street, Cst. Smith did not want to complete the search of C.(L.) there. He told Cst. Emerson who arrived on the scene that they were not finished the search.

[28] While Cst. Smith still had C.(L.) on the ground, Csts. Beehan and Boucher showed up.

[29] Cst. Boucher had been in the passenger seat of the SUV when Cst. Smith got out for the purpose of identifying whether the boy on the bicycle was N.M. Neither officer could make a positive identification.

[30] The boys and Cst. Smith passed each other quite close to the SUV. Cst. Boucher testified he could see the boys and Cst. Smith talking and then he could hear Cst. Smith talking but he could not hear what was being said. It was Cst. Boucher's evidence that the talking occurred when the boys and Cst. Smith were 10 to 15 feet apart, "a very small distance" in Cst. Boucher's words. At some point, Cst. Boucher lost sight of Cst. Smith: the boys continued past the SUV.

[31] Cst. Boucher observed no yelling. He testified that had there been, he would have got out of the car.

[32] When Cst. Boucher did get out of the SUV, he saw Cst. Smith holding his badge and saying to the boys, “It’s the police and you are both under arrest for causing a disturbance.” Cst. Boucher stepped in to deal with L.S. who was compliant and gave him no trouble.

[34] Cst. Boucher testified that as Cst. Smith was getting control of C.(L.) he was saying, “Get your hands out of your pants. Get your hands out of your pants. Get your hands out of your pants.”

[35] Cst. Beehan did not witness the interaction between Cst. Smith and L.S. and C.(L.) When he came upon them, Cst. Boucher was present with Cst. Smith and C.(L.) was on the ground. Cst. Beehan heard someone say the boys were in custody for trafficking and so he searched C.(L.)’s backpack incident to his arrest. He located a bag of pills, a digital scale, and an ID for C.(L.) Cst. Beehan decided to search C.(L.)’s backpack as he figured C.(L.) was likely carrying drugs.

[36] Cst. Beehan cannot now recall if C.(L.)’s backpack was on him or on the ground near him but it was “with him” and Cst. Beehan believed it was his. On

cross-examination, Cst. Beehan testified that he did not recall any smell of marijuana when he picked up the backpack. I note that no marijuana was found in the backpack. It was Cst. Smith, not Cst. Beehan, who was in the closest proximity to C.(L.)

[37] C.(L.) was transported to the Sackville RCMP detachment where he was strip searched by Cst. Nelson, the supervisor for the Street Crimes Unit team. The search was done in a cell. Cst. Nelson positioned himself in front of the window in the steel cell door. No females were present. As C.(L.) removed his clothing, each article was searched. Nothing was found until C.(L.) removed his underwear. At that point a ziplock bag containing what Cst. Nelson judged to be about a gram of marijuana fell out.

[38] Cst. Nelson did not smell any marijuana on C.(L.)

[39] Cst. Nelson testified that C.(L.) did not make any requests of him but he knew he wanted to speak to a lawyer and his mother. He does not know how many times C.(L.) asked to speak to his mother. A decision had been made to obtain a search warrant for N.M.'s home. It was decided that C.(L.) should not be permitted to speak to his mother until the search warrant had been executed.

[40] Cst. Smith and Cst. Nelson both testified that they did not want C.(L.)'s mother knowing about her son's arrest, which would inevitably happen if C.(L.) was allowed to call her, because they were concerned this would lead to N.M.'s household being alerted with the result that officer safety during the imminent search would be jeopardized or evidence would disappear. It was not suggested that C.(L.)'s mother would intentionally tip off N.M. and his family: the police officers did not want to risk any leak about the pending search.

[41] After C.(L.) was taken into custody, Cst. Smith prepared the Information to Obtain for the search warrant for N.M.'s residence. The search warrant was granted and the search was underway at 1:55 a.m. It was at this point that Cst. Nelson would have been comfortable with C.(L.) making a call to his mother. However the call was not facilitated until 4 a.m. when Cst. Smith saw C.(L.) again and C.(L.) reiterated that he wanted to speak to his mother.

[42] It was Cst. Smith's evidence that even when the search of N.M.'s residence was underway, he would still have had concerns about letting C.(L.) speak to his mother because of the risk that someone could disturb the Facebook messages. He wanted to be sure they were preserved. He testified to having obtained screen shots

of C.(L.)'s Facebook messages after the N.M. residence search was completed and before he facilitated the call with C.(L.)'s mother.

[43] However, it was Cst. Nelson's evidence that he had printed the screen shots for the file sometime between 5 a.m. and 7 a.m. He could not say however whether more than one set of screen shots was made.

[44] In the time that C.(L.) was in police custody no attempt was made to take a statement from him. Cst. Nelson testified that his instructions were that no one was to permit a phone call or attempt to take a statement from C.(L.) He tasked someone to make sure C.(L.) got his calls after the search warrant was executed.

[45] Cst. Nelson did not permit C.(L.) to speak to a lawyer before conducting the strip search. He testified that he has never done so out of a concern that evidence may be destroyed as a result. "Things can go down the toilet" is what he said.

[46] Cst. Nelson testified that C.(L.) was defiant during the strip search. C.(L.) told Cst. Nelson he was not allowed to see his "privates." He does not recall him crying.

The Evidence of C.(L.)

[47] C.(L.) was candid in his testimony about what he had been doing on July 4 before encountering Cst. Smith. He went over to N.M.'s house to get high. From just before lunch to about 4 p.m. he smoked two grams of marijuana with tobacco using a bong-like device. He was not close friends with N.M. and had never visited him at the **** address before. He had previously had some negative experiences with N.M. but was prepared to forgive and forget and give N.M. a second chance. The renewed contact with N.M. came about as a result of peers that C.(L.) knew being friends with N.M. C.(L.) was keen to make new friends and saw this as an opportunity.

[48] L.S. was a friend of C.(L.)'s and not a mere acquaintance like N.M. It was getting dark when C.(L.) left N.M.'s with L.S. They headed up **** Drive off ****. C.(L.) was riding a bicycle N.M. had said he could use and L.S. was jogging alongside. The boys were on their way to meet a friend of C.(L.)'s who was going to pick them up.

[49] It was C.(L.)'s evidence that he saw a man he didn't know but who was in fact Cst. Smith, get out of an SUV. C.(L.) thought he looked somewhat "shady." He was wearing dark glasses. C.(L.) noticed the man was looking at him. C.(L.)

testified that he "felt like something was going to happen by the way he was looking at me."

[50] L.S., also noticing the man, asked C.(L.), "Is that your buddy?" C.(L.) told him no. They passed by the man and C.(L.) looked back. He saw that the man was looking over his shoulder at them.

[51] C.(L.) testified to not being sure if he said anything at all to the man but agreed he could have said: "What the fuck are you looking at?" He described this as something he would say in the circumstances. It was his evidence that this was at most what he would have said. According to C.(L.) it was L.S. who got "offended" at the man and turned back toward him. C.(L.) recalls the man saying: "What did you say?" C.(L.) says he watched the man and L.S. approach each other.

[52] C.(L.) was about 15 to 20 feet away from L.S. and Cst. Smith at this point. He testified that he did not get off his bicycle or throw his backpack down. He made no movement toward L.S. and Cst. Smith. C.(L.) testified that L.S. is " a big enough guy to handle his own problems." In C.(L.)'s view, if L.S. wanted to fight that was L.S.'s issue. C.(L.) doesn't like fighting and had a fight broken out he would have just "biked away."

[53] C.(L.) testified that he was not doing or saying anything when Cst. Smith took out his badge. He saw Cst. Boucher get out of the passenger side of the SUV. Cst. Smith ran at him and told him he was under arrest for causing a disturbance. It was C.(L.)'s evidence that Cst. Smith tried to remove him from the bicycle. C.(L.) admits to reacting by inviting Cst. Smith to "suck my dick."

[54] C.(L.) saw Cst. Beehan pull up in a Nissan, run up and start to go through his backpack. C.(L.) was asking Cst. Smith: "Do you even know who I am?" Cst. Beehan found his ID card in the backpack, a Sackville Sports Stadium ID.

[55] According to C.(L.) when Cst. Smith tried to remove him from the bicycle, the strap of C.(L.)'s backpack slipped so he used his hands to try and stop Cst. Smith from "ripping" the pack off his back.

The Issues

[56] There is a consensus that the first arrest of C.(L.) – the arrest for causing a disturbance – is pivotal to this case. It is conceded by the Crown that if I find the causing a disturbance arrest to have been unlawful, then the possession for the purpose arrest and the searches that were undertaken pursuant to that, were unlawful. I will explain why the lawfulness of the second arrest is dependent on

the lawfulness of the first arrest, although that may be obvious. And then I will examine the key issue: Was the initial arrest of C.(L.) lawful?

Analysis

[57] Cst. Smith's evidence is that, believing he was about to be assaulted, he arrested C.(L.) for causing a disturbance. On Cst. Smith's evidence he was effecting a section 495(1)(b) *Criminal Code* arrest: a warrantless arrest of a person he found committing a criminal offence.

[58] In the course of arresting C.(L.), Cst. Smith gained control over him and brought him to the ground. In such close proximity to C.(L.), Cst. Smith says he smelled unburned marijuana which, along with his awareness of C.(L.)'s Facebook postings, led him to believe that C.(L.) was arrestable for apparently committing the offence of possession for the purpose of trafficking in a controlled substance. I find that the "finds committing" standard under section 495(1)(b) of the *Criminal Code* must be taken to mean "apparently finds committing." (*R. v. P.(S.T.), 2009 NSCA 86; R. v. Janvier, 2007 SKCA 147*)

[59] Cst. Smith only mentions noting the smell of marijuana on C.(L.) when he was in close physical hands-on proximity to him while gaining control of him in

the course of the arrest for causing a disturbance. Therefore, Cst. Smith only gained his grounds for the second arrest once he was effecting the first arrest. If the first arrest was not lawful then Cst. Smith had no right to be in physical contact with C.(L.), physical contact that led to him claiming he could smell fresh marijuana.

[60] While I am on the subject of the second arrest, I am satisfied that an arrest for possession for the purpose of trafficking can be grounded in the arresting officer's evidence that s/he smelled fresh marijuana, I rely on various authorities which have concluded that the smell of fresh marijuana is sufficient without more to justify an arrest: *R. v. Sewell, 2003 SKCA 52, paragraph 36; Janvier, paragraph 44; R. v. Harding, 2010 ABCA 180, paragraph 29; R. v. Polashek, [1999] O.J. No. 968 (C.A.), paragraph 14; and R. v. Huebschwerlen, [1997] Y.J. No. 24 (T.C.), paragraph 11.*

[61] I do wonder about the potency of the smell from a gram of marijuana in a ziplock bag hidden inside C.(L.)'s underwear. I note, as the Defence invited me to, that in two marijuana "smell" cases relied on by the Crown - *R. v. Sewell, [2003] S.J. No. 391 (C.A.)* and *R. v Harding, [2010] A.J. No. 651 (C.A.)*, the marijuana odour was emanating from large amounts of the drugs: three kilograms in a bag in

the back of an SUV in *Sewell* and 56 pounds in two hockey bags in an SUV in *Harding*. I also wonder about the ability of Cst. Smith to have smelled, in an outdoor setting, the marijuana in the ziplock bag in C.(L.)'s underwear when Cst. Nelson, in an enclosed cell, did not. However the marijuana smell issue relates to the second arrest and it is the first arrest I must focus on.

[62] The grounds for arrest must be both subjectively and objectively reasonable. (*R. v. Storrey, [1990] S.C.J. No. 12*) In this case, Cst. Smith has testified that he held a subjective belief that C.(L.) was arrestable for causing a disturbance based on the aggressive "What the fuck are you looking at" comment and the fact that both boys began to approach him. However I am not satisfied on a balance of probabilities that Cst. Smith's recollection of the events is entirely accurate.

[63] I find based on the evidence from both Cst. Smith and C.(L.) that Cst. Smith was looking intently at the boys as he walked past them on the street. Darkness was gathering. I find that C.(L.) spoke sharply to Cst. Smith. I find Cst. Smith said something back, challenging C.(L.) – What did you say? Cst. Smith testified that he may have said those words. I find he did. Cst. Boucher observed the boys and Cst. Smith talking before Cst. Smith pulled out his badge and revealed that he was a police officer.

[64] While it was Cst. Smith's evidence that he had anticipated walking by the boys without having any exchange with them and that he wanted to avoid drawing attention to himself, I find he reacted to C.(L.)'s comment. His reaction to C.(L.)'s comment set into motion what happened next – the arrest of L.S. and C.(L.)

[65] I am not satisfied that C.(L.) did anything after Cst. Smith spoke. Cst. Boucher was watching and saw only talking and no yelling and then enough distance between the boys and Cst. Smith that Cst. Smith was no longer in his line of sight. Cst. Boucher apparently did not see L.S. approach Cst. Smith as C.(L.) described but, as he said, things happened very quickly.

[66] I listened carefully to C.(L.)'s evidence and found no reason to disbelieve him. This was his first arrest and a very traumatic and memorable event. He was not evasive in his evidence and did not try to present himself as more law-abiding or braver than he was – he dedicated much of the day to getting stoned and was quite prepared when assessing the situation with Cst. Smith to abandon L.S. and take off if a fight broke out. Where there is a divergence between his evidence and the evidence of Cst. Smith about what C.(L.) was doing in the seconds before his arrest, I prefer the evidence of C.(L.) I find support for it in the testimony of Cst. Boucher about his observations.

[67] I find that when Cst. Smith decided to arrest C.(L.) there had been no threats, no weapons produced, and no aggression by C.(L.) toward him. I find that while L.S. turned back toward Cst. Smith, C.(L.) remained on his bicycle and did not throw it to the ground, readying himself for a confrontation. At the time when Cst. Smith arrested C.(L.), he was not committing an offence as required by section 495(1)(b) of the *Criminal Code.*

[68] C.(L.) was on his bicycle and had not engaged with Cst. Smith after making his initial “What the fuck are you looking at?” comment. I am satisfied based on C.(L.)’s evidence and the testimony of Cst. Boucher that C.(L.) was not creating “an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use” of the street by the public. (*R. v. Lohnes, [1992] S.C.J. No. 6, paragraph 30*) Cst. Smith testified he noticed that a woman driving by just before he arrested the boys was observing the scene but she did not slow down or pull over. Cst. Smith may have reacted to C.(L.)’s statement but there was no disturbance. A verbal confrontation on the street is not automatically a disturbance attracting criminal liability.

[69] As I previously noted, the grounds for arrest must be both subjectively and objectively reasonable. I have to assess the grounds based on the evidence I accept.

I do not accept there were any subjectively or objectively reasonable grounds for arresting C.(L.) for causing a disturbance. I find that C.(L.)'s arrest for causing a disturbance was not a lawful arrest.

[70] As I indicated earlier, C.(L.)'s arrest for possession for the purpose of trafficking could only be lawful if the first arrest was. The first arrest being unlawful makes the second arrest unlawful. It follows that the searches, conducted incident to that second arrest, were also unlawful.

C.(L.)'s Right to Contact a Lawyer and Call his Mother

[71] Before I turn to the issue of remedy, if any, I must return to the issue of the strip search. I find on the evidence that C.(L.) understood he had the right to call a lawyer and was told that he could call his mother. Cst. Nelson testified that he knew C.(L.) had asked to speak to a lawyer. He did not facilitate this call. It was his evidence that he never allows a suspect to speak to a lawyer before a strip search is done. Cst. Nelson's practice is a consequence of his concerns that evidence could be destroyed. Cst. Nelson testified that C.(L.) did not ask to speak to his mother while with him.

[72] It was C.(L.)'s evidence that he knew his rights and was told he could not speak to his mother or a lawyer as there was an investigation underway. He asked repeatedly to speak to his mother and he also asked to call a lawyer. As I indicated previously, C.(L.) spoke to his mother at 4 a.m. Cst. Smith was present during the call. No call to a lawyer was ever arranged by the police holding C.(L.) in custody.

[73] Even though Cst. Nelson recalls C.(L.) being defiant during the strip search and does not remember he was crying, I find that the strip search was profoundly traumatizing for C.(L.) I accept his evidence that he was "really upset", "pretty scared", and felt "violated" and vulnerable. Once he removed his boxers and the bagged gram of marijuana was retrieved, C.(L.) was completely naked. I find that a call to his mother or a lawyer could have lessened the trauma of the experience and may even have avoided it altogether as parental or legal advice may have resulted in C.(L.) making the choice to produce the small amount of marijuana and avoid a strip search. C.(L.) was never afforded the opportunity to get that advice.

[74] I find that the police could have protected the integrity of their investigation without depriving C.(L.) of his right to legal advice and contact with his mother. There was no valid reason for failing to facilitate a call to a lawyer for C.(L.). The contact with C.(L.)'s mother could have occurred as soon as the search warrant for

N.M.'s residence was executed. I find there was no justifiable reason for conducting a strip search for what at most was going to be a small amount of marijuana - as it was believed to be hidden on C.(L.)'s body, it couldn't have been any significant amount – prior to affording C.(L.) his rights.

[75] The only evidence that was obtained from C.(L.) as a result of the strip search was the one gram of marijuana that led to the section 4(1) *CDSA* charge. I have already found that the strip search was unlawful as it was a search conducted incident to C.(L.)'s unlawful arrest. This takes me to the issue of what remedy, if any, should be ordered. Should the evidence seized - the pills and the marijuana - be excluded under section 24(2) of the *Charter*?

Section 24(2) Analysis

[76] The purpose of section 24(2) is

> **…**not to punish police misconduct or compensate an accused. Its purpose is to maintain the rule of law and the values of the *Charter*. Its focus is long-term, prospective and societal. The concern is more on the impact over time of admitting evidence obtained in violation of protected rights and less with the particular case. That is the approach which must inform the court when *Charter*-protected rights are violated, and it

> considers whether evidence should be excluded because its admission would bring the administration of justice into disrepute. (*R. v. Christie, [2013] N.B.J. 428 (C.A.), paragraph 53*)

[77] In making my determination of whether the drugs in this case should be excluded from evidence, I must assess and balance "the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits." (*R. v. Grant, [2009] S.C.J. No. 32, paragraph 71*) Considering all the circumstances, I must determine whether admitting the evidence will bring the administration of justice into disrepute.

The Seriousness of the Charter-infringing State Conduct

[78] I find that the *Charter* breaches were very serious: C.(L.), a fifteen year old, was subjected to being unlawfully arrested and searched, including a strip search. As noted by the Supreme Court of Canada in *R. v. Golden, [2001] S.C.J. No. 81* strip searches are "…inherently humiliating and degrading for detainees regardless of the manner in which they are carried out…" (*Golden, paragraph 90*)

[79] C.(L.) was never given access to any advice, legal or parental, that may have mitigated the effects of what he experienced in police custody. The police officers did not recognize the special vulnerability of young persons, failing for example to comply with section 26 of the *Youth Criminal Justice Act* that requires the officer in charge to give notice to a parent of the arrest and the reasons for it, as soon as possible. There was no appreciation of the *YCJA*'s Declaration of Principle and its requirement that the criminal justice system for young people must emphasize "…enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected." (*YCJA*, section 3(1)(b)(iii))

[80] The breaches in this case were not minor or technical breaches nor were they the result of an "understandable mistake." (*R. v. Harrison, [2009] S.C.J. No. 34, paragraph 22*) No effort was made to honour C.(L.)'s right to call a lawyer or afford him the opportunity to speak to his mother in circumstances that would have safeguarded the integrity of the ongoing investigation. I find the considerations that prevailed do not attenuate the seriousness of the breaches. (*Grant, paragraph 75*)

The Impact of the Breach on the Charter-protected Interests of the Accused

[81] C.(L.) was subjected to being taken to the ground and pat-searched on a public street and then strip searched at the police detachment. He was traumatized

by the strip search which he found frightening, humiliating and profoundly intrusive. The strip search was an egregious infringement of C.(L.)'s bodily integrity and his dignity even though it was conducted in a reasonable manner. C.(L.) was detained in custody for approximately six hours before he was allowed a phone call he had been told he could make to his mother. He was never given the opportunity to get legal advice about his situation. C.(L.) testified that he has been having nightmares ever since these events occurred.

[82] As the Supreme Court of Canada has held: "The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute." (*Grant, paragraph 76*)

Society's Interest in the Adjudication of the Case on its Merits

[83] There is no question that the possession for the purpose of trafficking charge laid against C.(L.) is serious. The simple possession of marijuana charge is less serious. There is a broad societal interest in a criminal case being adjudicated on its merits. (*Grant, paragraph 79*) I must consider not only the negative impact of the admission of the evidence on the repute of the administration of justice, but also

"the impact of *failing to admit* the evidence." (*Grant, paragraph 79, emphasis in the original*) The evidence seized from C.(L.) is, as the Crown has noted in its brief, highly reliable and critically important to the prosecution. Its exclusion will likely mean the trial against C.(L.) cannot proceed. The Supreme Court of Canada commented on this result in *Grant*: "…the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution." (*Grant, paragraph 83*)

[84] The Defence fairly concedes in its brief that the assessment of society's interest in having C.(L.)'s prosecution proceed favours the admission of the evidence obtained from C.(L.)'s backpack and his underwear.

Balancing the Factors to be Considered in the Section 24(2) Analysis

[85] The fundamental question I must address in the section 24(2) analysis is whether the admission of the evidence seized from C.(L.) - the bag of TFMPP pills and the gram of marijuana – bring the administration of justice into disrepute. (*R. v. Harrison, [2009] S.C.J. No. 34, paragraph 21*) I just reviewed the three strands of inquiry that are relevant to determining this question.

[86] I find that the seriousness of the breaches and their impact on C.(L.)'s *Charter*-protected interests favour exclusion of the evidence whereas the reliability

of the evidence and its significance to the Crown's case favours admission. I must weigh in the balance the evidence on each line of inquiry "to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute." (*Harrison, paragraph 36*) The Supreme Court of Canada held in *Harrison* that, "In all cases, it is the long-term repute of the administration of justice that must be assessed."

[87] I find that the admission of the evidence in this case would amount to a condoning of the unlawful arrest and searches to which C.(L.) was subjected and would undermine the long-term repute of the administration of justice. The choices made by police officers in this case – to arrest C.(L.) in circumstances that did not justify doing so leading to him being detained through the night and strip searched, all without any access being provided to a lawyer or his mother – cannot be tolerated. These choices were made notwithstanding the availability of other options for the investigation and they were made in relation to a fifteen-year old entitled to procedural protection under the *Youth Criminal Justice Act*. The seriousness of the possession for the purpose of trafficking charge and the reliability of the evidence, while important factors, do not, in the circumstances of this case, weight the balance in favour of inclusion.

[88] The evidence seized from C.(L.) is excluded from evidence pursuant to section 24(2) of the *Charter*.

Anne S. Derrick, P.C.J.