IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Lynds, 2007 NSPC 47

Date: 20070628
Registry: Amherst

Between:

Her Majesty the Queen

v.

Christopher James Lynds
and
Curtis Blair Lynds

DECISION ON VOIR DIRE

Judge:	The Honourable Judge Carole A. Beaton
Oral decision:	28 June 2007, in Amherst, Nova Scotia
Written release of oral decision:	03 September 2007
Counsel:	Mr. Douglas Shatford, for the (federal) crown Mr. Bruce Baxter, for the (provincial) crown Mr. Robert Cragg, for the defence (Christopher Lynds) Mr. Warren Zimmer, for the defence (Curtis Lynds)

By the Court (orally):

The Charges

[1] The defendant Christopher James Lynds is charged:

> That on or about the 30th day of June, 2005 at or near Amherst, Nova Scotia, did unlawfully have in his possession a kind of manufactured tobacco or cigars, not put up in packages and stamped with tobacco stamps or cigar stamps in accordance with the provisions of the *Excise Act* 2001 and the Departmental Regulations and did thereby commit an offence, contrary to section 32 of the said *Excise Act* 2001 and the amendments thereto.

That is information number 487639 before the court.
He is also charged:

> That on or about the 30th day of June, 2005 at or near Amherst, Nova Scotia, did unlawfully have in his possession tobacco not bearing the prescribed markings contrary to section 76 of the Regulations made pursuant to section 92 of the *Revenue Act* S.N.S. 1995-96, C. 17, thereby committing an offence contrary to section 39(1)(b) and section 85 of the *Revenue Act* S.N.S. 1995-96, C. 17.

As contained in information number 487640 before the court. That same information contains an allegation:

> And furthermore at the aforesaid time and place did unlawfully have in his possession tobacco on which tax had not been paid, thereby committing an offence contrary to section 39(1)(a) and section 85 of the *Revenue Act* S.N.S. 1995-96, C. 17.

Mr. Lynds is also charged in information number 487642 that:

> On or about the 30th day of June, 2005 at or near Amherst, Nova Scotia did have in his possession a prohibited weapon to wit: brass knuckles, without being the holder of a license under which he may possess it contrary to section 91(2) of the *Criminal Code*.

And finally Christopher Lynds is charged that:

> On or about the 30th day of June, 2005 at or near Amherst, Nova Scotia did have in his possession a prohibited weapon, as described under section 84, part 3 of the *Criminal Code* to wit: brass knuckles, while he was prohibited from doing so by reason of an Order made pursuant to section 109 of the *Criminal Code* at Truro, Nova Scotia by Provincial Judge Robert A. Stroud on the 17th day of October, 2002 contrary to section 117.01(3)(a) of the *Criminal Code.*

That charge is contained on information number 507177.

[2] The defendant Curtis Blair Lynds stands charged that:

> On or about the 30th day of June, 2005 at or near Amherst, Nova Scotia did unlawfully have in his possession a kind of manufactured tobacco or cigars, not put up in packages and stamped with tobacco stamps or cigar stamps in accordance with the provisions of the *Excise Act* 2001 and the Departmental Regulations and did thereby commit an offence, contrary to section 32 of the said *Excise Act* 2001 and the amendments thereto.

That is information number 487630. It's an identical charge to that of his brother, Christopher, but contained on a separate information. Curtis Lynds is also charged:

> That on or about the 30th day of June, 2005 at or near Amherst, Nova Scotia, did unlawfully have in his possession tobacco not bearing the prescribed markings contrary to section 76 of the Regulations made pursuant

> to section 92 of the *Revenue Act* S.N.S. 1995-96, C. 17, thereby committing an offence contrary to section 39(1)(b) and section 85 of the *Revenue Act* S.N.S. 1995-96, C. 17.

As contained on information number 487632. On the same information he is charged with:

> And furthermore at the aforesaid time and place did unlawfully have in his possession tobacco on which tax had not been paid, thereby committing an offence contrary to section 39(1)(a) and section 85 of the *Revenue Act* S.N.S. 1995-96, C. 17.

He is also charged in information number 487636:

> That on or about the 30th day of June, 2005 at or near Amherst, Nova Scotia, did have in his possession a prohibited weapon to wit: brass knuckles, without being the holder of a license under which he may possess it contrary to section 91(2) of the *Criminal Code*.

As is his co-defendant, Curtis Lynds is also charged:

> That on or about the 30th day of June, 2005 at or near Amherst, Nova Scotia did have in his possession a prohibited weapon, as described under section 84 Part 3 of the *Criminal Code*, to wit: brass knuckles, while he was prohibited from doing so by reason of an Order pursuant to section 109 of the *Criminal Code* at Truro, Nova Scotia by Provincial Judge Ross B. Archibald on the 19th day of September, 2000, contrary to section 117.01(3)(a) of the *Criminal Code*.

That charge is contained on information number 507184. And finally, Curtis Lynds is charged:

> That on or about the 17th day of October, 2005 at or near Amherst, Nova Scotia did having appeared before a

> judge to wit: Provincial Court Judge C.A. Beaton on the 26th day of September, 2005, did unlawfully fail to attend court on the 17th day of October, 2005 at Amherst Provincial Court as required by the said judge, contrary to section 145(2) of the *Criminal Code*.

As contained on information number 503635.

The History of Proceedings

[3] Following upon the consent of both defendants to have all charges tried together and tried jointly, trial began on June 27, 2006. On June 12, 2006, via fax correspondence to the court, Mr. Cragg, counsel for the defendant Christopher Lynds, advised that his client would raise a *Charter* argument on the basis of allegation of breach of sections 8, 9, 10(a) and (b) of the *Charter*. Accordingly, there was an agreement by counsel on the date of commencement of trial that the proceedings would begin with a *voir dire* on the *Charter* motions raised, and that any evidence provided in the *voir dire* could be adopted as evidence in the trial proper. Following the calling of some evidence on the part of the crown, continuation of the *voir dire* was adjourned to February 28th and March 1st, 2007. For reasons not related to this decision, the trial continued on March 1st. The crown completed its evidence on the *voir dire* on that date. On May 9th the defendants elected not to call evidence on the *voir dire* and submissions were made on the *Charter* motions. In anticipation of May 9th, the defendant Curtis Lynds also filed materials through his counsel, Mr. Zimmer, alleging a breach of his *Charter* rights pursuant to sections 8, 9 and 10(a) and (b). The matter is before the court today for a decision on the *Charter* applications of both defendants.

The Facts

[4] On June 30th, 2005 Constable Stefan Raymond and Constable Brentley Steeves, members of the Royal Canadian Mounted Police stationed in Moncton, New Brunswick, were conducting a joint operation with the Nova Scotia R.C.M.P., in their capacity as members of the Roving Traffic Unit. Constable Steeves was a passenger in the police vehicle operated by Constable Raymond. A short distance inside the Nova Scotia border the officers observed eastbound traffic, and specifically a white SUV vehicle traveling in the outside lane which passed other vehicles and came into the police vehicle radar beam at 115 kilometres per hour in a 100 kilometre per hour zone. The officers pursued the vehicle and proceeded to check the occupants. Constable Raymond spoke with the driver, the defendant Christopher Lynds and Constable Steeves spoke with the front passenger, the defendant Curtis Lynds. Two young children occupied the rear of the vehicle.

[5] Constable Raymond engaged in conversation with the driver, Chris Lynds, and made observations of the visible contents of the vehicle and the front seat passenger. Constable Steeves engaged in conversation with the adult passenger, Curtis Lynds, and made observations of the driver and the visible contents of the vehicle. Both officers received information, apparently conflicting at times, about where the parties had been and the length and purpose of their journey.

[6] Back at the police vehicle Constable Steeves provided the identification to Constable Raymond, and Constable Raymond proceeded to conduct computer checks on the defendants. As a result of those checks, the officers learned both parties had records for offences of violence and property matters, and Curtis Lynds had convictions for drug offences. Both parties had firearms prohibitions. The officers discussed the conversations they had with each defendant and the observations they had each made, following which the officers decided to detain the individuals on suspicion of possession of contraband. They returned to the vehicle to advise of the detention and the defendant Curtis Lynds immediately contacted legal counsel by commencing a phone conversation via cell phone while inside the vehicle, and then exited the vehicle and continued that conversation.

[7] Because the officers made the decision to detain both accused, they also contacted Constable Gossse, a member of their team, who was in the area with a police dog. Within minutes Constable Gosse arrived and proceeded to walk the police dog, trained in the detection of narcotics, around the outside of the vehicle. Constable Gosse reported to the other two officers that the dog had indicated the

presence of drugs in the vehicle and Constable Steeves observed the dog as he "sat" in front of the defendant Curtis Lynds.

[8] Both defendants were placed under arrest for possession of narcotics and a search of their vehicle was conducted incident to arrest. Constable Steeves and Constable Gosse conducted the search, which revealed trace amounts of marihuana in the front centre console area of the vehicle. A zip-lock bag containing approximately $2900 in cash and a quantity of brass knuckles was also located. A quantity of cartons and loose bags of unmarked tobacco equivalent to five cartons or 48,200 cigarettes was retrieved from under the luggage in the back of the vehicle. When the defendant Curtis Lynds was searched a marihuana joint was recovered from his jacket.

[9] The defendant Curtis Lynds then drove the subject vehicle to the Amherst detachment of the R.C.M.P. with the children, while the defendant Christopher Lynds was accompanied by the officers to that same location. Once there, the parties and the exhibits were processed and each defendant was released on a promise to appear. No drug charges were laid, nor summary offence ticket issued pursuant to the *Motor Vehicle Act*.

The Charter Breaches Asserted by each Defendant

[10] Both defendants assert that their rights pursuant to section 8, 9 and 10(a) and (b) of the *Charter* were violated during the stop and their subsequent arrest by the officers on June 29, 2005. Specifically, the defendants allege they were unlawfully detained at that moment when the motor vehicle stop, which they concede was lawful, evolved into a criminal investigation. Further, they allege that the conduct of the officers in permitting a police dog to sniff outside of the vehicle constituted an unlawful search of the vehicle and that the evidence obtained as a result of the search of the vehicle was not obtained pursuant to a lawful search incidental to arrest because there were no reasonable and probable grounds upon which to arrest the defendants. Finally, the defendants assert they were not provided with the reasons for their arrest or detention contrary to section 10(a) and they were not provided with the proper informational component concerning their right to counsel, contrary to section 10(b).

[11] Both defendants assert that in light of a breach of any one or a combination of breaches of any of the section 8, 9 and 10 rights, the effect of those breaches is such that the appropriate remedy must be for the court to exclude the evidence, acquired as a result of or consequent upon the breach, pursuant to section 24 of the *Charter*.

[12] The burden in this matter rests with each applicant to establish on a balance of probabilities, based upon the evidence provided to the court in the *voir dire*, that their rights or any one of them were violated. The court must ask: is it more probable than not, based upon the evidence before me, that such a violation or violations occurred? As stated by Lamer, J. in *R. v. Collins* [1987] 1 S.C.R. 265:

> The appellant, in my view, bears the burden of persuading the court that her *Charter* Rights or freedoms have been infringed or denied. That appears from the wording of section 24(1) and (2), and most courts which have considered the issue have come to that conclusion: see *R. v. Lundrigan* [1985] C.C.C. (3d) 499...and the cases cited therein, and *Gibson, The Law of the Charter*: *General Principles* (1986) p. 278. The appellant also bears the initial burden of presenting evidence. The standard of persuasion required is only the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not. (From paragraph 277)

Evidence of the Witnesses on the *Voir Dire*

(i) Constable Steeves

[13] Constable Steeves testified that as he approached the vehicle he noted luggage in the back compartment area, and on top of the luggage an oversized beer can or bottle of a size he believed to be unavailable in Atlantic Canada. Curtis

Lynds told him the defendants were coming from Northern New Brunswick and the officer had a difficult time keeping Curtis Lynds' attention because Curtis Lynds was listening to and trying to intervene in the conversation between Constable Raymond and Chris Lynds. Constable Steeves then overheard Chris Lynds tell Constable Raymond that the parties were coming "from the water park". At that point, Curtis Lynds agreed that they were indeed coming from the water park and when Constable Steeves asked which one, Curtis Lynds said the one in Moncton. Constable Steeves asked Curtis Lynds why he changed his earlier answer from Northern New Brunswick to the Moncton water park and Curtis Lynds could not answer. Constable Steeves asked for identification and Curtis Lynds reached down to retrieve it while the officer observed the children. "Right out of the blue" as Constable Steeves put it, when he asked the kids how they enjoyed the day at the park Curtis Lynds got agitated and instructed the officer not to speak to the children. As Constable Steeves received the defendant's comment concerning the children, he noted the carotid artery on the side of Curtis Lynds' neck was pulsating. The officer then asked if they had traveled to the water park that day and Curtis Lynds said they had, coming from Truro. It struck the officer as unusual that one would travel from Truro to Moncton for the day and yet go home at 2:00 in the afternoon. It also struck the officer as unusual that there was within the vehicle numerous fast food wrappers and bottles and a lot of luggage, all contrary to the suggestion of a mere day trip.

[14] Constable Steeves asked Curtis Lynds if he had been in Quebec and the defendant replied he had not.

[15] At the police car Constable Raymond conducted various computer checks which revealed Curtis Lynds had a record, including convictions for offences contrary to sections 5(1) and (2) of the *CDSA*, break and enter, offences of violence, and a firearms prohibition. Chris Lynds had a record for section 5(2) *CDSA* offence and a firearms prohibition. The constables exchanged information about their respective discussions with each party and their observations of the vehicle and its occupants, and as Constable Steeves felt these factors were indicators of someone possibly traveling with contraband, and a decision was made to detain the individuals. The officers returned to the vehicle and Constable Steeves advised Curtis Lynds that he had a reasonable suspicion that Curtis was "possibly transporting contraband" and would be detained. Constable Steeves advised Curtis Lynds that he had a right to contact a lawyer and asked Curtis Lynds to step from the vehicle. Curtis Lynds was agitated and wanted to call a

lawyer and made a call immediately as he sat in his vehicle. Constable Steeves asked Curtis Lynds to step from the vehicle for officer safety and as Curtis Lynds exited the vehicle he continued the call. The officers could hear Curtis Lynds as he spoke with someone they assumed was a lawyer as to how Curtis Lynds and Chris Lynds had been stopped, and that the officers were taking them out of the vehicle and wanted to search it. Curtis Lynds was still on the phone when Constable Gosse arrived. When Constable Gosse brought the dog, Constable Raymond was near his police vehicle with Chris Lynds and Constable Steeves was with Curtis Lynds on the side of the road near the Lynds vehicle. Curtis Lynds was still on the phone informing someone there was now a dog present on scene. The dog went around the Lynds vehicle, beginning at the passenger side. It showed an interest in the area of the front passenger's door and continued down the passenger's side and walked toward Curtis Lynds, who began to back up as the dog sat in front of him and Curtis Lynds reported that to his lawyer. In Constable Steeves' experience, the dog was indicating for the presence of narcotics. Then Constable Gosse took the dog around the back of the vehicle and down the driver's side and came back to the area where Constable Steeves and Curtis Lynds were on the shoulder of the road and indicated there was a presence of narcotics within the vehicle. Constable Raymond then advised both parties they were under arrest for possession of narcotics and asked them to return to the police vehicle. Constable Steeves returned Curtis Lynds to the police vehicle, searched Curtis Lynds, located a marihuana joint in his pocket, and then placed Curtis Lynds in the rear of the police vehicle. Constable Raymond did the same with Chris Lynds and then got into the vehicle. The defendant's vehicle was then searched incident to the arrest by Constables Gosse and Steeves.

[16] On cross examination, Constable Steeves testified that in his experience people who are initially nervous during a stop have that nervousness subside after general conversation. In this case, the officer could see things escalating because Curtis Lynds didn't want to pay attention to him but wanted to listen to what was being said between Constable Raymond and Chris Lynds. Curtis Lynds became very agitated when the children were spoken to, which made Constable Steeves "very, very concerned".

(ii) <u>Constable Raymond</u>

[17] At 14:10 Constable Raymond spoke to the driver, identified as Chris Lynds, and told him he was pulled over due to having exceeded the speed limit. The

officer asked for a license and registration and explained the limit was 100 kilometres per hour and then pointed out the speed zone sign located nearby. Chris Lynds reported he hadn't noticed it and apologized. Chris Lynds' hands were shaking and it took him one minute to get his license out. Chris Lynds told Constable Raymond he was coming from Nova Scotia and going to New Brunswick. Then he said he was coming from a park in Moncton. Constable Raymond asked if it was Magic Mountain and Chris Lynds said yes. Chris Lynds gave the officer the vehicle rental agreement and was rubbing his legs with his hands and seemed nervous. The front seat passenger was moving around, talking loud and agitated. The officer returned to his vehicle and did checks which revealed that both adults had criminal records, one of them for drugs. He discussed with Constable Steeves what each of them had seen. The officers decided to detain the defendants because of the nervousness of both, the fact that they were in a rental vehicle and such vehicles are often used by the criminal element, the fact that the vehicle looked lived in with food wrappers and beverage containers consistent with traveling criminals, and the fact that the passenger didn't want Constable Steeves to address the children, which the officers considered to be a potential safety issue because of those cases when divorced parents abduct children. Constable Raymond felt the observations of the officers were consistent with people traveling with drugs.

[18] Constable Raymond returned to the vehicle and told Chris Lynds he was being detained and had a right to call a lawyer which Chris Lynds did right away, as did his passenger, Curtis Lynds. Both parties were told the dog would do a search and Constable Gosse was called. Constable Gosse advised of the dog's indication of narcotics in the vehicle. The parties were arrested for possession of narcotics at 14:30. At 14:30 Chris Lynds was given his right to counsel and *Charter* caution which was understood and at 14:33 Curtis Lynds was given his right to counsel and *Charter* caution and he had already spoken to a lawyer. A search of the parties ensued.

[19] On cross examination, Constable Raymond testified he had no prior knowledge about the vehicle or the people in it. In his work Constable Raymond sees a lot of nervous drivers but had only ever seen three nervous passengers and in each of those cases the situation related to seized contraband. Chris Lynds was told that they were being detained for "investigation purposes", although Constable Raymond did not say what was being investigated because the officers did not know at that time exactly what they were investigating and because there was no

time to tell the defendants, because Chris Lynds wanted to talk to a lawyer right away.

[20] Constable Raymond also testified that Constable Gosse was called because investigative detention has to be brief, and the dog was available to the team that day and it was decided to use it. The officers thought there was contraband in the car and investigative detention required eliminating all possibilities as quickly as possible. Both defendants were arrested prior to their vehicle being searched, and were read their *Charter* rights and right to counsel and caution.

[21] The officer testified it would be his practice to "re-*Charter*" someone if he moved from a *Motor Vehicle Act* arrest to a *Criminal Code* arrest. Here the defendants were arrested for drugs, but as in a search of a house, because something else was found in the course of the search he wouldn't re-*Charter* or re-arrest the parties again.

[22] When the suggestion was put to Constable Raymond that the easiest, briefest detention would have been to ask permission to search the truck, Constable Raymond did not disagree, but maintained that having a dog available that day was less intrusive, and was the quickest way to investigate. He did not think the defendants would have consented to a search but he never asked; rather, he used the dog.

[23] Constable Raymond testified his normal routine in a traffic stop is to have an eye out for the possibility of contraband because he is trained to look beyond the ticket: "The purpose is to engage people in conversation and to observe and if we have the opportunity to discuss we do."

[24] Both officers were trained in "pipeline", to ask questions of persons during vehicle stops and compare the answers with a partner if one was present. It was suggested to Constable Raymond by defence counsel that there is "a lot more going on" when officers walk up to a vehicle and ask for a license and registration and his reply was "a lot more if we find it, but the main purpose is a traffic stop".

(iii) <u>Constable Gosse</u>

[25] Constable Gosse went past the passenger door of the defendants' vehicle with the drug detection dog, conducting the free air scent sniff. The dog placed

both feet on the running board of the vehicle and became different in his demeanour, as if detecting a scent. Constable Gosse took the dog to the rear tire well and back hatch area of the vehicle, and then down toward the left rear driver's side. As they got close to the driver side door the dog's demeanour changed and he was much more attentive, and then, when his nose was on the driver's side door plastic handle, he gave the immediate indication of the presence of drugs inside the vehicle. Constable Gosse went back to Constable Steeves, who was speaking with Curtis Lynds, to tell Constable Steeves what had happened and as the dog came toward Curtis Lynds its body changed and the dog then came closer to Curtis Lynds and he "sat" next to Curtis Lynds.

[26] Constable Gosse could visually see the arrest process but not hear it. He saw Constable Steeves reading through the silent patrol with a card in his hand and Constable Gosse assumed that Constable Steeves was reading one of the parties their rights.

[27] Earlier that same day Constable Gosse had used the dog in a walk around both a commercial vehicle and a half ton truck during vehicle stops that he made. The dog is another piece of equipment used by the officers, and not all equipment used relates to highway safety.

ISSUES

(A) Was there a violation of the applicants' section 9 rights?

[28] Counsel for both applicants agree that the officers were justified in stopping the vehicle pursuant to the powers and duties contained in the *Motor Vehicle Act* R.S.N.S. 1989 c. 293. Christopher Lynds agrees that the police were entitled to question him as to where he was traveling from pursuant to both common law and the *Act*. Curtis Lynds argues that the initial detention under the *Act* became in essence merely an excuse to stop the vehicle because the pretext was quickly abandoned when the police embarked upon a series of questions to the driver, his passenger and the children in the back of the vehicle. Similarly, Christopher Lynds

argues that very early in the transaction, after the officers had advised of the reason for the stop, but failing any evidence that the officers intended to act on the reason for the stop, the subsequent detention was unlawful because the police were no longer acting within their statutory duties under the *Act* such that the detention went beyond what was initially justifiable. Both applicants also assert that the detention which occurred after the officers conducted a records check was also in violation of section 9 because there was never any intention or effort by the officers to pursue the initial reason for the detention and no traffic ticket was issued to either defendant.

[29] Clearly, as both applicants have conceded, the initial detention of both parties at the moment when the police conducted a motor vehicle stop under the *Motor Vehicle Act*, as a result of their observations about the speed of the vehicle, was lawful. The police were acting under statutory authority pursuant to section 83(1) of the *Motor Vehicle Act*, R.S.N.S. 1989 which provides:

> It shall be an offence for any person to refuse or fail to comply with any order, signal or direction of any peace officer.

[30] Both defendants assert that the detention which was statutorily authorized lost its validity at that point when the police transformed the traffic stop into a fishing expedition about what might be contained in the vehicle. It is plain law, as Fichaud, J. reminded us in *R. v. Cooper* [2005] N.S.J. 107, paragraph 36 that:

> A detention loses its justification if the police conduct surpasses these “traffic stop” objectives to become a pretext for criminal investigation.

[31] The Supreme Court of Canada considered the section 9 principles in *R. v. Mann* [2004] 3 S.C.R. 59. At paragraph 24 of that decision Iaccobucci, J. identified the relevant test to be applied on the facts of each case. Beginning at paragraph 23 of the decision he stated:

> A number of cases occurring over the years have culminated in the recognition of a limited power of officers to detain for investigative purposes.

> The test for whether a police officer has acted within his or her common law powers was first expressed by the English Court of Criminal Appeal in *Waterfield*, supra, at pp. 660-61. From the decision emerged a two-pronged analysis where the officer's conduct is *prima facie* an unlawful interference with an individual's liberty or property. In those situations, courts must first consider whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or at common-law. If this threshold is met, the analysis continues to consider secondly whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

And at paragraphs 26 to 28:

> At the first stage of the *Waterfield* test, police powers are recognized as deriving from the nature and scope of police duties, including, at common-law, "the preservation of the peace, the prevention of crime, and the protection of life and property". (*Deaman*, supra at p. 32). The second stage of the test requires a balance between the competing interests of the police duty and of the liberty interests at stake...
>
> The Court of Appeal for Ontario helpfully added a further gloss to this second stage of the *Waterfield* test in *R. v. Simpson* (1993), 12 O.R. (3d) 182, at p. 200, by holding that investigative detentions are only justified at common-law "if the detaining officer has some articulable cause for the detention", a concept borrowed from U.S. jurisprudence. Articulable cause was defined by Doherty, J.A. at p. 202 as:
>
> > "...a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee

> is criminally implicated in the activity under investigation".
>
> Articulable cause, while clearly a threshold somewhat lower than the reasonable and probable grounds required for lawful arrest (*Simpson*, supra, at p. 302) is likewise both an objective and subjective standard *R. v. Storrey* [1990] 1 S.C.R. 241, at p. 250; *R. v. Feency* [1997] 2 S.C.R. 13, at para. 29.
>
> Doherty, J.A. limited the scope of common-law investigative detention by explaining that the articulable cause requirement was only an initial step in the ultimate determination of "whether the detention was justified in the totality of the circumstances" and was thus a lawful exercise of the officer's common-law powers under *Waterfield* (*Simpson*, supra, at p. 203). The court did not, however, set concrete guidelines concerning investigative detentions, leaving the matter to be resolved on a case by case approach to the power.

[32] At the time the officers stopped the vehicle pursuant to their authority under the *Motor Vehicle Act* they each asked a series of questions, one to the defendant driver and one to the defendant front seat passenger; they each made observations about the physical state of the driver and the passenger; Constable Raymond made observations about the apparent inconsistencies between the answers provided by the driver as compared to those provided by the passenger; and each officer made observations about the clearly visible contents of the vehicle. All of this information was shared by the officers when they returned to their vehicle to conduct a records check.

[33] As the provincial crown properly argued, I accept that any detention at that moment was very brief and no more or less than what would have been involved in the preparation of a summary offence ticket pursuant to the original purpose for which the vehicle was stopped under the *Act*. The detention continued when, based upon all the information available to the officers at that moment, they decided to further detain the vehicle and ask for the assistance of Constable Gosse and the drug detection dog. The issue is whether that second portion of the

detention, where the focus was shifted, became unlawful. As stated by Fichaud, J. In *Cooper*, supra at paragraph 42:

> Whether there are reasonable grounds for the detention is a "front-end" assessment, as stated in *Mann*. The determination is made based on the information available to the police officer at the moment of detention. This is analogous to the principle that, whether there are reasonable grounds for an arrest is determined from the information available to the police officer at the time of the arrest, regardless of the later verdict on the charge for which the arrest was made: *R. v. Biron*, [1976] 2 S.C.R. 56 at pp. 72-77: *R. v. Anderson* (1996) 111 C.C.C. (3d) 540 (B.C.C.A.) at paragraph 43, leave to appeal denied, [1997] S.C.C.A. No. 10, 114 C.C.C. (3d)(b)(i) (S.C.C.). The detention occurs when the police officer stops the individual in a manner that involves significant physical or psychological restraint (*Mann*, paragraph 19)...

[34] In *Mann*, supra, Justice Iacobucci provided a note of caution when assessing the actions of the police in the context of the *Waterfield*, supra, test and the *Simpson* requirement of articulable cause. At paragraph 35 of the *Mann* decision, Iacobucci, J. stated:

> Police powers and police duties are not necessarily correlative. While the police have a common-law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *defacto* arrest.

[35] The applicants assert that the police were merely acting upon a hunch, that they used their statutory powers under the *Motor Vehicle Act* as a pretext to conduct a fishing expedition, and that once the officers considered the state of the vehicle, the condition of the passengers and the records of the accused, they

pursued a hunch that there might be contraband in the vehicle, contraband of a nature that they could not specifically articulate or identify.

[36] It is clear and I accept that the officers' statutory authority to stop the vehicle permitted them to engage in conversation and ask questions of the defendants as to where they were coming from and going to. I accept that an extension of those statutory powers continued as the officers departed from the vehicle and returned to their police car to conduct a records check, which was entirely consistent with their powers both under the *Motor Vehicle Act* and at common-law. Further, I am satisfied on the evidence of Constable Steeves and Constable Raymond that once they shared information in the police vehicle, there then existed a constellation of objectively discernable facts which gave the officers reasonable cause to suspect that the defendants were implicated in the activity of possession and/or transportation of contraband. The officers did not have to be correct in that assessment, but only reasonable in coming to it. I reject the suggestion that the officers were acting on the basis of a hunch or that there was no particular crime contemplated such as could meet the definition of articulable cause. Surely it is not incumbent upon the police, in possessing the clear nexus between the individual and a recent or ongoing crime, as discussed in *Mann*, to be able to cite with undue specificity the recent or ongoing offence to the extent that it would require the officers to identify a possible offence with greater detail than "transportation of contraband". To require for example that the officer be able to, at that moment, identify contraband as something more specific, such as, for example, "drugs" as opposed to "cigarettes", would be akin to requiring the officer to engage in a mere guessing game with little better odds at accuracy than a lottery might hold. The officers indicated in their evidence that they did not know whether the contraband would be drugs, tobacco, weapons or whatever the case might be. The various factors present as the officers heard and observed them did not propel the officers to wonder if there was <u>any</u> offence underway; rather, the things the officers saw and heard propelled them to suspect that the detainees were transporting contraband, as opposed to possibly committing any other type of offence. To consider any one of the indicia observed by the officers in isolation, and to accept the explanations offered by the defendants' counsel in support of the argument of the logical presence of any one of those features, would be to ignore the requirement that the features be assessed on the basis of whether there existed "a constellation of objectively discernable factors". The ongoing detention, as brief as it was, to first conduct the records check and then await the arrival of the police dog, was, I am satisfied, necessary to pursue further investigation by the

police of the observations that led them to develop suspicion of the transportation of contraband. I am satisfied that at that point in time the officers had a constellation of indicia available to them, as they enumerated each of them in their respective evidence, which permitted them reasonable cause to suspect criminal activity.

[37] Once the police observed what they observed and heard what they heard, the fact that they had initially conducted a stop under the *Motor Vehicle Act* did not mean that the defendants were entitled to expect that the officers should only deal with that traffic matter, if the constellation of reasonably discernable facts was then leading the officers in a direction away from the initial purpose of the stop. Just as the officers were not entitled to proceed on a mere hunch, so the defendants could not be immune during the traffic stop from the observations the officers made. There is no evidence before the court that the defendants were specifically targeted for a vehicle stop, or that the defendants were intentionally stopped under the mere pretext of the statutory powers of the police pursuant to the *Motor Vehicle Act*.

[38] Accordingly, the defendants' assertion of a violation of their section 9 rights is dismissed.

(B) Was the deployment of the drug dog in violation of the applicants' section 8 rights?

[39] While the defendants waited on the side of the road Constable Gosse, accompanied by a trained drug detection dog, walked around the outside of the defendants' vehicle to permit the dog to conduct a "free air scent sniff". As a result of that exercise, the dog placed his paws up on the running board of the driver side of the defendants' vehicle and on the passenger door handle of the vehicle.

[40] Constable Gosse then reported to Constable Raymond that the dog "sat" on the vehicle, which terminology both Constable Raymond and Constable Steeves interpreted as meaning that the dog indicated to Constable Gosse the presence of drugs inside the vehicle. All three officers saw the dog sit by the defendant Curtis Lynds, which all three understood to mean the dog was indicating the presence of drugs on the person of Curtis Lynds. The applicants maintain that the conduct of

the dog was tantamount to a warrantless search which violated their rights pursuant to section 8 of the Charter.

[41] In order to assess whether there was a breach of section 8, the questions to be answered are whether the defendant Christopher Lynds had a reasonable expectation of privacy pertaining to the vehicle and whether the defendant Curtis Lynds had a reasonable expectation of privacy pertaining to the vehicle and his person? The crown maintains that the section 8 right belongs to the individual and does not protect the privacy of places such as a vehicle, nor the odors emanating therefrom. Is there a connection to be made between those cases in which a dog sniffs a "public" place (e.g. train station, bus depot) and the sniffing of the air outside a vehicle, being a place for which a person has in law a reduced expectation of privacy, in the sense that a vehicle is not their bodily person but is properly owned or controlled by them?

[42] The defendant Curtis Lynds asserts that the defendants and the two children were required to exit the vehicle to facilitate the unlawful search of the vehicle, and not for any issue of police safety or the safety of any other party.

[43] Further, both defendants assert that the distinction in this case, as opposed to those cases where police dogs have been employed to sniff the air around a public location where the individual has no reasonable expectation of privacy, or a situation as in *R. v. Tessling* where emanations from the home do not violate section 8, is that the search in this case was not of the air in general but the air specifically around the suspect vehicle, in furtherance of gathering information that would assist the officers in formulating the requisite reasonable and probable grounds needed to effect an arrest. Much has been written in this area of the law of late: *R. v. Brown*, 2006 A.B.C.A. 199; *R. v. Taylor*, 2006 N.L.C.A. 41; *R. v. Gallant*, 2006 N.B.Q.B. 114; *R. v. Kang-Brown* [2005] A.J. No. 1110; *R. v. A.M.* [2006] O.J. No. 1663. I note that *R. v. Kang-Brown* and *R. v. A.M.*, are both at this date on appeal to the Supreme Court of Canada.

[44] In *Tessling*, Binnie, J. noted as follows at paragraph 25:

> Privacy is a protean concept, and the difficult issue is where the "reasonableness" line should be drawn. Sopinka, J. offered a response to this question in the

context of informational privacy in *Plant*, supra, at p. 293 as follows:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that section 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the indivual. (emphasis added)

[45] At paragraph 27 of *Tessling*, Binnie characterized FLIR imaging as "...an external search for information about the home which may or may not be capable of giving rise to an inference about what was actually going on inside, depending upon what other information is available". In the same way, I take the view that the sniff of the air around the vehicle by the dog, being a vehicle to which the defendant Christopher Lynds had some reduced expectation of privacy and a vehicle to which the defendant Curtis Lynds as a passenger had, if any, an even further reduced expectation of privacy, was not an expectation extending to the air around the vehicle. The state of the air around the vehicle was information which might be capable of giving rise to an inference about what was inside the vehicle. In the same way that the police detained the defendants while the records check was conducted, which they deemed necessary as a result of their observations and conversations with the defendants pursuant to the motor vehicle stop, so too the brief detention while the investigation employed the police tool of a dog was in the nature of an external search for information about what might be going on inside the vehicle. What was going on inside the vehicle was a question which arose as a result of the constellation of objectively discernable factors which led the police to suspect the presence of contraband. In the same way as the question was put in *Tessling*, it must be asked here: what does the sniffing by the dog tell the police about the existence of drugs inside the vehicle? The evidence of Constable Gosse was that the dog could not tell the quantity or type of material inside the vehicle, nor could it tell the police how long the odor of drugs might have been present or

have lasted on a vehicle. Constable Gosse described that the odor could remain on an item such as the door handle for days, weeks or months after making contact with the door handle. Clearly the indications by the dog were consistent with any one of a number of possibilities about the existence of drugs inside the vehicle at that time or at an earlier time. This information would have to be considered in concert with and in the context of the other information available to the police at that moment. The dog was not intruding into the vehicle but was sniffing the air outside of the vehicle. Whatever privacy interest may have attached to the defendants while inside the vehicle, I do not accept that they had a reasonable expectation of privacy to the air surrounding the vehicle or the odors emanating from the vehicle into that free air.

[46] In my view, the air surrounding a vehicle contains nothing relating to a biographical core of personal information, much less intimate details of lifestyle or personal choices.

[47] According to the principles established in *R. v. Belnavis* [1971] 3 S.C.R. 341, the defendant Curtis Lynds, as a passenger, had no expectation of privacy in the vehicle. At best, as a signatory to the rental agreement, even if it could be argued that he had a reasonable expectation of privacy equal to that of the defendant Christopher Lynds, who was the driver during the relevant time, nonetheless, I do not accept that either party had a reasonable expectation of privacy to the air surrounding the vehicle for the reasons outlined above. Even if it could be said that Curtis Lynds' position as a signatory to the rental agreement established his control over the vehicle, he was ultimately in no better position than the driver Christopher Lynds vis-a-vis the lawfulness of the free air scent sniff of air outside the vehicle.

[48] The actions of the dog in conducting a free air scent sniff around the outside of the vehicle did not, in my view, constitute a warrantless search of the vehicle which could be said to be a violation of either defendant's section 8 right to be protected from an unlawful search of property in which either defendant had a reasonable expectation of privacy. The free air sniff by the dog was not a "search" of a medium which the defendants could be said to possess, control or exert ownership of, in terms of the air around their vehicle (per *R. v. Edwards* (1996), 104, C.C.C. (3d) 136 (Supreme Court of Canada)). The accuseds' applications pursuant to section 9 are dismissed.

(C) Were either or both defendants unlawfully detained and/or searched?

[49] Based upon the reasoning set out above in relation to the validity of the investigative detention and the free air scent sniff conducted by the police dog, I am satisfied on the evidence before me that as a result of the information available to the investigators following the free air scent sniff by the dog, in concert with the indicia and information available to the officers prior to the dog sniff, the officers possessed reasonable and probable grounds, upon the totality of the information before them, to arrest both defendants for possession of drugs. The defendant Christopher Lynds was the driver of the vehicle which the officers had reasonable and probable grounds to believe contained drugs, and the passenger Curtis Lynds was an occupant of the same vehicle and was also a person whom the dog had indicated was personally in possession of drugs.

(D) Was the search of the interior of the vehicle following arrest a violation of the applicants' section 8 rights?

[50] In *R. v. Caslake* [1998] 1 S.C.R. 51, Lamer, J. reviewed the concept of the scope of search incident to arrest. At paragraph 19 of the decision he stated:

> As L'Heureux-Dube, J. stated in *Cloutier*, the three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial. The restriction that the search must be "truly incidental" to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why. There are both subjective and objective aspects to this issue. In my view, the police must have one of the purposes of a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose

> will be served by the search must be a reasonable one. (emphasis added)

And continuing at paragraphs 23 and 23, Lamer, J. stated:

> Requiring that the search truly be incidental to the arrest means that if the justification for the search is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested. For example, when the arrest is for traffic violations, once the police have ensured their own safety, there is nothing that could properly justify searching any further (see *Belnavis*, supra).
>
> As explained above, these limits will be no different for automobiles than for any other place. The right to search a car incident to arrest and the scope of that search will depend on a number of factors, including the basis for the arrest, the location of the motor vehicle in relation to the place of the arrest, and other relevant circumstances.

[51] In this case, I accept that the police, in searching the vehicle, were indeed attempting to achieve a valid purpose connected to the arrest. The police had effected an arrest on the basis of reasonable and probable grounds to believe the vehicle contained drugs. It was entirely reasonable to search the vehicle to see whether it did in fact contain the drugs the police had reasonable and probable grounds to believe it did. Further, it was also reasonable to search the defendants for reasons of officer safety. The police had a reasonable prospect of securing evidence of the offence for which the defendants had been arrested as a result of the indication of the police dog that there was an odor of drugs emanating from the vehicle and from the person of Curtis Lynds.

[52] I reject the suggestion by the defendant Curtis Lynds that the arrest of the parties was merely a “springboard” to search the vehicle incidental thereto and gather information which would otherwise not have been properly available to the police. To suggest that the officers could have obtained a search warrant would seem to be, under the circumstances as they existed at the time of the arrest, entirely unrealistic and possibly unwise in terms of officer safety. The search was

not conducted in an abusive fashion and it was clearly for the purpose of determining whether there was evidence directly related to the lawful arrest, upon reasonable and probable grounds, which had just been made. The arrest was clearly related to the information the police had available to them as a result of their observations and the actions of the police dog. The officers' belief that the search of the vehicle could or would uncover drugs was a reasonable one under the circumstances as they then existed.

[53] Further, as the provincial crown pointed out in argument, requiring the officers to secure a search warrant for the vehicle would undoubtedly have resulted in a much longer detention of the occupants of the vehicle than that which actually occurred, in order to allow such a procedure to be undertaken. The accuseds' applications pursuant to section 9 are therefore dismissed.

(E) Were the section 10(a) or 10(b) rights of the applicants violated?

[54] The crown evidence on the *voir dire* clearly establishes that once the defendants were subjected to investigative detention, the defendant Curtis Lynds immediately began to exercise his right to counsel, without it being communicated to him, when he promptly engaged in a cell phone call to counsel while still inside the vehicle. The evidence discloses that Chris Lynds was told he had a right to counsel, but did not exercise it at that time. I am also satisfied that at that point the defendants had been advised that they were being detained with respect to the possibility of the presence of contraband.

[55] I accept the evidence of Constable Raymond that he did, following immediately upon having advised both individuals that they were under arrest (subsequent to the information relayed to Constable Steeves by Constable Gosse about the results of the free air scent sniff), provide each defendant with their *Charter* rights and cautions which they indicated they understood. The evidence clearly demonstrates that neither individual made any effort to contact counsel following arrest which, on a practical level, makes sense with respect to the defendant Curtis Lynds because he had already been in contact with counsel immediately following his detention. The protection provided in the *Charter* is not invoked only when someone calls counsel; rather the right to counsel is provided and then a decision is made by the individual as to whether they act upon it.

Having said that, there is no evidence whatsoever before the court as to what was said to the defendants when they were told at detention that they had a right to counsel. It is not for the court to merely presume they were provided with the proper informational component pursuant to section 10(b) on the principles discussed in cases such as *R. v. Latimer* (1977), 4 C.R. (5th) 1; *R. v. Prosper* (1994), 33 C.R. (4th) 85; and *R. v. Bartle* (1994), 92 C.C.C. (3d) 289. The officers say the defendants were read their *Charter* rights and cautions upon arrest - does any of the evidence before me establish on a balance of probabilities that the defendants were not advised of their rights and *Charter* cautions? The answer is no, qualified by the absence of any evidence as to precisely what it was that was said about the right to counsel.

[56] Further, there is a distinction to be made in this matter in terms of rights provided following detention as opposed to rights following arrest. With respect to the defendants' rights upon detention, the evidence is that Chris Lynds was told he had a right to counsel, and before Curtis Lynds could even be advised of such a right he began to exercise it. Even if it can be assumed that Curtis Lynds knew what to do (although there is no obligation upon him to know that) the same assumption cannot be made with respect to Chris Lynds, because the evidence does not disclose precisely what was said to either individual about their right to counsel.

[57] In *R. v. Borden* [1994] 3 S.C.R. 145, Iacobucci, J., speaking on behalf of the majority, stated at paragraphs 44 and 45:

> As this court has previously stated, the rights in section 10(a) and 10(b) of the *Charter* are linked. One of the primary purposes of requiring the police to inform a person of the reasons for his or her detention is so that person may make an informed choice whether to exercise the right to counsel, and if so, to obtain sound advice based on an understanding of the extent of his or her jeopardy; *R. v. Black* [1989] 2 S.C.R. 138 at pp. 152-53; and *R. v. Smith* [1991] 1 S.C.R. 714, at p. 728...
>
> ...As was stated by McLaughlin, J. in *R. v. Evans* [1991] 1 S.C.R. 869 at pp. 892-93:

> ...there is a duty on the police to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning...I add that to hold otherwise leaves open the possibility of police manipulation, whereby the police - hoping to question a suspect in a serious crime without the suspect's lawyer present - bring in the suspect on a relatively minor offence, one for which a person may not consider it necessary to have a lawyer immediately present, in order to question him or her on a more serious crime.
>
> I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. I do, however, affirm that...the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different or unrelated offence or a significantly more serious offence than the one contemplated at the time of the warning.

[58] There is simply no evidence about what precisely was communicated to Chris Lynds as to his right to counsel, and no evidence at all that Curtis Lynds was advised of his right to counsel pursuant to section 10(a) and (b) at the moment when both were detained. Ironically, Curtis chose to exercise such a right in any event. This goes to the effect of the breach of his rights, but cannot negate the occurrence of the breach.

[59] On a related tangent, the comments by McLaughlin, J. in *Evans* as referred to in *Borden*, supra, support that I must reject the suggestion that at the time of

detention of both defendants and as the investigation ensued, there was an obligation on the police, in complying with section 10(a) and (b) to ever restate the right to counsel at that moment when the search for narcotics revealed instead the presence of cigarettes and prohibited weapons in the back of the vehicle.

[60] It is clear from the evidence of Constable Raymond that both parties were provided with their *Charter* rights and cautions upon arrest, but again there is no specific evidence before the court as to exactly what was communicated to the defendants. The court cannot be satisfied that the informational component was provided to either defendant. The burden in this application rests with the defendants to establish a violation of their *Charter* right(s) on a balance of probabilities. The only evidence on the section 10 question is that of the crown witnesses Constable Steeves and Constable Raymond, who both spoke about giving the defendants their right to counsel, but said nothing more about what that may have consisted of or entailed. At a minimum, it is entirely clear that the section 10(a) and (b) rights of Curtis Lynds were violated at the moment of detention. Arguably, the same rights of Chris Lynds at the moment of detention and of both defendants upon arrest were violated due to a lack of evidence as to any informational component having been provided to them.

(F) Does section 24 apply?

[61] Having satisfied myself that the section 10(a) and 10(b) rights of both defendants were violated, the question is whether the evidence that was discovered by the police should be excluded in light of that breach, by virtue of the application of section 24 of the *Charter* to invoke a remedy. The three prong test: what is the effect of the admission of the evidence on the fairness of the trial, how serious is the breach and what effect would the exclusion of the evidence have on the administration of justice, must be applied: *R. v. Collins* [1987] 1 S.C.R. 265.

[62] It is clear that the evidence that was uncovered following the free air scent sniff is non-conscriptive evidence which would have been located in any event but for the breach of the defendants' section 10 rights. This was evidence which existed regardless of the violation, and its admission would not render the trial unfair.

[63] The evidence of the officers as to how the events were unfolding at the moment the defendants were advised of their detention does not support any contention that the officers were attempting to act absent good faith or deliberately attempting to deprive the defendants of their right to counsel.

[64] In the case of Chris Lynds, we cannot know whether he would ever have exercised the right to counsel upon detention. Nonetheless, had he exercised the right, there is nothing in the evidence before the court to suggest that the officers would not have proceeded with the investigative detention and the free air scent sniff conducted by the police dog. In the case of Curtis Lynds, despite the fact that he effectively "jumped the gun" and exercised a right that the police were nonetheless obliged to inform him of, there is nothing arising from his exercise of the right, or non-exercise of a right of which he wasn't informed, that would have affected the course of the investigation and the free air scent sniff conducted by the dog. There was no evidence obtained in the course of the investigation, the investigative detention, the arrest or the search incident to arrest which arose out of or flowed from or could in any way be said to be directly related to the failure of the police to fully inform the defendants of their section 10 rights.

[65] The effect of the exclusion of the evidence on the administration of justice would, practically speaking, mean that the crown would have no evidence in the trial proper upon which to ask the court to adjudicate. There would be no evidence about the defendants traveling with the 47,200 illegal cigarettes and brass knuckles. The items seized as evidence were "real evidence and existed independently": *R. v. MacEachern* 2007 N.S.C.A. 69. The evidence seized is clearly key to prosecution of the alleged offences, save the allegation contrary to section 145 involving the defendant, Curtis Lynds. Society has an interest in the prosecution of such offences. I am satisfied the police were not wilfully engaging in a course of conduct specifically intended to deprive the defendants of their section 10 rights. I accept that the violation of the *Charter* rights in this case was technical in nature and not premised on bad faith. To exclude the evidence would more likely tend to bring the administration of justice into disrepute than would the admission of the evidence under all of the circumstances. Accordingly, the defendants are not entitled to a remedy pursuant to section 24(2) of the *Charter*. Trial of these matters shall continue.

PCJ